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

[redacted]

U.S. Citizenship and Immigration Services

FEB 07 2005

FILE: LIN 03 193 51969 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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, Nebraska 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 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 Indiana that is engaged in the purchase and management of rental properties in the United States. The petitioner claims that it is a subsidiary of the beneficiary's foreign employer, located in Lagos, Nigeria. The petitioner now seeks to employ the beneficiary as its president for two years.

The director denied the petition concluding that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity within one year of approval of the petition. In making this determination, the director specifically focused on the financial ability of both the beneficiary's foreign employer and the petitioning organization to fund the business activity of the new United States company.

On appeal, counsel states that the director incorrectly concluded that the beneficiary would not be employed in the United States in a primarily managerial or executive capacity. Counsel claims that contrary to the director's decision, the beneficiary would not directly perform any job duties directly related to the daily operation of the business. Counsel also contends that the petitioner, the foreign entity and its affiliates have adequate funding to implement the petitioner's business plan. Counsel submits a brief and additional documentary evidence in support of the appeal.

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.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The issue in the instant matter is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity within one year of approval of the petition.

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-
>
> (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 filed the nonimmigrant petition on June 2, 2003, noting that the beneficiary would be employed in the United States company as its president. In an attached "rider," counsel provided the following description of the beneficiary's proposed responsibilities:

> As President, she will be responsible for managing and directing all aspects of the business operations of the U.S. subsidiary during the initial stages. She will exercise complete discretion and authority in making business decisions, including the acquiring of new properties, entering into financing or lending agreements, the hiring and firing of employees, contractors, and consultants, supervising the management of the company's rental properties, establishing business goals and operating policies for the leasing and development of properties, and planning and directing the growth of the company.
>
> [The beneficiary] will report every month to the chairman of the Nayee Group on the status of the U.S. subsidiary.
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> * * *
>
> As President of the U.S. subsidiary, the beneficiary will perform an essential function within the parent company's international business expansion strategy.

Counsel noted that following the beneficiary's assignment in the United States, she would resume her position in the Nigerian company.

Counsel also stated that over the next two years the petitioner anticipated hiring an accountant, a building manager-supervisor, a secretary, and a clerical employee. Counsel noted that the petitioner may utilize estate surveyors, construction engineers, and property appraisers on a contractual basis.

In an attached letter from the foreign entity, its managing director explained that the beneficiary would supervise the business activities of the United States operation until it "is well-established and substantial in terms of returns." The managing director stated that the beneficiary "is then expected to appoint a General

Manager who shall report to her as the Executive Director (Finance and Administration) of the Group." The managing director also explained that the beneficiary was expected to hire for the petitioning organization "[a] staff with such academic qualifications as shse [sic] considers necessary now or in the nearest future."

With regard to the funding of the business, counsel stated that the petitioner would purchase additional properties with funds from the parent company's overseas operations and rental income from the United States operation. Counsel stated that the petitioner's business would eventually expand to include the development and construction of residential properties and multipurpose buildings. As evidence of the petitioner's financial status, counsel submitted a bank statement for an account held by the petitioner in the amount of approximately $45,000. Counsel also provided two bank account statements for the foreign entity reflecting account balances of approximately $25,000 and $36,000.

The director issued a request for evidence on June 6, 2003, noting that the petitioner had not submitted "a specific, credible business plan for the development of this proposal that would support an L-1A managerial/executive position within one year." The director also noted it is unclear from the financial documentation submitted with the petition whether the foreign entity has the "financial capability" to support the development of the United States entity and the beneficiary as a manager or an executive. The director requested that the petitioner submit the following evidence: (1) a lease confirming that physical office premises have been obtained; (2) photographs of the interior and exterior premises; (3) photographs of real estate purchased by the petitioner; and (4) evidence that the petitioning organization would support the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition. The director noted that such evidence should include the petitioner's business plan, a description of its scope, organizational structure and financial goals, and copies of current bank account statements for both the United States and foreign organizations.

In counsel's response to the director's request, counsel referred to a March 28, 2003 letter from the foreign entity's managing director as evidence of the petitioner's ability to support the beneficiary in a primarily qualifying capacity within one year of approval of the petition. Counsel restated sections of the managing director's letter and explained that the petitioner's organizational structure would include personnel who the beneficiary "considers necessary now or in the nearest future." Counsel again stated that the petitioner anticipated hiring an accountant, a building manager-supervisor, a secretary, and a clerical employee within the next one to two years. Counsel also referenced the managing director's explanation that the United States operation would be funded with rental income from properties owned by the foreign company overseas, and would, within one to three years, generate rental income equal to that of the foreign company. As evidence of the companies' financial ability to remunerate the beneficiary and fund the petitioner's operations, counsel submitted the foreign company's 2001 and 2002 annual reports and bank statements for both organizations.

Counsel also provided the petitioner's business plan in which the petitioner stated that it anticipated an initial base of 100 rental units during its first year of operations. The petitioner explained this "goal represents the number of properties that can be managed and controlled by a limited staff while allowing for principal preservation and income and profit utilization for further investments." The petitioner further noted that during its second through fifth years of operation it would diversify into real estate based business operations, which would allow for the employment of a property manager who would direct the daily business operations. The petitioner explained that repairs and maintenance work would be outsourced, therefore limiting the number of workers necessary.

