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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

File: SRC 05 113 50473 Office: TEXAS SERVICE CENTER Date: DEC 11 2006

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)

IN 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 visa petition seeking to extend the employment of its director 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 under the laws of the State of Texas and is allegedly engaged in commercial and residential construction and remodeling. The petitioner claims a qualifying relationship with [redacted] of Nuevo Laredo, Mexico. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for three years.

The director denied the petition concluding that the petitioner did not establish that (1) the petitioner was doing business during the previous year; or (2) the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred in denying the petition because (1) the record establishes that the petitioner was doing business as defined in the regulations during the previous year; and (2) the record establishes that the beneficiary is employed in a primarily managerial or executive capacity. The petitioner submits a brief and additional evidence in support of its appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(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 the present matter is whether the petitioner has established that the United States entity has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

"Doing business" is defined in 8 C.F.R. § 214.2(l)(1)(ii)(H) as "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."

In support of its petition, the petitioner explained that it is engaged in the business of commercial and residential construction. During its first year in business, the petitioner submitted evidence that it arranged for financing, acquired several building lots, received permits to build several residential structures, actually built several structures, paid for supplies and subcontractors, listed the residences for sale with a real estate broker, and entered into agreements of sale for the conveyance of completed homes to consumers.

Despite this evidence, the director concluded that the petitioner did not establish that it was "doing business" during its first year in business because (1) the petitioner did not establish that it had actually sold any houses during its first year in business; (2) the petitioner borrowed the money to build the homes; and (3) the

petitioner reported a loss on its 2004 Form 1120.[1] The director also concluded that the petitioner had not proven that any homes were actually built. Finally, the director questioned the petitioner's evidence by noting that the promissory notes submitted by the petitioner were not signed by the lender.

Upon review, the AAO agrees with the petitioner and withdraws the director's conclusion that the petitioner failed to establish that it was "doing business" during the previous year.

As asserted by counsel to the petitioner in his letter dated April 20, 2005:

> The 2004 federal income tax return for [the petitioner] indicates gross revenues of zero dollars because none of the properties were sold until 2005; 2004 was spent in the production of the houses on those properties, a necessary series of steps before there can be a product to be sold. "Doing business" is defined in 8 C.F.R. § 214.2(l)(1)(ii)(H) as the regular, systematic, and continuous provision of goods and/or services by a qualifying organization. Although the company is required to provide its goods and services on a regular, systematic and continuous basis, it is only reasonable to expect that a natural part of the process involves producing the goods that will be provided. It is inherent in the construction industry that the processes of obtaining financing and properties, construction of structures and lastly the marketing of those properties require a significant period of time. Once they are complete, a company then has a product that can be sold. Requiring immediate sales of the product from Day One would ignore the fundamental realities of construction and create an unreasonable requirement that a construction company sell products in advance of the products' creation. In 2005, [the petitioner] has begun to sell the houses they have been building – a copy of the sales contract for the first house that was sold was included in the initial submission.

Indeed, the petitioner has provided ample evidence that it has been engaged in acquiring, building, and offering for sale residential structures. Moreover, this evidence establishes that the petitioner has been engaged in this activity on a regular, systematic, and continuous basis during its entire first year in business. While the petitioner did not provide evidence that it had sold its first house with the initial petition, this is not necessarily damaging to the petitioner's position. The fact that the petitioner has been actively engaged in constructing and offering for sale these structures constitutes the provision of goods and/or services. While a sale could be evidence of the provision of a good or service, it is not necessary. Otherwise, all "new office extension" petitions would be denied for failing to establish that the petitioners had been doing business

[1]While the evidence initially submitted with the petition and in response to the Notice of Intent to Deny did not include evidence of an actual sale, the evidence submitted on appeal includes evidence that the petitioner sold one of its homes on February 28, 2005, less than two weeks before the instant petition was filed. Although the AAO will not give any weight to this evidence since it was submitted for the first time on appeal, even though it could have been submitted in response to the Notice of Intent to Deny, the actual consummation of a sale in this case is not relevant in determining whether or not the petitioner was "doing business" during the previous year.

during the previous year if the petitioner is engaged in creating a product or providing a service which may take more than one year to create or perform.[2]

Accordingly, the petitioner has established that it was "doing business" during its first year in operation, and the director's conclusion that the petitioner failed to establish that it was "doing business" during the previous year is hereby withdrawn.

The second issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily executive capacity.[3]

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as 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 described the beneficiary's job duties in a letter dated March 8, 2004, appended to the initial Form I-129, as follows: "[The beneficiary] will be directing and overseeing the overall operation of the company by planning, directing and coordinating operational activities with the help of season[al] staff, subcontractor[s], and vendors."

The petitioner also provided wage reports indicating that he is the only employee of the petitioner.

On March 21, 2005, the director sent a Notice of Intent to Deny requesting, *inter alia*, documents evidencing the petitioner's staffing levels, a description of the beneficiary's job duties, and a breakdown of the percentage

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[2]Finally, the director's questioning of the evidentiary value of the promissory notes because they were not signed by the lender is without merit. In Texas, promissory notes only need to be signed by the maker, i.e., the debtor. *See* Texas Uniform Commercial Code, Chapter 3.

[3]While the initial petition is unclear regarding whether the petitioner is seeking to classify the beneficiary as a manager or an executive, counsel to the petitioner clearly states in his letter dated April 20, 2005 that the petitioner is seeking to classify the beneficiary as an executive and not as a manager. Moreover, counsel's appellate brief asserts that "the duties of the [b]eneficiary are primarily qualifying executive duties." Therefore, the AAO will consider the petition as one seeking to classify the beneficiary as an executive and not as a manager.

of time the beneficiary spends on each duty.

