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FILE: WAC 03 117 50965 Office: CALIFORNIA SERVICE CENTER Date: FEB 18 2005

IN RE: Petitioner: [Redacted]  
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:



**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, California 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 president 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 sole proprietorship located in California that is operating an embroidery business. The petitioner claims that it is an affiliate of the beneficiary's foreign employer, located in Budapest, Hungary. The petitioner now seeks to employ the beneficiary for an additional two years.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel claims that the petitioner provided sufficient evidence establishing that the beneficiary's job duties are primarily managerial or executive. Counsel also contends "it is clear that [the beneficiary] directs a major function of the organization, which in essence is running every aspect of its California affiliate." Counsel submits a brief 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.

The issue in the instant 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), 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 February 27, 2003 noting that it employed two workers, including the beneficiary as president, and "outside staff." In a letter appended to the petition, dated February 21, 2002, the petitioner provided the following description of the beneficiary's position as president:

The position for [the petitioning organization] will involve [sic] executive direction of the operations here including policy making, establishing goals, finance, accounting, administration, financial analysis, marketing[,] contract negotiations, provider relations, and ongoing international reporting. Primary duties will include management and expansion of

employment opportunities of the required staff of workers in the United States to expand and develop the enterprise here. We are happy to report that the company is finally growing and has been profitable in the USA, after a very difficult start following the acquisition. The business environment is now improving, and we anticipate growth and new employment creation when the new business cycle has taken hold.<sup>1</sup>

The petitioner further explained that it anticipated hiring two additional workers during the next year with "intentions . . . to develop a full marketing operation for sales and necessary support to the Threadcraft product line as well as the introduction of new concepts from [the beneficiary]."

The director issued a request for evidence dated April 7, 2003. In his notice, the director asked that the petitioner submit the following evidence pertaining to the beneficiary's employment in the United States: (1) a list of the workers employed by the United States organization; (2) the petitioner's organizational chart describing its managerial hierarchy and clearly identifying the beneficiary's position in relation to all other employees in the company; (3) a detailed description of the beneficiary's job duties in the petitioning company, including a description of the educational and employment qualifications required for the position of president; and (4) a brief description of the educational level, salary, and tasks performed by the beneficiary's subordinate employees.

Counsel responded in a letter dated June 26, 2003. In his letter, counsel explained that the petitioner had been forced to reduce its staff due to economic conditions and the lack of available workers in the United States. Counsel noted that Citizenship and Immigration Services (CIS), however, should take into account the petitioner's contribution to its community, and the "realities of business and times of expansion" when determining whether the beneficiary is employed in a qualifying capacity. Counsel also stated that case law permits a sole proprietor to qualify as an L-1A owner and executive. Counsel submitted an organizational chart for the petitioning organization reflecting the beneficiary in the position of "owner/president" with two subordinate employees identified only as "EAD + EOS L2" and seamstress. A notation on the chart referenced an accompanying letter from the petitioner for information regarding the seamstress' employment. In this separate letter from the petitioner, dated June 18, 2003, the petitioner acknowledged the seamstress' employment, explaining only that she would operate the embroidery machines.

In a decision dated July 14, 2003, the director determined that the petitioner had not demonstrated that the beneficiary would be employed in the United States in a qualifying capacity. The director acknowledged the petitioner's organizational chart, yet noted that it did not include a description of the job duties performed by the beneficiary's two subordinate workers. The director noted that the record did not contain a comprehensive description of managerial or executive duties that the beneficiary would perform in his position as president.<sup>2</sup> The director stated that the beneficiary would not be managing or directing the management of a function, department, subdivision or component of the petitioning organization, and would not be functioning at a senior level in the organization's personnel hierarchy. The director also stated that the beneficiary would not manage a subordinate staff of professional, managerial or supervisory personnel who would relieve the

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<sup>1</sup> Although the petitioner's letter is dated February 21, 2002, one year prior to the filing of the instant petition, it appears that this was a typographical error as the letter references the instant petition extension.

<sup>2</sup> While the director included in his decision an outline of five tasks to be performed by the beneficiary as president, these job duties actually relate to the beneficiary's prior employment abroad and are listed as such in a letter from the foreign entity dated February 1, 2000.

beneficiary from performing non-qualifying operations of the business. Consequently, the director denied the petition.

