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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: SRC 03 076 50023 Office: TEXAS SERVICE CENTER Date: FEB 23 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 petitioner subsequently filed a motion to reopen. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [redacted] claims to be a joint venture of [redacted] located in Argentina. The U.S. entity was incorporated in the State of Florida on June 22, 2001 and is engaged in the hotel business. Accordingly, on January 16, 2003, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for three years. The petitioner seeks to employ the beneficiary's services as a new employee and as the U.S. entity's vice president at a yearly salary of $36,500. The petitioner claims to have six employees.

On February 12, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be employed in a primarily managerial capacity.

On February 27, 2003, the petitioner's counsel filed Form I-290B and submitted a motion to reopen the denial of the application. On the Form I-290B Notice of Appeal, counsel stated that the petitioner demonstrated that the beneficiary "will supervise the activities of all employees" and requested that the "petition be reevaluated as an application from a new company in the U.S."

On April 9, 2003, the director denied the motion to reopen.

To establish L-1 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 qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, 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.

The regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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's prior year of employment abroad 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.

(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 first issue in this proceeding is whether the petitioning organization has been doing business for less than one year to qualify as a new office.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F) and (H) state:

(F) New Office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

(H) Doing business means the 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.

On January 16, 2003, the petitioner indicated on the Form I-129 that the beneficiary was not coming to the U.S. to open a new office. However, in counsel's motion to reopen, counsel requested that "the petition be reevaluated as an application from a new company in the U.S." Counsel further claimed, "The company was unable to satisfy the burden of evidence required for an existing company, as the company only began its operations in 2001."

In the director's denial of the motion to reopen, she determined that the U.S. entity was not a new office pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F). The director found that the U.S. entity had been doing business for more than one year because the entity had been in "business since 2001 while the petition was filed in 2003."

Upon review of the record, the evidence indicates that the U.S. entity has been doing business for more than one year and does not qualify as a new office. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F) and (H). On the Form I-129, the petitioner indicated that the U.S. company was established in 2001. In addition, in a January 13, 2003 supporting letter, the petitioner indicated that the U.S. business was "an established company which is dedicated to the administration and management of the Stardust Motel" and the petitioner has ran the hotel which has had "over $251,365.00 gross dollars of sales since it's [sic] foundation." The petitioner also submitted balance sheets, bank statements, invoices, and an occupational license tax for 2003. Since the petitioner filed for L-1A classification for the beneficiary on January 16, 2003, more than eighteen months after the U.S. company was established on June 22, 2001 and the record contains sufficient supporting documentation establishing that the U.S. company has been doing business, the AAO finds that the petitioner has been doing business for more than one year.

After careful consideration of the evidence, the AAO affirms the director's findings that the U.S. entity is not considered a new office for purposes of adjudicating this petition.

The AAO notes that counsel requested on motion that the "petition be reevaluated as an application from a new company in the U.S." At the time of filing the petition for the beneficiary, the petitioner indicated on Form I-129 that the beneficiary was not coming to the United States to open a new office. However, after the director denied the petition, the petitioner subsequently asserted that the U.S. entity should be considered a new office. However, 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). 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).

The second issue in this proceeding is whether the beneficiary will be employed 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-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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
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> 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.

On January 16, 2003, the petitioner submitted the Form I-129 and a supporting letter. On the Form I-129, the petitioner described the beneficiary's U.S. duties as:

> [The beneficiary] will set standards for production and general guidelines for the company which must be followed and executed. He will make decisions that will ensure that the company is operating efficiently and effectively. He will be responsible for the administrative duties, customers service, nationwide sales, advertising, distribution and personnel [of] the company.

In addition, in a January 13, 2003 supporting letter the petitioner further described the beneficiary's proposed U.S. duties as:

> [H]ead the administrative duties, the commercial sales and purchasing department of the company. [The beneficiary] will assist the [p]resident in the day-to-day activities . . . in setting the guidelines and ensuring that these guidelines are implemented. He will review market analysis to determine customer needs, prices and discount rates and develop sales campaign to accommodate the goals of our company.
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> * * *
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> He will assist the [p]resident in determining and formulating policies and business strategies and he has been coordinating the operational activities with the help of the subordinate managers. [M]anage the sales and purchasing activities of the company, coordinate the sales distribution by establishing territories, quotas and goals, and advise dealers and clients concerning sales and advertising techniques. He will assign territories to sales personnel. He will analyze sales statistics to formulate policy and assist dealers in promoting sales. [The beneficiary] will also review market analysis to determine customer needs, volume potential, prices and discount rates and develop sales campaign to accommodate the goals of our company. He will set the guidelines for the company which must be followed and executed and develop and implement office operations and system instructions, policies and procedures. He will supervise the management and administration, and analyze market and delivery system to determine present and future material availability.

The petitioner also submitted four W-2 Wage and Tax Statement for 2001 and a copy of its payroll journal. The employees listed on the W-2's included [redacted]

[redacted] and [redacted] The payroll also included an additional name, [redacted] not listed on the W-2 Wage and Tax Statement for 2001.

