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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 14 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Rachiti Corporation, endeavors to classify the beneficiary as a manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L).[1] The petitioner claims to be a branch of Rachiti Enterprises Concern, located in Nepal and claims to be engaged in the import, wholesale, and distribution of handmade woolen goods and handicrafts business. It appears that the petitioner operates a gas station and convenience store. It seeks to extend the petition's validity and the beneficiary's stay for three years as the general director at an annual salary of $20,000. The petitioner was incorporated in the State of Texas on October 9, 1998 and claims to have four employees.

On May 24, 2002, the director denied the petition. The director determined that the beneficiary will not be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner's counsel states that the beneficiary is employed in a managerial and executive position

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 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(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.

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[1] The AAO notes that on Form I-129, the petitioner indicated that it seeks to classify the beneficiary as an L-1B specialized knowledge worker. The alien was previously granted L-1B status from May 22, 1999 to February 1, 2000 and from February 2, 2000 until February 2002. However, on appeal, counsel's brief and the petitioner's supporting letters claim that the beneficiary will be employed in a managerial and executive capacity. Therefore, this decision will only address the issue of whether the beneficiary is employed in a primarily manager or executive capacity.

The issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), 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.

On February 12, 2002, the petitioner filed Form I-129. On Form I-129, the petitioner described the beneficiary's U.S. duties as "[the beneficiary] makes policy decisions, managing, directing, supervising US Branch including hiring, firing of employees, deal and negotiate and contract with customers." In addition, in a letter of support, the beneficiary's duties are described as:

- Plan, manage, and make policy decision to secure the growth of the company under his management.
- Make policy decisions regarding the management and the operation of this branch office,
- Negotiate deals
- Manage the cash flow of the company
- Hire and fire employees, decide their benefits
- Confer and report directly to the board of director in Nepal.

On March 7, 2002, the director requested additional evidence. In particular, the director requested a description of the beneficiary's U.S. duties, percentage of time spent in each of the listed duties, the number of subordinate managers and employees, and their job titles.

In response to the request for additional evidence, the petitioner described the beneficiary's duties in an April 3, 2002 letter as:

- 10%: Making policy decisions regarding the management and operation of the office and developing market strategy.
- 10%: Negotiating deals, quality control of goods and services, signing contracts, managing cash flows.
- 25%: Conferring with managers of the parent company, regarding production, design and quality in accordance to current American market taste and setting prices, analyzing and evaluating market trends, designing feasibility and draft design, and reporting to the board of directors in Nepal.
- 50%: Advertising, promotional activities such as getting in touch with regular and prospective clients direct and through correspondence, telephone, Internet, providing samples, observing and participating in shows and exhibitions.
- 5%: Day to day administration.

In addition, the petitioner claimed that "as the business expands, it plans to hire subordinate employees in the branch office such as a manager, an accountant, and a secretary." The petitioner claimed that the beneficiary supervises the following employees:

a. Manager (not hired yet)
b. Secretary to the Director (not hired yet)

c. Accountant
d. Office Executives:(2) already hired 1

On May 24, 2002, the director denied the petition concluding that the petitioner had not established that the beneficiary will not be performing duties in a primarily managerial or executive capacity for the United States entity.

On appeal, the petitioner's counsel states that the beneficiary is employed in a managerial and executive capacity. Counsel reiterates the duties the beneficiary performs. Counsel also states that the beneficiary, "performs executive duties which include managing, directing, making decisions regarding the operation and policy of the company, and supervising and directing, hiring and firing personnel, and establishing the goals and policies of the company under his sole discretion."

On review, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity. 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). The petitioner has provided a general and nonspecific description of the beneficiary's U.S. duties. For example, the petitioner states that the beneficiary's duties include planning, managing, establishing goals, and making policy decision. The petitioner did not, however, define the beneficiary's goals, plans, or policies. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the company, establishing the goals and policies of the company, and exercising sole discretionary in decision making. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary's primary U.S. duties as dedicating 50 percent of his time to advertising and promotional activities, 25 percent of his time to analyzing and evaluating market trends, and draft design activities, and 10 percent of his time to developing market strategies and negotiating deals. This description indicates that the beneficiary spends 85 percent of his time performing the daily tasks of the company; therefore, the beneficiary is not employed in a primarily managerial or executive capacity. 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 capacity. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner also claims that "as the business expands it plans to hire some subordinate employees in the branch office such as the manager, accountant, secretary, and one office

executive who will be under the control of the beneficiary." However, 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).

In sum, the petitioner failed to provide a sufficiently comprehensive and detailed description of the beneficiary's proposed responsibilities. Thus, the petitioner did not provide evidence sufficient to meet the burden of proof. *See Matter of Soffici*, 22 I&N Dec. at 165. Second, as demonstrated above, the beneficiary will be largely performing tasks necessary to produce a product or provide services; thus, the beneficiary is not employed in a primarily managerial or executive capacity. *See Matter of Church Scientology International,* 19 I&N Dec. at 604.

Finally, a critical analysis of the nature of the petitioner's business further undermines counsel's assertion that the beneficiary is employed in a managerial or executive capacity. At the time of filing, the petitioner operated a gas station and convenience store and claimed to employ the beneficiary, an accountant, and an "office executive" whose duties have not been described. There is no mention of any cashiers, clerks, supervisors, or a store manager working in the petitioner's store. Accordingly, it is evident from the record that the beneficiary and his two subordinates must actually be engaged in routine non-qualifying tasks required for the operation of a retail store. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The AAO is therefore left to question the validity of the remainder of the beneficiary's claimed 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 is not persuaded that a qualifying relationship exists between the petitioner and foreign entity. The petitioner claims to be a branch office of the foreign entity. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of LeBlanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

The AAO notes that there is insufficient evidence in the record to establish ownership of the petitioner. The petitioner was incorporated in the State of Texas on October 9, 1998. Therefore, the petitioner is not considered a branch of the foreign entity. In addition, on Form I-129, the petitioner indicated that the foreign entity owns 100 percent of the U.S. entity. However, the 2001 Form 1120, U.S. Corporation Income Tax Return, Schedule K, does not indicate that a corporation owned 50 percent or more of the U.S. entity's voting stock. The petitioner submitted no additional evidence to substantiate its claim that the foreign entity owns 100 percent of its stock. The lack of current evidence and inconsistencies in the record leads the AAO to conclude that there is insufficient evidence to establish that a qualifying relationship exists between the petitioner and foreign entity. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, *supra.* In addition, 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). Based on the above, the petitioner has not established that it has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(i). 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.

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