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U.S. Citizenship and Immigration Services

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FILE: SRC 02 111 53608 Office: TEXAS SERVICE CENTER Date: JUL 26 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:



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 evidence contained in the record, the petitioner was established in 2000 and claims to be in the landscaping services business, including the wholesale and retail of plants and trees, and consultation services. The petitioner claims to be a subsidiary of [REDACTED] located in Colombia. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president of its operations for a period of two years, at an annual salary of \$48,000.00. The director determined that the petitioner had failed to establish that: (1) the U.S. entity has been doing business during the previous year; (2) the foreign entity was currently doing business; (3) the beneficiary has been employed by the U.S. entity primarily in a managerial or executive capacity; and (4) the petitioner intends to transfer the beneficiary to a foreign assignment at the end of his stay in the United States.

On appeal, counsel contends that the U.S. entity has been doing business for the past year; that the foreign entity was currently doing business; that the beneficiary has been employed primarily in a managerial or executive capacity; and that there is no longer a statutory requirement to show intent to transfer the beneficiary to a foreign assignment at the end of his stay in the United States.

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 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 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) 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 this proceeding is whether the U.S. entity has been doing business and will continue to do 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 (1)(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.

In support of its claim of doing business, the petitioner initially submitted copies of its Articles of Incorporation, State of Florida Uniform Business Report, a sub-lease agreement for the premises known as [REDACTED] for the period covering December 15, 2001 through December 15, 2002, its IRS Form 1120, federal Income Tax return for the year 2000, Employer Quarterly Tax returns, State of Florida Employers Quarterly Tax returns, federal tax deposits, commercial bank statements, occupational licenses, purchase orders, and invoices.

In response to the director's request for evidence, the petitioner submitted copies of its State of Florida Department of Labor Unemployment Tax Returns, Employer's Quarterly Federal Tax Returns, a commercial lease agreement for the premises known as [REDACTED] for the period covering October 1, 2000, through May 31, 2001, and commercial licenses.

The director determined that the petitioner had not submitted sufficient evidence to establish that the U.S. entity had been doing business in that it failed to demonstrate that it had acquired sufficient physical premises and that it had the employees necessary to conduct business. The director also stated that the U.S. entity appeared to be in the investment business rather than providing a product or service.

On appeal, counsel argues that the petitioner has submitted sufficient evidence to establish that the U.S. entity has been doing business in a regular, systematic, and continuous manner. Counsel also argues that the lease agreements were for temporary rentals and that the entity has subsequently entered into a contract for the sale of five plus acres of land to house its office. Counsel further argues that the company's tax documents and other business documents submitted demonstrate that it has been doing business. Counsel contends that the entity employed new hires beginning in the seventh month of 2001 and that they managed the organization's functions and independent contractors. On appeal, the petitioner submits copies of a tentative contract for the purchase of real property for a retail nursery, dated August 15, 2002, a corporate tax return for the fiscal year ending July 31, 2002, and a check register from February through October 2002.

In review of the record, the petitioner has failed to submit sufficient evidence to establish that it has been doing business. The petitioner is a nursery business, which includes the sale of nursery products and related landscaping consultancy services. The record demonstrates that the petitioner subleased the premises known as [REDACTED]. The record shows that the premises were subleased for "consulting" purposes only. There has been insufficient evidence submitted to establish that the consultancy business engaged in the regular, systematic, and continuous provision of goods and/or services. Furthermore, there has been no evidence submitted to establish that the petitioner was given permission to operate a landscaping business from the above noted address. On appeal the petitioner submits a copy of a tentative commercial real estate agreement. The tentative agreement is dated August 15, 2002, which is subsequent to the filing of the petition in the instant matter. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*,

17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, the petitioner has failed to overcome the director's decision concerning the numerous inconsistencies in the petitioner's various business addresses. 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). The record demonstrates that the U.S. entity was incorporated in 2000, therefore, the submission of seven business invoices covering its business activities during August 2, 2001 through March 2, 2002, is insufficient to demonstrate the regular, systematic, and continuous provision of goods and/or services. There has been insufficient evidence submitted to substantiate counsel's claim that the petitioner employed new hires that managed the organization's functions and the activities of five independent contractors. Further, there is no evidence in the record to show that independent contractors were ever employed by the U.S. entity. Because the petitioner has not shown that it is doing business as defined at 8 C.F.R. § 214.2(l)(1)(ii)(H), the petition may not be approved.