In a decision dated September 8, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed in the United States as a manager or executive. The director stated that the record did not indicate that the petitioner would employ any professional, managerial or supervisory personnel within its first year of operations, and concluded that "the beneficiary would be involved in the performance of day-to-day tasks that are necessary to provide the services of the U.S. entity for the foreseeable future." The director also concluded that the foreign and United States entities do not have "the financial capability to support the U.S. entity in the major real estate investment planned for the first year of operations." The director further noted inconsistencies in the purchase agreements for the petitioner's residential properties and in the financial statements submitted as evidence of the petitioner's funds. Consequently, the director denied the petition.

In an appeal filed on October 7, 2003, counsel claims that Citizenship and Immigration Services (CIS) erred in determining that the petitioning organization would not support the beneficiary in a primarily managerial or executive position within one year of approval of the petition as the petitioner submitted sufficient evidence to satisfy the regulation at 8 C.F.R. § 214.2(l)(3)(v). Counsel states that the foreign parent company and its affiliates have adequate funds and assets to implement the petitioner's business plan, and notes that the petitioner already purchased two apartment buildings at a purchase price of approximately $500,000. Counsel submits the petitioner's purchase agreement, warranty deed, and settlement statement as evidence of the purchase. Counsel also provides documentary evidence, including bank statements and an electronic funds transfer, as evidence of funds received by the petitioner from the foreign entity and its affiliates to finance the petitioner's purchase of the real estate. Counsel contends that "[CIS'] apparent requirement of liquid assets in the accounts of the petitioner, the parent company, and its affiliates sufficient for the purchase of 100 rental units fails to properly consider the highly leveraged nature of real estate investments and cash flows from rental properties." Counsel further notes that fixed assets and property held by the foreign and United States companies could be used as collateral for additional sources of funding.

On review, the petitioner has failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, organizational structure, and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

As correctly determined by the director, the record does not demonstrate that within one year of approval of the petition the beneficiary would be employed by the United States entity as a manager or executive. 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* Other than a brief statement that the beneficiary "will exercise complete discretion and authority in making

business decisions," hire and fire employees, supervise the management of the petitioner's rental properties, and establish business goals and policies, the petitioner failed to specifically identify the job duties to be performed by the beneficiary as a manager or executive. In fact, it appears that the petitioner described only those job responsibilities of the beneficiary during the first year of the petitioner's operations, as the petitioner specifically noted that "[the beneficiary] would be responsible for managing and directing all aspects of the business operations of the U.S. subsidiary during the initial stages." The petitioner is required to substantiate its claim of the beneficiary's future employment as a manager or executive with a detailed description of the qualifying job duties to be performed by the beneficiary. *Id.* 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). 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).

Additionally, it does not appear that the petitioner would employ a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. While the petitioner noted its plans to hire additional employees, including an accountant, building manager, secretary and clerical employee, the additional personnel would not begin employment until after the first or second years of operation. The petitioner further confirms in its business plan its anticipated delay in hiring additional employees. The petitioner stated in the business plan that it is unlikely that a large full-time staff will be needed during the first one to two years of operation except for maintenance and repairs. The petitioner's remaining references to personnel are vague and merely indicate that the beneficiary would hire a staff with such academic qualifications she deems necessary in the future. The petitioner's limited explanation of the petitioner's proposed personnel as well as its expected delay in hiring additional subordinate workers indicates that the petitioner's organizational structure would not support the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition. The AAO notes that absent a subordinate staff to perform the non-qualifying functions of the business, it is likely that the beneficiary would be responsible for the daily operations of the business. 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).

Moreover, although counsel submits financial documentation of the foreign entity's ability to fund the petitioner's operations, the monetary amounts are not translated into U.S. dollars. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Furthermore, the bank statements submitted on appeal as evidence of the petitioner's financial status reference an account held in the name of the beneficiary, not a business account. There is no indication that the petitioning organization is the owner of the funds. Again, this documentary evidence is not probative of the petitioner's financial ability to support the beneficiary in a qualifying 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. at 193.

Based on the foregoing discussion, the AAO cannot conclude that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities as required in the Act at § 101(a)(15)(L). The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International,* 19 I&N Dec. at 595.

Here, the petitioner claimed that it is the subsidiary of the beneficiary's foreign employer. The petitioner submitted two stock certificates identifying the beneficiary and her husband as equal shareholders of the petitioning organization's stock. A 2002 annual report for the foreign entity indicates that 20% of the foreign entity's stock is held by the beneficiary while her husband owns the remaining stock. The record does not contain any stock certificates for the foreign entity. The petitioner has not submitted sufficient documentary evidence to establish the claimed parent-subsidiary relationship or an affiliate relationship. 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. at 193. Based on the petitioner's representations, the two entities do not meet the definition of qualifying organization. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason, the appeal will be dismissed.

An additional issue not addressed by the director is the beneficiary's current H-1B status. According to Form I-797A, the petitioner was granted status as an H-1B nonimmigrant worker from May 1, 2002 through January 31, 2005 for employment with an unrelated company. Based on the record, the beneficiary is currently working for another United States company, and therefore has not satisfied the regulatory requirement for foreign employment. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(iii), the beneficiary is required to have "at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition." The beneficiary's current employment as an H-1B nonimmigrant worker is interruptive of her claimed overseas employment. Consequently, the appeal will be dismissed for this additional reason.

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.