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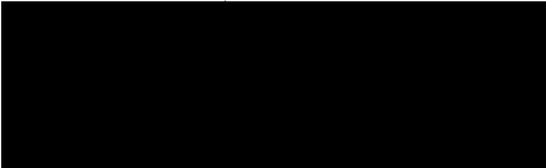
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**U.S. Citizenship
and Immigration
Services**

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FILE: SRC 02 080 50650 Office: TEXAS SERVICE CENTER Date: JUN 16 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

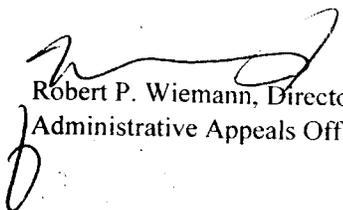
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2000 and claims to be an internet postal services business. The petitioner claims that the U.S. entity is a subsidiary of [REDACTED] located in Buenos Aires, Argentina. The petitioner declares two employees. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager for three years, at a weekly salary of \$600.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that: (1) the beneficiary had been or would continue to be employed by the U.S. entity primarily in a managerial or executive capacity; and (2) the U.S. entity had been doing business during the previous year.

On appeal, the petitioner disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to be managerial or executive in nature, and that the U.S. entity has been engaged in the regular, systematic and continuous provision of goods and services for the past year.

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 demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary has been and will be employed by the U.S. entity primarily in a 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) 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.

The petitioner initially stated that the beneficiary had been and would continue to be the company's general manager in charge of supervising the various departments of the company.

In a letter of support, dated January 7, 2002, the petitioner described the beneficiary's duties as follows:

[The beneficiary] has been the general manager of the company and is in charge of supervising the various departments of the company; he is an expert in the computer field and his services are needed in the company to continue with our growth and developing our business plan. He has the capacity to hire the necessary personnel, contract the necessary services needed for our business, and together with the directors of the parent company will set policy, strategy, and procedures, and goals. [sic]

In response to the director's request for additional evidence on this subject, the petitioner submitted a breakdown of the beneficiary's duties as:

The duties of the beneficiary during the past year have been:

- a- Supervision of the various departments of the company – 70%
- b- Research – 15%
- c- Legal and accountant matters – 10%
- d- Attending fairs, developing plans, and others – 5%

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary had been or would be employed primarily in a managerial or executive capacity. The director stated that the evidence failed to show that the petitioner employed any other person besides the beneficiary. The director

further stated that absent the support staff and/or duties that reflect managerial responsibilities, the petitioner had failed to show that the beneficiary had been functioning in a managerial or executive capacity.

On appeal, the petitioner argues that the U.S. entity is engaged in E-business; and that therefore, there is no need for multiple employees. The petitioner also argues that it employs 13 individuals worldwide who work as independent contractors. The petitioner continues by arguing that the Internet sites will be handled automatically, without the need for much human intervention. The petitioner asserts that the beneficiary's duties have included research on the North American market, start up of the U.S. entity, and day-to-day office work. The petitioner described the beneficiary's job duties as:

Making the business plan a reality

- To adapt it to the changes of the market and to mark road map
- To close down on strategic alliances
- To make agreements with the main ad-networks
- To know how to observe new trends and new opportunities
- To determine changes in our services and make them better
- To determine the new products that the market demands

Handling and supervision of the personnel

- Allocation of tasks and duties
- Supervising the tasks of the employees
- To mark the course of changes the employees need
- Keeping the effectiveness and dynamism in the course

Accounting, tax reports and payment

- Bookkeeping of the company
- Paying wages to employees
- Paying our providers and office rent
- Reporting and payment of payroll taxes
- Reporting and payment of income taxes

Handling with the providers

- Selection and hiring of good and reliable providers
- Payments to suppliers
- Searching analyzing the market of providers for better prices

Handling with banks

- Bank statement controls
- Credit card payments
- Building an excellent credit history
- Searching for cost-saving opportunities.