On January 28, 2003, the director requested additional evidence. Specifically, the director requested evidence of the current staffing levels in the United States. The director requested a list of the U.S. entity's employees' titles, duties, and educational backgrounds.

In response, the petitioner submitted the U.S. entity's organizational chart and a description of the employees' duties and educational backgrounds.

On February 12, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be employed in a primarily managerial capacity. The director found that there was no evidence that the employees actually worked for the U.S. entity or evidence of their actual duties. The director also found that this evidence was different from the evidence submitted with Form I-129 indicating that there were different employees.

On February 27, 2003, the petitioner's counsel filed Form I-290B and submitted a motion to reopen the denial of the application. On the Form I-290B Notice of Appeal, counsel stated that the petitioner demonstrated that the beneficiary "will direct and supervise the activities of all the U.S. employees, including the company accountant Ming Wang, the general manager [redacted] and all other staff, investments, finances and all company activities."

On April 9, 2003, the director denied the motion to reopen.

In 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). On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner described the beneficiary's duties as "mak[ing] decisions that will ensure that the company is operating efficiently and effectively" and "assist[ing] the [p]resident in determining and formulating policies and business strategies." Based upon the petitioner's limited description, it is unclear whether the beneficiary's duties are those of a manager or executive. 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).

In addition, the petitioner claims that the beneficiary has a "unique understanding of the company's activities and organizational structure" and "has demonstrated considerable expertise as [v]ice [p]resident." However, the petitioner fails to identify how the beneficiary will specifically draw upon his expertise and knowledge to promote and establish the U.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).

Moreover, the petitioner described the beneficiary's proposed U.S. duties as "analyz[ing] sales statistics to formulate policy," "assist[ing] dealers in promoting sales," and being responsible for "administrative duties, customers service, nationwide sales, advertising, distribution and personnel." Since the beneficiary will actually promote sales and be responsible for advertising, he is performing tasks necessary to provide a service or product. 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. Although the petitioner stated in its response to the request for evidence that several of the employees obtained bachelor's degrees, the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant matter, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the administrative work of the guest quality services employee, who is among the beneficiary's subordinates.

Finally, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "review[ing] market analysis to determine customer needs, prices and discount rates and develop sales campaign to accommodate the goals of our company," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO notes that there are discrepancies in the record concerning the claimed subordinate employees. On the Form I-129, the petitioner stated that it currently employs six employees.

However, the petitioner submitted only four W-2 Wage and Tax Statements for 2001 and a payroll journal showing five names. In addition, some of the employees listed on the W-2 Wage and Tax Statement for 2001 were not the same employees as those listed on the U.S. organizational chart or as described in the February 3, 2003 response letter to the director's request for additional evidence. 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). There is also insufficient evidence that the claimed employees actually work for the petitioner. In the absence of such evidence as consistent pay stubs and payroll records, the petitioner has not established that the petitioner employs the claimed subordinate staff that would relieve the beneficiary from performing non-qualifying duties.

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO finds that the beneficiary has not been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated, to establish L-1 eligibility under section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L), the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *Id.* On review, the petitioner submitted a limited and vague description of the beneficiary's foreign duties. For example, the petitioner described the beneficiary's foreign duties as "assisting the [p]resident in determining and formulating policies and business strategies." Again, 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 at 190.

In addition, it is unclear as to when the beneficiary began working for the foreign entity. On Form I-129, the petitioner stated that the beneficiary has been working abroad since 1998. However, in a January 13, 2003 supporting letter, the petitioner claimed that the beneficiary began working for the foreign entity "since its founding in 1997." 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). In sum, the AAO is not persuaded that the beneficiary has been employed in a primarily managerial or executive capacity abroad. For this additional reason, the petition will not be approved.

Another issue beyond the decision of the director is whether the petitioner and foreign entity have a qualifying relationship. The petitioner claims that it is a "joint venture" of the foreign entity. Neither the Act nor regulation provides a definition of the phrase "joint venture." However, the Commissioner has applied a broad definition of joint venture in a prior decision. *Matter of Hughes* states that a joint venture is "a business enterprise in which two or more economic entities from different countries participate on a permanent basis." *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(quoting a definition from [redacted] *International Business Enterprise* (Prentice Hall,

1973)). Upon review, the petitioner described the stock ownership of the U.S. and foreign entity on the Form I-129 as: "The stockholders of [the foreign company] are: [redacted] (50%) and [redacted] (50%). The U.S. Company, [the petitioner], are: [redacted] (79%) and Jeni [redacted] (21%)." Based upon the description of the stockownership, the petitioner is not considered to be a joint venture of the foreign entity. In addition, the petitioner is not a subsidiary of the parent company because the parent company does not own or control any of the stock of the U.S. company. In terms of an affiliate relationship, an affiliate relationship exists if one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. However, to establish eligibility in this matter, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N at 289. In this matter, the U.S. entity is majority owned by [redacted] and the foreign entity is owned equally by [redacted] and [redacted] Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. For this additional reason, the petition may not be approved.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.