U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: SRC 05 177 50630 Office: TEXAS SERVICE CENTER Date: DEC 27 2006

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)

ON BEHALF OF PETITIONER:

[redacted]

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, Chief
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 appeal will be summarily dismissed.

The petitioner is a New York company that is registered to do business in Florida. The petitioner claims to be engaged in the whole trade of eyeglass frames. The petitioner states that it is a subsidiary of [redacted] located in The Netherlands. Accordingly, the United States entity petitioned U.S. Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner seeks to employ the beneficiary for a three-year period to fill the position of president.[1]

On July 7, 2005, the director denied the petition on the grounds that the petitioner failed to establish: (1) that the beneficiary will be employed in a primarily executive or managerial capacity; and (2) that the United States company is doing business as required by the regulations.

The petitioner subsequently filed an appeal on July 29, 2005. On appeal, counsel for the petitioner states that the instant petition is a new employment petition and not a petition to extend the beneficiary's L-1A status and thus "the grounds on which this petition was denied were not valid." Counsel for the petitioner requested that the petition be re-adjudicated as a new employment petition. Counsel submits a brief in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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.

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition. Counsel's general objections to the denial of the petition, without specifically identifying any errors on the part of the director, are simply insufficient to overcome the well-founded and logical conclusions the director reached based on the evidence submitted by the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I & N Dec. 1 (BIA 1983); *Matter of Laureano*, 19 I & N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I & N Dec. 503, 506 (BIA 1980). In fact, counsel has not addressed, the specific substantive findings in the director's decision.

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[1] The beneficiary was initially granted a one-year period of stay to open a new office in the United States valid from October 2, 2003 until October 2, 2004 (EAC 03 234 56997). The petitioner filed a petition to seek to extend the beneficiary's stay in order to continue to fill the position of president which was denied by the Director, Texas Service Center on April 20, 3005 (SRC 05 002 51586). Counsel for the petitioner emphasizes that the instant petition is for new employment for an established office, and is not a petition to extend the beneficiary's L-1 status.

Counsel correctly asserts that the director referenced the regulations for the extension of an L-1A petition that involved the opening of a new office pursuant to 8 C.F.R. § 214.2(l)(14)(ii). However, counsel does not explain how this error resulted in an inappropriate decision. Both 8 C.F.R. § 214.2(l)(3) and 8 C.F.R. § 214.2(l)(14)(ii) requires that the petitioner demonstrate that the beneficiary will be employed in the United States in a primarily managerial or executive capacity as defined at sections 101(a)(44)(A) and (B) of the Act. Regardless of whether the petitioner is filing a new L-1 petition or an extension of a previously approved new office petition, the director is required to review the beneficiary's job description, and may take into account the petitioner's staffing levels and organizational structure in light of its overall purpose and stage of development. The director's reference to the regulation at 8 C.F.R. § 214.2(l)(14)(ii), while regrettable, had no bearing on the director's determination that the beneficiary will not be employed in the United States in a primarily managerial or executive capacity.

The petitioner failed to provide a comprehensive description of the beneficiary's proposed role as president. The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary's duties will include "directing the management of the organization," "setting all corporate goals, policies and procedures," "developing and implementing the company's business plan," "exercising discretion over day-to-day operations of the business," and "setting and implementing pricing policies." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, in the petitioner's response to the director's request for evidence, dated June 21, 2005, the petitioner stated that the U.S. company plans to hire a sales manager within a year of filing the instant petition. In addition, the petitioner stated that "the company was founded in July 2003 and, for a variety of reasons, it has not yet achieved the level of commercial success requiring the hiring of employees; thus, there was no payroll." The United States company has not hired any individuals. 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). The petitioner has not submitted evidence to establish that the beneficiary supervised a subordinate staff at the time the petitioner was filed. Going on record without supporting documentary evidence is not sufficient to satisfy the petitioner's burden of proof in these proceedings. *Matter of Soffici*, 22 I & N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I & N Dec. 190 (Reg. Comm. 1972)).

A critical analysis of the nature of the petitioner's business undermines the petitioner's claim that the beneficiary will be employed in a managerial or executive capacity. As the only employee hired by the U.S. entity, the petitioner does not claim to have anyone on its staff to actually perform the day-to-day operations of running a business. The beneficiary will not supervise subordinate employees who would relieve him from performing non-qualifying duties. Rather, it appears from the record that the only individual performing any marketing and sales functions, finance operations and business development activities will be the beneficiary himself. As the United States company will only hire the beneficiary as president, it is reasonable to assume that the beneficiary will be performing all sales and marketing

functions and financial development, and all of the various operational tasks inherent in operating a retail store on a daily basis, such as purchasing products, maintaining inventory, arranging store displays, receiving deliveries, paying bills, and handling routine customer transactions. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role.

Accordingly, the director reasonably concluded that the beneficiary will be performing the day-to-day operations and directly be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International* 19 I & N Dec. at 604. Since the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity, and counsel has not addressed this issue on appeal, the appeal will be dismissed.

Furthermore, the minimal documentation of the petitioner's business operations raised the issue of whether the petitioner is a qualifying organization doing business in the United States as required by 8 C.F.R. § 214.2(l)(3)(i). Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. In the instant matter, the petitioner submitted bank statements in the U.S. company's name from February 2005 through April 2005 indicating account balances ranging from $5.23 to $184.57. In addition, the petitioner submitted copies of bills for inventory purchased by the U.S. company, however, the petitioner did not submit sufficient documentation of sales made by the U.S. entity such as receipts, invoices, purchase agreements and/or bills of lading. The petitioner submitted IRS Form 1040, Profit or Loss From Business for 2004, indicating gross sales of $15,125. However, it is unclear how the U.S. company could do any business since the company has not hired any individuals to run the business. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Since the United States company has not hired any employees, it is implausible that the United States company is engaged in the regular, systematic and continuous provision of goods or services. Again, counsel has not submitted evidence on appeal to overcome the director's determination on this issue. For this additional reason, the appeal must be dismissed and the petition denied.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

> An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Inasmuch as

counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the petitioner has not sustained that burden. Therefore, the appeal will be summarily dismissed.

ORDER: The appeal is summarily dismissed.