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FILE: SRC 06 070 52771 Office: TEXAS SERVICE CENTER Date: MAR 27 2007

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

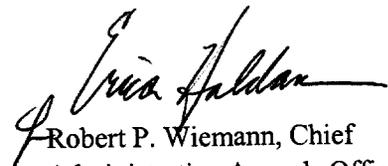
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, 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 appeal will be dismissed.

The petitioner, a Florida corporation, claims to be engaged in property maintenance. The petitioner states that it is a wholly owned subsidiary of [REDACTED] located in the United Kingdom. Accordingly, the United States 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). 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 in order to continue to fill the position of president and general manager.

The director denied the petition on April 25, 2006, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that since the beneficiary is the only employee of the U.S. company, the beneficiary would be primarily involved in performing the day-to-day services essential to maintaining the business.

Counsel for the petitioner filed an appeal on May 19, 2006. On appeal, counsel for the petitioner states that the beneficiary manages "all facets of the petitioning business enterprise." Counsel further states that although the beneficiary is the only employee of the U.S. company, the company does utilize independent contractors who are responsible for providing the services of the business. Counsel states that the U.S. company utilizes one independent contractor who has two employees that report directly to him. In addition, counsel states that the U.S. company is seeking to employ a full-time employee. Furthermore, counsel states that the beneficiary was employed in a managerial capacity with the foreign company and will continue to be employed in a managerial capacity with the U.S. entity. Counsel for the petitioner also asserts that the beneficiary maintains sole responsibility of the company and will only report to the parent company in the United Kingdom. Counsel submits a brief and documentation in support of the appeal.

On June 29, 2006, counsel for the petitioner submitted supplemental evidence in support of the appeal. The documentation confirmed that the U.S. company hired one additional employee to fill the part-time position of service technician. The new employee was hired in June 2006, six months after the instant petition was filed. 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). Thus, the supplemental documentation will not be considered in this decision.

To establish 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 firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary 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 regulation at 8 C.F.R. § 214.2(l)(3) further 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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

The nonimmigrant petition was filed on December 30, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of president and general manager for the petitioner, which claimed to have

three employees. In a letter of support by the petitioner, dated December 12, 2005, the beneficiary's proposed duties in the U.S. are described as the following:

In this capacity [as president and general manager], [the beneficiary] will have [sic] continue to have diverse duties and responsibilities as he oversees and directs the overall management of our subsidiary. He will continue to implement corporate policy & procedure, set sales targets as well as recruit further employees in his downline. He will direct, supervise and coordinate the efforts of all subordinate management and support personnel and will routinely conduct performance evaluations. He will liaise with all outside professional services as necessary and will approve all budgets and key contracts. In summary, [the beneficiary] will be responsible for all aspects of our subsidiary's day-to-day commercial operations and development of the business in all regions, for which he has sole authority and will exercise broad discretionary decision making in all aspects. In addition, he will continue to review the development plans and projections, including budget control. His proposed duties and responsibilities can be summarized as follows (please note approximate amount of time spent on each duty in parentheses):

- Direct all business activities of the company, planning procedures, establishing policy and coordinating functions among departments and sites. (40%)
- Assign tasks to subordinates and supervise staff/subcontractors to ensure satisfactory completion. (15%)
- Review financial statements and sales/activity reports to ensure the objectives are achieved. (15%)
- Analyze operations to evaluate performance of company and personnel and to determine areas of cost reduction and program improvement. (15%)
- Confer with Parent Company & personnel to report progress & recommend improvements (5%)
- Establish and maintain internal control procedures. (5%)
- Direct training of personnel. (5%)

The support letter also indicated that the U.S. company recently hired two additional employees, a service manager and a service technician.

In addition, the petitioner submitted the company's Florida Forms UCT-6, Employer's Quarterly Report, for all four quarters of 2005 which indicated that the only individual employed by the U.S. company for all four quarters in 2005 was the beneficiary.

The petitioner also submitted a document entitled, "Monthly Payroll Report." In the month of November 2005, the document indicated three individuals as employees, the beneficiary, [REDACTED]. Next to the beneficiary's name, the document states "Pool Service @ \$40 Per Pool," as an explanation of his remuneration for that month.

The petitioner submitted an organizational chart for the U.S. entity. The organizational chart indicates that the beneficiary supervises the operations manager, a position which is not yet filled. The operations manager in turn supervises the sales/accounts manager, a position that is still vacant, and the service

manager, which is filled by [REDACTED]. The chart also indicates that the sales/accounts manager and the service manager supervise the accounts, sales, maintenance and general workforce, however, these positions are not identified with specific individuals. As noted below, the petitioner stated that [REDACTED] who is identified as the service manager in the organizational chart, is no longer employed by the U.S. company. Therefore, the U.S. company has not employed individuals to fill the positions of operations manager, sales/accounts manager, service manager and accounts, sales maintenance and general workforce as listed on the organizational chart.

On January 26, 2006, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director noted that the petitioner indicated in the petition that the beneficiary was the only employee of the company for most of the year, however, the U.S. entity recently hired a new employee. The director requested that the petitioner identify the date the new worker was hired, the new employee's position, duties and educational credentials. In addition, the director requested a copy of Form 941, Employer's Quarterly Federal Tax Return, and the company's Florida Form UCT-6, Employer Quarterly Report, for the fourth quarter of 2005.