Counsel filed an appeal on August 8, 2003, stating that the beneficiary's duties are executive and managerial in nature, and contending that the beneficiary directs a major function of the organization. In a letter submitted with the appeal, dated August 7, 2003, counsel states:

It is submitted that sufficient evidence has been produced to support the position that [the beneficiary's] duties are primarily executive and managerial. The evidence submitted clearly demonstrates that he is and has been responsible for the establishment of company policies; that he has and continues to provide executive direction and general management; that he has been and continues to be responsible for product development and for marketing of the company's products. Further, it is clear that [the beneficiary] directs a major function of the organization, which in essence is running every aspect of its California affiliate. Based upon his vast experience gained in running the Hungarian business for approximately nine years before coming to California to run its branch-affiliate business, [the beneficiary] clearly has the special knowledge of the company's products and business operations.

Counsel again explains that while the petitioner has experienced a decrease in staffing levels due to economic conditions, the beneficiary, as the sole proprietor of the petitioning organization, may qualify as an L-1A owner and executive. Counsel also states that CIS should "be considerate of the realities of business and times of expansion or contraction in adjudicating this business related petition."

On review, the petitioner has not demonstrated that the beneficiary would be employed by the United States organization 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). 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.*

The record does not contain a sufficient description of the beneficiary's claimed managerial and executive employment. The petitioner's vague description in its February 200[3] letter that the beneficiary would be responsible for directing the company's finance, accounting, administration, financial analysis, marketing, contract negotiations, and provider relations fails to accurately detail any qualifying job duties related to these functions. The actual duties themselves 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). Additionally, the petitioner's blanket claim that the beneficiary's responsibilities would "involve executive direction of the operations here including policy making, establishing goals . . ." is merely a restatement of a portion of the regulatory definition of executive capacity, and is not sufficient for establishing employment in a qualifying capacity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(C). 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, although specifically requested by the director, counsel failed to submit a detailed statement of the tasks to be performed by the beneficiary. The petitioner's 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).

The petitioner's organizational chart also fails to support the petitioner's claim that the beneficiary would be employed in a primarily managerial or executive capacity. Other than identifying the beneficiary and two additional workers on its organizational chart, the petitioner fails to indicate how the petitioner employs a staff sufficient to support the beneficiary as a manager or an executive. Again, although requested by the director, the petitioner did not submit a description of the job duties performed by the beneficiary's subordinate workers, and in the case of one worker, fails to even provide her job title. While the petitioner references its June 18, 2003 letter as containing documentation of the seamstress' position, the letter merely indicates that the petitioner was able to locate a good candidate for the job of seamstress after experiencing difficulty filling the position. Moreover, the record does not indicate whether the seamstress is presently working for the petitioner, or, more importantly, was employed at the time of filing the petition. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, the petitioner indicated on its nonimmigrant petition that it employed two employees plus "outside staff," yet never explained or identified the use of other workers not directly employed by the petitioning organization. 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). The limited information regarding the petitioner's personnel prevents a finding that the petitioner employs a staff sufficient to support the beneficiary as a manager or an executive.

Also, despite counsel's claim on appeal that CIS should consider the "realities of business" and the time needed for expansion, counsel fails to recognize the requirement that the petitioner establish eligibility at the time of filing the 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.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner concedes that the petitioning organization has been operating since November 1999. Therefore, the petitioner is expected to be sufficiently operational to support the beneficiary in the position of manager or executive. The petitioner has not satisfied this essential requirement.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, 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). Here, as noted above, the petitioner fails to adequately describe the managerial or executive job duties to be performed by the beneficiary during his employment in the United States, and does not account for a staff sufficient to support the beneficiary in a qualifying capacity. The petitioner has failed to explain how the reasonable needs of the organization are met by the employment of the beneficiary, a seamstress, and a third unidentified employee. 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). Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel's additional claim on appeal that the beneficiary is directing a major function of the business is not supported by the record. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As noted previously, the record is devoid of a detailed explanation of the beneficiary's job duties, which is necessary to determine the employment capacity of the beneficiary. Consequently, absent additional evidence, the AAO cannot conclude the beneficiary would be directing a major function of the organization. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated the existence of a qualifying relationship as required in the Act at § 101(a)(15)(L). As a matter of law, the beneficiary is ineligible for the classification sought. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. See 8 C.F.R. 214.2(l)(1)(ii)(G)(2). The petition includes evidence, including an IRS Form 1040 with Schedule C that demonstrates that the beneficiary is doing business as 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). As in the present matter, 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.

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.

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**ORDER:** The appeal is dismissed.