On appeal, the petitioner submitted copies of its' IRS Form 1120, Corporate Income Tax Return for 2001, IRS Form 941, Employer's Quarterly Federal Tax Return ending December 31, 2001, State Form UCT-6, State Employer's Quarterly Report for the year 2001, and copies of employment agreements with independent contractors.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner is not a new office for purposes of evaluating the beneficiary's proposed position. The petitioner infers that the U.S. entity is still in its developmental stages. However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has failed to present sufficient evidence to establish that the beneficiary has been employed in a managerial or executive capacity, or that it has reached the point where it can employ the beneficiary in a primarily managerial or executive position.

The petitioner has not provided a comprehensive description of the beneficiary's purported job duties. The beneficiary's position description is too general and broad to establish that the preponderance of his duties have been and will be managerial or executive in nature. The following duties are without any context in which to reach a determination as to whether they would be qualifying as executive: supervising various departments within the company, research, legal and accounting matters, and attending fairs and developing plans. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. 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). The actual duties themselves reveal the true nature of the employment. *Id. at 1108*.

The petitioner has not demonstrated that the beneficiary has been or will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing non-qualifying duties. There is no evidence submitted to establish that the petitioner employs anyone other than the beneficiary. Although the petitioner asserts that the company as an E-business is not in need of many employees and that the company employs independent contractors, there has been no independent documentary evidence submitted to substantiate this claim. There is no evidence to show how the beneficiary supervises the daily activities of independent contractors. Moreover, there has been no evidence presented to establish where the independent contractors are located, or that they perform managerial, supervisory, or professional duties sufficient to relieve the beneficiary from performing non-qualifying duties.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he has been or will be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record does not demonstrate that the beneficiary primarily manages an essential function of the organization. Although the petitioner stated that the beneficiary would primarily be responsible for supervising the various departments within the U.S. entity, the record reflects that the beneficiary has been performing and will continue to perform the duties necessary to establish the business. Based upon the evidence of record it appears that the beneficiary has been and will continue to be responsible for carrying out the sales, marketing, accounting, administrative, and negotiation functions 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). The petitioner has not demonstrated that the beneficiary will be functioning at a

senior level within an organizational hierarchy other than in position title. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the U.S. entity has been doing business as defined in the regulations.

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

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

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

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.

The petitioner initially submitted financial and business records as proof that the U.S. entity had been doing business at the time the petition was filed. The petitioner submitted copies of U.S. bank statements, and company invoices dated February 12, 2001, and April 2, 2001.

The director requested that the petitioner submit additional evidence to substantiate its doing business claim. The director specifically requested "evidence of the business conducted by the United States entity during the past year, such as copies of corporate income tax returns, accountant statements, invoices, bills of sale, bills of lading, shipping receipts, etc."

In response to the director's request for additional evidence, the petitioner submitted copies of a company bank statement; and company invoices dated January 31, 2001, February 28, 2001, May 31, 2001, June 30, 2001, July 15, 2001, July 31, 2001, August 31, 2001, and December 31, 2001.

The director determined that the petitioner had not submitted sufficient evidence to establish that the U.S. entity was doing business, i.e., continuously and systematically engaged in the provision of goods and/or services.

On appeal, the petitioner submitted copies of its sales summary chart covering the period from January of 2002 through November of 2002; an invoices report listing invoices dated from January of 2001 to October 15, 2002; company invoices covering the period from May of 2002 through October of 2002; letters of

accommodation and recommendation from vendors; a record of expenses by vendor summary; Employer's Quarterly Tax Returns for 2001 and 2002; IRS Form 1120, U.S. Corporate Income Tax Return for 2001; State Corporate Income Tax Return for 2001; First Union National Bank statements, and documentation from Wells Fargo Bank Northwest, N.A. of transfer of funds.

In review, the evidence submitted on appeal is sufficient to establish that the U.S. entity has been engaged in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. The company income tax returns for 2001 demonstrate gross receipt or sales in the amount of \$94,684.00. In addition, the company's sales summary chart, lists of expenses by vendor, copies of invoices, and banks statements all demonstrate that the petitioner has been engaged in business activities during 2001 and 2002. Based upon the evidence submitted, it appears that the U.S. entity's business activities meet the regulatory requirements that call for the regular, systematic, and continuous provision of goods and/or services. Therefore, the director's decision with respect to this issue will be withdrawn.

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. The petitioner has not sustained that burden with respect to establishing that the beneficiary has been employed by the U.S. entity in a primarily managerial or executive capacity.

ORDER: The appeal is dismissed.