The second issue in this proceeding is whether the petitioner has submitted sufficient evidence to show that the foreign entity has been doing business and will continue to do business in the absence of the beneficiary.

In support of its initial claim that the foreign entity has been doing business, the petitioner submitted copies of translated versions of the foreign entity's Articles of Incorporation, Certificate of Existence and Legal Registration, general balance sheet and income statement for 2001, and photos. The petitioner submitted untranslated copies of the foreign company's stock ownership statement, organizational chart, payroll records, tax returns for the year 2001, bank statements, occupational license, lease agreement and rent payment receipts, company invoices, commissions paid on plant concessions, and marketing documents.

The director determined that the petitioner had not submitted sufficient evidence to establish that the foreign entity has been systematically engaged in the provision of goods or services. The director stated that it appeared unlikely that the foreign entity would continue doing business in the absence of the beneficiary and the director of the U.S. entity, in that they were the 50/50 owners of the foreign entity.

On appeal, counsel argues that the evidence establishes that the foreign entity continues to do business. The petitioner resubmits untranslated copies of the foreign entity's payroll records in support of its claim.

In review of the record, the petitioner has not submitted sufficient evidence to show that the foreign entity continues to be systematically engaged in the provision of goods or services. Although the petitioner submitted business records pertaining to the foreign entity's doing business, the majority of documents submitted were not translated into English. Pertinent documents such as the foreign entity's stock ownership statement, organizational chart, payroll records, tax returns, bank statements, occupational licenses, lease agreements, rent payment receipts, company invoices, commissions paid on plant concessions, and marketing documents could not be examined to determine their authenticity or to substantiate the petitioner's claims. 8 C.F.R. § 103.2(b)(3) requires that any document containing foreign language submitted to Citizenship and Immigration Services (CIS) shall be accompanied by a full English language translation which the translator has certified as completed and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. Without a translation CIS cannot find that the business documents indicate that the foreign entity continues to do business. Furthermore, unaudited financial statements are insufficient to establish that the foreign entity continues to do business. The petitioner has failed to establish that the foreign entity will remain a viable business entity, thus bringing into question the U.S. entity's ability to continue to qualify as an organization doing business in the United States, and in at

least one other country, during the requested period of approval on behalf of the beneficiary. For this additional reason, the petition may not be approved.

The third issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity has been and will continue to be primarily managerial or executive in nature.

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 described the beneficiary's duties as: "Engage in long range planning and continued identification of new markets in North America; Acting as a liaison and representative for the parent company in the United States; overall performance of the company via supervision of subordinate officers; manage the function of seed export/plant import project."

In response to the director's request for additional evidence, counsel stated that the beneficiary's duties consist of:

- Administrative: Hire and fire management personnel; determine the policies and procedures by which the company operates; project, plan and formulate budgets for fiscal operations of the company; identification of business opportunities and which opportunities to invest in; review of financial data, i.e. income and expenses, on a continual basis; presiding at intra-company meetings, planning sessions and consultations.
- Management: Supervision of subordinate managers and professional [sic] on staff, including review of marketing strategies, sales campaigns, accounting and legal functions.
- Operations: Consulting on projects; preparation and review of proposals for clients; management of projects in progress; meeting with current and prospective clients; development of the seed export/import project; identifying the proper tract of land to purchase for the nursery; negotiating contracts and generally representing the company in business transactions.

Counsel further stated that 30 percent of the beneficiary's time would be spent performing administrative duties, 30 percent of his time would be spent performing managerial duties, 40 percent of his time would be spent performing operational duties, and that no time would be spent by the beneficiary performing non-qualifying duties. Counsel asserted that two additional employees were employed by the U.S. entity. Counsel asserted that one employee reports to the beneficiary on matters relating to sales, customer service, project proposals, and all matters concerning the independent contractors. Counsel further asserted that the other employee reports to the beneficiary concerning matters relative to administration and finance of the U.S. entity. Counsel contended that the company currently employed five independent contractors to perform delivery, maintenance, transportation, and installation functions.

