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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FEB 07 2005

FILE: SRC 03 107 50562 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)

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 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 visa seeking to employ the beneficiary 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 is a corporation organized in the State of Tennessee operating as a real estate development company. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer located in London, United Kingdom. The petitioner now seeks to employ the beneficiary as its president for three years.

The director denied the petition determining that the petitioner did not demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner's 2000 corporate income tax return indicates that it has been doing business in the United States, yet has no employees. The director stated that the petitioning organization, which he concluded is not a new office, would therefore not be able to support the need for a manager or an executive.

On appeal, the petitioner states that it was incorrectly noted on the nonimmigrant petition that the beneficiary's transfer to the United States would not be for the purpose of opening a new office. The petitioner claims that although the beneficiary has previously entered the United States on a B visa to negotiate contracts for the petitioner, "[h]is presence in the U.S. on these occasions has been to legitimately progress activities to a point ready for his proposed temporary transfer on an L visa as its President." The petitioner contends that the failure to correctly identify the petitioning organization as a new office on the nonimmigrant petition "has misled the adjudication of the petition." The petitioner submits a statement and additional documentation on appeal in support of the beneficiary's proposed employment in a primarily managerial or executive capacity.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 issue in the present matter is whether the beneficiary would be employed in the United States in a primarily managerial or executive capacity. However, the appropriate analysis of this issue necessitates a determination of whether the United States organization is considered to be a new office. The AAO will therefore address this issue first.

The regulation at § 214.2(l)(1)(ii)(F) defines a new office as:

> [A]n organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

The phrase "doing business" is defined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) as:

> [T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

As previously noted, the petitioner indicated on the nonimmigrant petition, filed on March 5, 2003, that the beneficiary would not be transferred to the United States for the purposes of opening a new office. The accompanying documentation included: (1) the petitioner's articles of incorporation reflecting the incorporation of the petitioning organization on January 4, 1999; (2) a March 1999 notice from the Department of Treasury indicating the assignment of the petitioner's employer identification number; (3) a lease agreement for the use of office space from October 1, 2002 through September 30, 2004; (4) Form 1120, U.S. Corporation Income Tax Return, for the year 2000; and (5) invoices from August 2002 through January 2003 for demolition and construction services performed by outside contractors on properties owned by the petitioner. The petitioner also submitted a "History and Relevant Facts" sheet, in which it indicated that it "has been operating in the United States since its incorporation." The petitioner explained that the beneficiary has controlled its activities from the United Kingdom and has visited the United States whenever major decisions had to be made. The petitioner further explained in an attached document titled "Business Activities" that it acquired its first building in May 2002, and has since performed the necessary demolition and began refurbishment. The petitioner stated that its strategy would be to acquire additional properties for redevelopment.

In a request for evidence, dated June 16, 2003, the director asked that the petitioner submit photographs of its office premises. In response to the director's request for additional evidence, the petitioner submitted a letter, dated January 24, 2003, confirming that "[t]he U.S. Corporation commenced operation with [the beneficiary] as President controlling its business activities from the U.K. [and] through occasional visits to the U.S.A. on a B visa." The petitioner stated that during this time it "commenced its real estate development" through the purchase, remodeling, and sale of one property, and has purchased a second building for refurbishment. The petitioner also submitted photographs of its interior and exterior business premises.

While the petitioner claims on appeal that it should be considered a new office, as defined in the regulation at § 214.2(l)(1)(ii)(F), the record supports the director's correct determination that the petitioning organization has been doing business in the United States prior to the filing of the petition. Accordingly, the petitioner will not be deemed to be a new office. The petitioner must, therefore, demonstrate upon the filing of the petition that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The AAO will next consider 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), 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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-
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> (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.

The petitioner does not address on appeal the issue of the beneficiary's proposed employment capacity. 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).

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition. The record does not demonstrate that upon the beneficiary's transfer to the United States he will be employed in a primarily managerial or executive capacity. As the beneficiary would be the sole employee of the organization, he would clearly lack support personnel that would relieve him from performing several of the non-qualifying tasks outlined by the petitioner, including setting and monitoring the company's budgets and cash flow, representing the petitioner to third parties, and ensuring compliance of corporate and tax regulations. Additionally, although the petitioner anticipates hiring three employees, including a construction manager and a general manager, the beneficiary's proposed employment at the time of filing the petition does not satisfy an essential element of managerial or executive capacity. *See* §§ 101(a)(44)(A) and (B). 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, there is no indication in the record that the beneficiary would be responsible for managing or directing a major function of the organization. The AAO will therefore affirm the director's decision that the petitioner failed to establish the beneficiary's proposed employment in a qualifying capacity. For this reason, the appeal will be denied.

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.