In response, counsel provided a letter dated April 20, 2005 in which he provided an uncorroborated description of the beneficiary's job duties and a breakdown of how much time the beneficiary devotes to each duty:

- Present projects to the bank to obtain financing – 10%
- Sign for banking credits – 5%
- Locate and purchase properties – 6%
- Develop investment projects – 10%
- Contribution of capital – as needed (requires only nominal amounts of time)
- Apply for municipal construction permits with the city – 3%
- Arrange for provision of services such as water, light – 3%
- Negotiate prices of materials with suppliers – 5%
- Negotiate with the contractors to set costs for labor and execution times – 5%
- Administration of the payments of manual labor of the company – 25%
- Administration of the payments of materials with suppliers – 25%
- Process purchase orders – 3%
- To act as a guarantor in the obtaining of credit with banks and suppliers, being the proprietor of the company and main shareholder and investor – as needed (requires only nominal amounts of time)

Counsel also reiterated the regulations which define "executive capacity" and concluded that the beneficiary meets all four prongs of this definition.

Finally, counsel provided a list of twenty-eight independent contractors (both individuals and business entities) used by the petitioner in its construction projects and who were issued Forms 1099.

On May 4, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary is the only employee of the petitioner, and that the independent contractors used by the petitioner were not hired to relieve the beneficiary from performing non-qualifying, day-to-day operational duties; rather, the independent contractors were hired to provide a service in exchange for a fee on an as-needed basis.

On appeal, the petitioner asserts that the director erred in denying the petition. Specifically, counsel to the petitioner asserts that the beneficiary is primarily employed as an executive and that the independent contractors relieve the beneficiary from "spending most of his time in non-qualifying duties."

Upon review, petitioner's assertions are not persuasive.

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision 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 not reached the point that it can employ the beneficiary in a predominantly managerial or executive position as defined by law.

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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has failed to prove that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee.

As a threshold matter, the petitioner in this matter has failed to provide any credible explanation of the beneficiary's duties. While counsel in his April 20, 2005 letter provided his own description of the beneficiary's duties along with a breakdown of how much time is spent on each duty, the assertions of counsel will not satisfy the petitioner's burden of proof without documentary evidence to support his claims. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

Regardless, counsel's description of the beneficiary's duties is insufficient to establish that he will be employed primarily in an executive capacity. The beneficiary is the only employee of the petitioner. The petitioner, by and through its sole employee, is in the business of building homes for ultimate sale to consumers. As explained in the vague job description provided by counsel, the beneficiary's role appears to includes many administrative and operational duties necessary to the management of the business. For example, locating properties for development, preparing permit applications, negotiating for materials and labor, and processing purchase orders are not executive duties. Likewise, those duties which take up 50% of the beneficiary's time, i.e., the administration of payments for labor and materials, are vaguely described and apparently include non-qualifying components such as check writing and bookkeeping. 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). Based on the job description provided, the petitioner has not established that the beneficiary will be primarily employed in an executive capacity. An employee who "primarily" performs the tasks necessary to produce a product or to

provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the petitioner's employment of independent contractors to perform much of the skilled labor needed to construct a house does not establish that the beneficiary will be primarily employed as an executive. While the employment of the subcontractors may relieve the beneficiary of the need to install electrical systems or erect foundations during the construction phase, these individuals and businesses are not relieving the beneficiary from the need to perform operational or administrative tasks inherent to the petitioner's business. The petitioner is acting as a general contractor and land developer. It is inherent to this business that the petitioner would employ skilled laborers as subcontractors in constructing the houses. However, as explained in counsel's job description for the beneficiary, the operation and administration of the petitioner's business involves many non-qualifying duties other than building houses, i.e., negotiating prices, permitting, financing, and paying the bills. The petitioner does not employ anyone to relieve the beneficiary of performing all these other non-qualifying or administrative duties. Therefore, it has not been demonstrated that the beneficiary will be employed primarily in an executive capacity.

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).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily executive capacity as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, a related issue is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

> (A) Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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." An "affiliate" is defined, in part, as "a legal entity owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity."

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes

of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or 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.

In the initial Form I-129 petition, the petitioner asserts that the beneficiary owns 95% of the stock of the petitioner and 98% of the foreign entity thus, if true, establishing that the two companies are "affiliates" as defined in the regulations. In support, the petitioner provided a copy of a certificate of incorporation for the petitioner; articles of incorporation for the petitioner authorizing 1,000 shares of stock; and a stock certificate purporting to issue "95%" of the shares to the beneficiary.

Upon review, the petitioner has not established that it has a qualifying relationship with the foreign employer.

First, the stock certificate provided by the petitioner is invalid under Texas law and does not sufficiently evidence ownership in the petitioner. In Texas, a share certificate shall state upon its face the number of shares which such certificate represents. Tex. Bus. Corp. Code Ann. 2.19(C)(3) (2006). Since the share certificate submitted does not comply with local law and is ambiguous as to what it represents, it does not adequately prove that the beneficiary owns or controls the petitioner.

Second, even accepting the stock certificate as evidence of ownership, the petitioner has provided insufficient evidence to establish the ownership and control of the United States operation. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Here, the petitioner has provided only a defective stock certificate to establish ownership and control. Without full disclosure of all these relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.