In a response letter dated April 17, 2006, counsel for the petitioner stated that the U.S. company hired [REDACTED] on November 1, 2005 in order to fill the position of Pool Service Manager. Counsel stated that this individual was an independent contractor and was not listed in the company's tax returns. Counsel further explained that this individual left the company one month later in December 2005. Counsel for the petitioner also asserted that the U.S. company hired [REDACTED] as an independent pool service technician but he left the company after a few weeks in November 2005. Counsel for the petitioner also asserted that the U.S. company utilizes an independent contractor, [REDACTED], who provides "maintenance, landscaping, planting, pruning, mulching and fertilizing services to the company." The petitioner indicated that the independent contractor employs two individuals who report directly to him.

In response to the director's request for evidence, the petitioner submitted: a letter from the beneficiary repeating the above-mentioned assertions regarding the U.S. company's staffing levels; a letter from the claimed independent contractor confirming his relationship with the U.S. company; invoices from the independent contractor issued to the U.S. company; and copies of checks paid to [REDACTED].

The director denied the petition on April 25, 2006 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running the business.

On appeal, counsel for the petitioner states that the beneficiary manages "all facets of the petitioning business enterprise." Counsel further states that although the beneficiary is the only employee of the U.S. company, the company does utilize independent contractors who are responsible for providing the services of the business. Counsel states that the U.S. company utilizes one independent contractor who has two employees that report directly to him. In addition, counsel states that the U.S. company is seeking to employ a full-time employee. Furthermore, counsel states that the beneficiary was employed

in a managerial capacity with the foreign company and will continue to be employed in a managerial capacity with the U.S. entity. Counsel for the petitioner also asserts that the beneficiary maintains sole responsibility of the company and will only report to the parent company in the United Kingdom.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). 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.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

On review, the petitioner 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 states vague duties such as the beneficiary will "direct all business activities of the company, planning procedures, establishing policy and coordinating functions among departments and sites"; "assign tasks to subordinates and supervise staff/subcontractors to ensure satisfactory completion"; "review financial statements and sales/activity reports to ensure the objectives are achieved"; "analyze operations to evaluate performance of company and personnel and to determine areas of cost reduction and program improvement"; and "establish and maintain internal control procedures." The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the sales, finance, operational, and personnel functions that the beneficiary will supervise. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

In addition, as noted above, the petitioner submitted a document entitled, "Monthly Payroll Report." In the month of November 2005, the document indicated three individuals, the beneficiary, [REDACTED] [REDACTED] Next to the beneficiary's name, the document states "Pool Service @ \$40 Per Pool." According

to this document, it appears that the beneficiary is compensated for the pool services he rendered for the U.S. company. Based on this document, it appears that the beneficiary is functioning as a pool technician, rather than the president and general manager of the U.S. company. 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).

According to the petitioner's statement on Form I-129, the U.S. company has three employees. However, the organizational chart of the U.S. entity, and the company's federal and state tax returns indicate that the beneficiary is the only employee of the U.S. company. In the response to the director's request for evidence, the petitioner confirmed that the beneficiary is the only employee of the U.S. company, but also indicated that the company utilizes an independent contractor. The independent contractor has two employees that report directly to him. The petitioner indicated three different staffing levels for the U.S. entity in the petition. Again, 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. at 591-92.

As the United States company appeared to employ only the beneficiary at the time of filing, it is reasonable to assume, and has not been proven otherwise, that the beneficiary is directly performing sales, promotion, purchasing, marketing and financial development, and all or many of the various operational tasks inherent in operating a maintenance business on a daily basis, such as acquiring products, maintaining inventory, paying bills, and customer service. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Accordingly, the director reasonably concluded that the beneficiary will be performing the day-to-day operations and directly be providing the services of the business rather than directing such activities through subordinate employees. 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 Intn'l.*, 19 I&N Dec. at 604.

Although the petitioner states in its response to request for evidence that the petitioner utilizes a subcontractor who provides "maintenance, landscaping, planting, pruning, mulching and fertilizing services to the company," and has two individuals who report directly to him, the petitioner has not explained how the services of this subcontractor obviate the need for the beneficiary to primarily perform non-qualifying duties associated with running the business as well as directly providing pool maintenance services to the company's clients. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Thus, even if the petitioner does utilize the services of one independent contractor, the record does not reflect that the employee is professional, maintains a supervisory position, works on a full-time basis, or that he takes direction from the beneficiary in performing his duties. There is no evidence of formal agreements or contracts entered into by the petitioner that explains the usage of outside sources. The petitioner has failed to submit a detailed job description or duties performed by the independent

contractor. There is no evidence on record to show that the claimed independent contractor would engage in the day-to-day operations of the business or that he would relieve the beneficiary from performing other routine, non-qualifying tasks associated with the business' daily marketing, sales, administrative, operational and financial functions.

The regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations 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." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, 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.

Based on the vague job description submitted with the petition, and considering the petitioner's failure to document the employment of any other workers as of the date of filing, the director reasonably concluded that the petitioner has failed to demonstrate that the beneficiary would be primarily performing managerial or executive duties in her proposed position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.