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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D7

FILE: SRC 02 137 51887 Office: TEXAS SERVICE CENTER Date: AUG 01 2005

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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the evidence contained in the record, the petitioner was established October 3, 2000, and claims to be a courier service and cleaning service business. The petitioner claims to be an affiliate of Germanos Ferreteria, located in Cartagena, Colombia. The petitioner claims to have four employees as independent contractors and a gross annual income of $100,000. The petitioner's new office petition was initially approved allowing the beneficiary to enter the United States in an L-1A classification from March 30, 2001 to March 30, 2002. It now seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and general manager for an additional two years, at a weekly salary of $500.00. The director determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary has been or would be employed primarily in an executive or managerial capacity.

On appeal, counsel disagrees with the director's determination and asserts that the evidence establishes that the beneficiary's duties have been and will continue to be primarily managerial in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer, or a subsidiary, or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;

B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);

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 managerial or executive capacity; and

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

The issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary has been and will be employed primarily in an executive or managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means 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), provides:

> The term "executive capacity" means 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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

> If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In an addendum to the petition, the petitioner described the beneficiary's duties in the United States as:

- He is responsible for directing, supervising, and coordinating all matters, including administrative, operational, production, financial and personnel matters.
- He has ultimate authority with respect to negotiations with suppliers and clients.
- He sets guidelines in accordance with the general policies of the company.
- He directs and coordinates the company's activities while continuing to be consistent with the policies and procedures implemented.
- He is responsible for making plans to improve operations, while striving to attain predetermined goals of efficiency.
- He trains and supervises subordinates in all phases of company activities.
- He is responsible for formulating personnel policies, such as hiring and firing.

In a letter dated March 13, 2002, the foreign entity described the beneficiary's duties in the United States to be the same as those described by the U.S. petitioner, with one addition. The foreign entity representative

stated that "[the beneficiary] is responsible for formulating personnel policies, such as hiring and firing, and the policies governing the placement and supervision of subcontractors."

The petitioner submitted an organizational chart of the U.S. entity's hierarchy that demonstrated the beneficiary as general manager, with messenger service contractors, and cleaning and janitorial services contractors as subordinates. The petitioner also submitted copies of the U.S. entity's lease agreement; IRS Form 1120, U.S. Corporate Income Tax Return for 2000 and 2001; unaudited financial statements for the period ending March 2002; Occupational License; company payroll statements for 2001 and 2002; IRS Form 1099 for 2001; four independent contractor's agreements; independent contractor commission reports from Lincoln Messenger Services for the months of January and February of 2002; Jan King monthly franchise business reports and inspection reports; and Jan King franchisee cleaning contracts entered into by the petitioner and Advanced Cosmetic Surgery and Aventura Center for Cosmetic Surgery dated October 2001. The petitioner entered into contractor's agreements with [redacted] January 15, 2002, Delta Health on February 1, 2002, Nidia Witte on March 1, 2002, and Claudia Sanin on March 20, 2002.

In response to the director's request for additional evidence, the petitioner stated that it increased its staff size to two, hiring a full-time contract administrator as of July 2002. The petitioner asserted that the beneficiary's duties abroad as general manager for the foreign entity were similar to his duties performed in the United States. The petitioner also stated that the beneficiary satisfies the definition of manager since he manages the organization, supervises and controls the work of the essential functions of the company, manages the contract administrator, supervises the independent contractors, has the discretion to hire and fire employees and contractors, and exercises discretion over the day-to-day activities of the company. The petitioner further asserted that the beneficiary also qualifies as an executive, and continues by reiterating the beneficiary's responsibilities. The petitioner noted that the beneficiary was paid as an independent contractor during the year 2001. The petitioner stated that the contract it entered into with Lincoln Messenger Services had terminated. The petitioner submitted copies of the U.S. entity's Quarterly Federal Tax Return, State of Florida Employer's Quarterly Report, payroll roster, business lease, current and projected financial statements, bank statements, and checks paid to the petitioner from Broward Water Consultants, Inc. in 2002.

The director denied the petition determining that the record was insufficient to establish that the beneficiary had been or would be employed by the U.S. entity primarily in a managerial or executive capacity. The director noted that the petitioner was no longer involved in courier activities with Lincoln Messenger, whose relationship was on a contractual basis while it existed. The director also noted that the Contract for Services lease agreement did not clearly indicate which portion of the space was subleased and paid for by the petitioner. The director stated that the record indicated that the beneficiary was the sole employee of the U.S. entity at the time the petition was filed; and noted the absence of personnel documents for the 2001 time period. The director noted that the petitioner hired a "contract administrator" as of July 2002, but found that this action was insufficient to show that the beneficiary oversees the business through a professional middle manager. The director concluded by stating that the assertion that the beneficiary is functioning in a managerial or executive capacity, in the absence of supporting evidence, is insufficient to establish eligibility for L-1 classification.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary qualifies as a manager and therefore qualifies for an extension of L-1A status. Counsel asserts that the contract administrator's position is professional in nature, and that the administrator reports directly to the beneficiary in her professional capacity. Counsel also asserts that at the time the petition was filed the U.S. entity employed the beneficiary and four independent contractors. Counsel cites to an unpublished AAO decision in

support of the appeal. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. There has been no evidence submitted to establish that the facts of the instant petition are analogous to those in the unpublished decision. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed primarily in a managerial or executive capacity. In the instant matter, the record shows that the U.S. entity was established in 2000. In response to the director's request for additional evidence, counsel for the petitioner admits that the U.S. entity has been active for more than one year and that it "plans on further increasing its full-time permanent staff over the next year." The foreign entity infers that the U.S. entity is still in its developmental stages. In a letter of support, the foreign entity representative stated: "We currently have three employees under contract and plan to hire additional employees on a full-time basis in the near future, as we continue growing in this business venture." However, the record shows that the entity has been operational for more than one year and therefore, it will be treated as an established entity pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C). As an established entity, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. In the instant matter, the petitioner submits evidence of a contract administrator being hired subsequent to the filing of the 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). 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 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 order to qualify for an extension of the L-1 visa after an organization becomes operational, the petitioner must establish the need for an executive or managerial employee. In the instant matter, the evidence fails to demonstrate that the petitioner has reached the point that it can or needs to employ the beneficiary in a predominantly managerial or executive position. Based upon evidence contained in the record, the petitioner is still in its developmental stages. Hence, the beneficiary has been and will continue to primarily perform the day-to-day services of the organization rather than perform primarily in a managerial or executive capacity.

