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U.S. Citizenship
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Services

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[redacted]

File: SRC 03 013 52975 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a limited liability company organized in the State of Georgia, is engaging in the business of interior design consulting. The petitioner claims that it is an affiliate of Digit BT, located in Budapest, Hungary. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director noted that it appears that the beneficiary would be engaged primarily in the day-to-day operations of the business itself.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that, since an operations manager has been hired for the United States entity, the beneficiary will not be engaged in the day-to-day running of the business, and will be employed in an executive capacity. In support of this assertion, the petitioner submits additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

At issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated September 20, 2002, submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

> To perform upper management duties and responsibilities including major decision-making, establishing goals, business strategies, leading the management and middle managers. The co-ownership in both companies assures the financial responsibilities as well.

The petitioner also submitted a proposed company structure chart for 2003, which included the beneficiary as chief executive officer, a technical manger to be hired in January 2003, and four to six employees to be hired in January 2004.

On November 21, 2002, the director requested additional evidence. Specifically, the director requested (1) a statement describing the staffing of the United States company, including the number of employees, the position, job duties, educational level, and start date for each employee; (2) the employer's quarterly federal tax report ending September 2002; (3) a work schedule for all employees; and (4) if applicable, evidence of any contract employees such as IRS Forms 1099 MISC and contracts, and a statement describing how often the U.S. entity uses the services of such contract employees.

In response, the petitioner submitted a letter dated February 14, 2003, stating that "the economic situation changed rapidly in the past year, which slowed down the growing process. Therefore the company could not hire the employees yet." The letter further indicated that the first employee will be hired in June 2003. No detailed description of the beneficiary's duties in the U.S. entity was provided, although the letter included the following statements relating to the beneficiary's responsibilities:

- The beneficiary is holding an executive position managing subcontractors, dealing with professional advisors, consultants and having the responsibility [sic] for all his financial and strategic decisions.

- All the intellectual work of [the company's] services is done by [the beneficiary].

- The actual interior design consulting is done by [the petitioner] and [the beneficiary] personally.

The petitioner did not provide the U.S. entity's federal income tax report for the quarter ending September 2002 as the director requested. Instead, the petitioner submitted the beneficiary's individual income tax return on IRS Form 1040 for the year 2002. The petitioner indicated in its response letter that "all the physical work including delivery, loading-unloading and installing the designed piece is contracted out to subcontractors." The letter also referred to Schedule C of the beneficiary's individual income tax return for 2002, which lists consulting fees in the amount of $1148.00, and payment to subcontractors in the amount of $450. However, the petitioner did not provide IRS Forms 1099, contracts, or any other evidence of the U.S. entity's use of contractors, as the director requested.

On April 22, 2003, the director denied the petition. The director determined that the petitioner has not demonstrated that the beneficiary's duties in his position with the U.S. entity are primarily that of an executive or manager. Rather, the director found, the beneficiary appears to be engaged primarily in the day-to-day operations of the business itself.

On appeal, the petitioner asserts that the petitioner has hired an operations manager as of May 15, 2003. Consequently, the petitioner states, "the beneficiary is not involved in the day-to-day running of the business anymore, only in decision-making and control of the company's major functions." The petitioner offers on appeal the following description of the "new duties" of the beneficiary in his role as CEO:

- To establish the company's economic and strategic goals (10% of time)
- To develop and control the business plans (15% of time)
- To hire and evaluate and manage the management (10% of time)
- Direct, control and evaluate the management of the company (30% of time)
- To control the major functions of the company (15% of time)
- Administrative tasks (20% of time)

The record is not persuasive in demonstrating that the beneficiary has been or would be employed in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

Initially, the AAO notes that the petitioner did not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. The petitioner's September 20, 2002 letter indicated that the beneficiary will hold an "executive position," but also stated that the beneficiary will "perform upper management duties." Moreover, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis that is of a managerial or executive nature. For example, the petitioner states in its response to the director's request for evidence that "the

beneficiary is holding an executive position managing subcontractors, dealing with professional advisors, consultants and having the responsibility [sic] for all his financial and strategic decisions." However, the petitioner failed to provide any specifics with regard to what the tasks of managing subcontractors and dealing with advisors and consultants entail, or what financial and strategic decisions might be involved. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the record supports the director's conclusion that the beneficiary appears to be engaged primarily in the day-to-day operations of the business itself. Based on the statements in the petitioner's letter, the beneficiary is responsible for "all the intellectual work of [the company's] services" and "actual interior design consulting." These are tasks necessary to provide the company's service or product, and as such, cannot be considered managerial or executive in nature. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner also failed to document what proportion of the beneficiary's duties would be managerial or executive in nature and what proportion would not. This failure of documentation is important because, as noted above, the beneficiary appears to have certain responsibilities that do not fall directly under traditional managerial or executive duties as defined in the statute. Without a clear breakdown of duties, the AAO cannot determine whether the beneficiary will be employed by the United States entity *primarily* in a managerial or executive capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The petitioner indicates on appeal that it has hired an operations manager as of May 15, 2003, and plans to hire additional employees in the future. Therefore, the petitioner asserts, the beneficiary is now relieved from performing the day-to-day operational services of the company. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, even taking into account the hiring of the operations manager, it appears that the U.S. entity still does not have any staff other than the beneficiary to perform the "intellectual work" aspect of the company's services, or the "interior design consulting" function of the company, which the petitioner previously described as part of the beneficiary's responsibilities. Thus, despite the petitioner's revision of the beneficiary's job duties offered on appeal, the record does not substantiate the petitioner's claim that the beneficiary would be relieved from primarily performing the day-to-day operational services of the company.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity by the United States entity. Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in the Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is

not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the evidence of record does not demonstrate that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

In light of the foregoing, the AAO agrees with the director's conclusion that the petitioner has not established that the beneficiary would be employed in a primarily or managerial capacity by the United States entity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the petitioner has not provided sufficient evidence of the financial status of the United States operation, as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). The director had requested copies of the petitioner's federal income tax report for the quarter ending September 2002 to establish the financial status of the U.S. operation and to show that the petitioner is doing business. The petitioner did not comply with this request, but instead, submitted the beneficiary's individual income tax return on IRS Form 1040 for the year 2002. In addition, although the petitioner indicated that it uses the services of subcontractors, the petitioner also failed to provide evidence requested by the director relating to the employment of such subcontractors. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this additional reason, the petition may not be approved.

In addition, the evidence of record raises doubts as to whether the petitioner is a United States employer, as required under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. The petition includes evidence that the petitioner was organized as a limited liability company in the State of Georgia, and filed IRS Form 1065, U.S Return of Partnership Income, for the year 2001. However, the record also includes an IRS Form 1040 with Schedule C for the year 2002, itemizing profit or loss from business for a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). If the petitioner is actually the individual beneficiary doing business as a sole proprietorship, with no authorized branch office of the foreign employer or separate legal entity in the United States, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization. Thus, based on the evidence of record, the AAO is unable to determine whether the petitioner is indeed a United States employer, as required under the regulations.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.