The director determined that the petitioner had failed to establish that the beneficiary has been performing in a managerial or executive capacity. The director stated that the beneficiary was not working at the U.S. entity until the third quarter of 2001 and that he did not hire additional employees until the last two months of 2001. The director also stated that if the petitioner were producing a product or providing a service, the beneficiary was performing the tasks necessary to produce the product or provide the service of the U.S. entity.

On appeal, counsel argues that the director incorrectly focused on the fact that the beneficiary did not begin work for the U.S. entity until the third quarter of 2001. Counsel further argues that the director did not dispute the beneficiary's performance of his duties, or the executive nature of the duties as described.

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. In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's 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 show 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). Counsel argues that the beneficiary determines the organization's policies and procedures and supervises subordinate managers and professional staff. There is insufficient evidence to show that the beneficiary performs the high level responsibilities as defined, or that he primarily performs those duties rather than spending the majority of his time performing day-to-day functions of the organization.

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 states that the beneficiary's duties include determining policies and procedures, identifying business opportunities, and consulting and managing projects. The petitioner did not, however, define the petitioner's policies and procedures, or clarify the consultation services or the projects managed. 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). 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).

Counsel contends that the beneficiary engaged in routine start-up activities that were common to all new business start-ups in the United States. Although the regulations do not require proof that the duties performed by the beneficiary in the first year were entirely managerial or executive, there must be some evidence of progressively responsible activity to substantiate the managerial or executive position. It appears from the record that the U.S. organization was incorporated in 2000, thus alleviating the need for the beneficiary to devote all of his time to start-up activities. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

There is insufficient evidence to show that the beneficiary primarily performs executive 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, exercising a wide latitude in discretionary decision-making, or receive only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California, supra.* There has been no evidence presented to demonstrate how the company's goals and policies have been and will be established by the beneficiary in his capacity.

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

There has been no evidence submitted to substantiate the petitioner's claim that the U.S. entity employs independent contractors or that the U.S. company's employees exercise significant control over the manner in which the independent contractors perform their services. Neither does the record show that the independent contractors are employed full-time or to what extent they take direction from the beneficiary in performing their duties. There has been no evidence submitted to demonstrate how the independent contractor's performance interrelates with the beneficiary's duties or how their activities alleviate the need for the beneficiary to perform non-qualifying duties.

The record does not demonstrate that the beneficiary primarily manages an essential function of the organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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). Counsel asserts that the beneficiary spends 30 percent of his time performing administrative duties, 30 percent performing managerial duties, and 40 percent performing operational duties. However, there is no evidence to show that the beneficiary manages an essential function of the organization or that he employs full-time workers capable of performing the functions of the organization. For this additional reason, the petition may not be approved.

A final issue to be addressed is whether the petitioner has demonstrated that it intends to transfer the beneficiary to a foreign assignment at the end of his stay in the United States.

The director determined that the beneficiary was a major stockholder in the foreign entity and therefore must show an intent to return to an assignment abroad in accordance with 8 C.F.R. § 214.2(l)(3)(vii). The director stated that the evidence of record failed to demonstrate that the petitioner intended for the beneficiary to return to an assignment abroad upon completion of his assignment in the United States in that there was no evidence that the foreign entity was currently doing business.

On appeal, counsel argues that under both INS and State Department interpretations of the statute and implementing regulations, the "temporariness" issue has been reduced to whether the transferee will adhere to the statutory limits of an L-1A stay. Counsel further asserts that the presumption of immigrant intent has been eliminated and that the doctrine of "dual intent" is currently applicable concerning L-1A status applicants.

In review of the evidence, the petitioner has not established that the employment offered to the beneficiary is temporary. Generally, the petitioner for an L-1 nonimmigrant classification needs to submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Iovic*, 18 I&N Dec. 361 (Comm. 1982); see also 8 C.F.R. § 214.2(l)(3)(vii). The record indicates that the beneficiary is a majority owner of the petitioning organization. The record also shows that there has been insufficient evidence submitted to

establish that the foreign entity is doing business. Therefore, it appears that there is no existing foreign entity abroad to employ the beneficiary. Hence, the beneficiary's stay in the United States does not appear to be temporary. For this additional reason, the petition may not be approved.

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.

**ORDER:** The appeal is dismissed.