In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). There has been insufficient evidence and/or explanation given to establish that the beneficiary has performed and will perform the high-level responsibilities of a managerial or executive position. In review of the record it appears that the beneficiary, being the sole employee of the U.S. entity, has been and will be primarily performing the day-to-day services of the business.

While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these factors can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). It is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* The record demonstrates that the beneficiary was the sole employee employed by the U.S. entity at the time the petition was filed. The record also demonstrates that four independent contractors performed cleaning and janitorial services, as needed, during this period. The record shows that the petitioner hired a contract administrator in July 2002, subsequent to the filing of the petition. Although the petitioner goes to great lengths in describing the duties of this contract administrator, the position will not be considered for purposes of the instant petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp., supra*; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Counsel contends that at the time the petition was filed, the beneficiary was responsible for managing the overall organization and for retaining and overseeing the services of independent contractors who perform cleaning and janitorial services. The record indicates that the independent contractors have received compensation from the U.S. entity for work assignments completed; however, there is no evidence to demonstrate that they have been and will be employed on a full-time basis. To the contrary, based on payroll records and bank records it appears that the contractors have been and are employed on a part-time, as needed basis. There is insufficient evidence to show that the beneficiary exercises significant control over the manner in which the independent contractors perform their services. Nor does it appear from the record that the independent contractors take direction from the beneficiary in performing their duties. The Independent Contractor's Agreement entered into between the U.S. entity and independent contractors states in part:

> Contractor shall perform all services generally related to contractors line of business . . . .
>
> Services will be performed on the date and time set by the owner with the client and at the client's place. After being offered a job the contractor has the right to accept it or not.
>
> Contractor will provide his/her own transportation, supplies and equipment necessary to perform its duties.
>
> Owner will set a price for each service and shall pay said amount completely to contractor due [on] completion of the work. This payment does not constitute salary, and the contractor is responsible for his/her own taxes. All such sums paid are contract payment and not wages.

Furthermore, counsel has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. 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).

The evidence of record demonstrates that the beneficiary continues to perform the services of the organization, rather than directing the activities of the organization. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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 record does not establish that the beneficiary has been or will be primarily managing a function of the organization. The beneficiary's proposed job description depicts an individual in charge of the day-to-day services of the organization, not that of a functional manager. When managing or directing a function, the petitioner is required to establish that the function is essential and that the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must also demonstrate that the executive or manager does not directly perform the function. Although counsel asserts that the beneficiary "manages the organization, supervises and controls the work of the essential functions," the record does not demonstrate that the beneficiary has been or will be primarily managing or directing, rather than performing, the functions of the business. 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, supra.* The record must demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing non-qualifying duties. In the instant matter, there is no evidence to show that at the time the petition was filed the petitioner employed anyone other than the beneficiary to perform managerial as well as non-qualifying duties. The company payroll records and the beneficiary's IRS Form 1099 for 2001 indicate that the beneficiary was employed by the U.S. entity as an independent contractor during 2001 rather than as a manager or executive.

Furthermore, it cannot be found that the beneficiary has been or will be employed primarily in an executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be directing the management of the organization or a major component or function of the organization, that he will be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. 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, supra.*

In summary, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed primarily in an executive or managerial capacity. Neither is there evidence to establish that the U.S. entity has progressed to a point where it can support or needs the services of a manager or executive. The CIS is not compelled to deem the beneficiary to be an executive or manager simply because the beneficiary possesses an executive or managerial title. Furthermore, the petitioner has failed to overcome the issues raised and objections made by the director in her request for additional evidence and in her decision. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, there has been insufficient evidence submitted to establish that the petitioner has secured sufficient physical premises to house the U.S. entity. The record demonstrates that at the time the petition was filed the petitioner submitted a copy of a sublease agreement entered into with Franja Corporation for a period of six months. The sublease agreement indicated that it was for the purpose of renting an office space was exclusively to conduct business. The director requested that the petitioner

submit a current copy of the U.S. entity's lease agreement, showing that the office had sufficient premises to house its operations. In response, the petitioner submitted a sublease agreement entered into with Franja Corporation for the same premises. The petitioner inferred that the U.S. entity did not need any substantive physical premises because the independent contractors primarily perform all their duties at client sites. The director determined that the Contract for Services lease agreement did not clearly indicate which portion of the space was subleased and paid for by the petitioner. There has been no evidence presented to show that space requirements have been met. There is nothing in the record to indicate that the petitioner has leased sufficient office space to accommodate the anticipated growth in the business or its personnel. Although the petitioner infers that the U.S. entity does not need any substantive physical premises because the independent contractors have and will continue to perform their duties onsite, there has been no independent documentary evidence submitted to establish how the day-to-day services of the organization can be met with the current office accommodations. The evidence as submitted fails to demonstrate that the petitioner has secured sufficient physical premises to house the new office. For this additional reason, the appeal will be dismissed.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.