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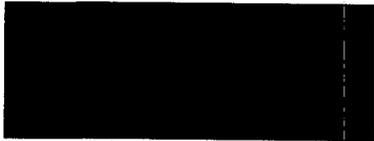
PETITION COPY

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



U.S. Citizenship
and Immigration
Services

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File: [Redacted] Office: VERMONT SERVICE CENTER Date: MAY 19 2005

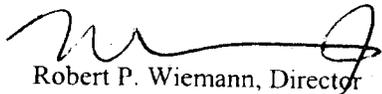
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

IN 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 Director, Vermont 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 petition seeking to extend the employment of its president 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 in the State of Maryland that is engaged in the retail business. The petitioner claims that it is the subsidiary of [REDACTED] located in Lagos, Nigeria. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted a two-year extension of stay. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary has been and will continue to be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal.¹ The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner restates the beneficiary's duties and concludes that they are clearly both managerial and executive in nature.

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.

¹ It is noted that the petition and the appeal were prepared by an immigration service provider. Although the petition is accompanied by a Form G-28, Notice of Entry of Appearance by an Attorney or Representative, the immigration service provider has not established that it is a licensed attorney or an accredited representative authorized to undertake representations on the petitioner's behalf. See 8 C.F.R. § 292.1. Accordingly, the assertions of the immigration service provider will not be considered in this proceeding.

- (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 primary issue in this matter is whether the beneficiary has been and will continue to be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), 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.

In a letter dated April 16, 2003, the petitioner discussed the beneficiary's qualifications and his role in the U.S. company. Specifically, the beneficiary's duties were described as follows.

[The beneficiary] has been successful in stimulating and directing [the petitioner] as it continues its expansion in the U.S. market. He has developed a location for the business in Washington, D.C., which is also the site for [redacted]. [The beneficiary] has been actively involved in all major strategic business decisions involving the [petitioner] and has been instrumental in shaping both the marketing and sales direction of the company. Earlier in the embryonic stages of [the petitioner] much of his time was spent meeting with representatives of various regulatory bodies to ensure that the company is in compliance with the licensing requirements. [The beneficiary] spends much of his time now meeting prospects and cultivating business for [the petitioner], a critical aspect of the business. He also spends a considerable amount of his time and energy analyzing market conditions for increased profitability, establishing liaison with the local communities to establish a client base, developing the personnel (management and supervisory employees) and policies for the U.S. business. He has selected and hired the line management to conduct the day-to-day sales and related duties. He has reviewed the existing credit programs to ensure that risks are adequately covered. This still requires target management definition, risk acceptance criteria, and detailed financial analysis. [The beneficiary] has succeeded in placing (and is still training) personnel to ensure that this aspect of the business is delegated appropriately. He still has market risk management responsibilities and price risk in the normal course of business. He has put a process in place to control exposures and retain appropriate decision-making policies.

The petitioner indicated on Form I-129 that it had one employee at the time of filing.

Finding the initial evidence insufficient, the director issued a request for additional evidence on May 23, 2003. In the detailed request, the director requested an extensive list of documents, and specifically requested a comprehensive description of the beneficiary's duties and evidence demonstrating that he functioned at a senior level in the organizational hierarchy of the petitioner. In a response dated August 15, 2003, the petitioner submitted a detailed response which presented the following description of the beneficiary's position.

The beneficiary's duties are as follows: to direct and coordinate the activities of [the petitioner]; to direct and coordinate the activities of [redacted] formulate and administer the activities of these entities; develop long-range strategic goals [and] objectives for both businesses; coordinate and liaise on behalf of [the petitioner] in the USA and abroad; develop potentials for [the petitioner's] interests in other industries. Beneficiary also implements policies on a day to day basis, oversees the marketing, sales, purchasing and

finance for the businesses. We have enclosed copies of 2 letters written earlier and regarding the duties and functions of the beneficiary at his present position. Those duties and functions remain practically the same then as now.

Furthermore, with regard to the percentage of time the beneficiary devotes to each duty, the petitioner indicates that "[i]t is safe to say that the beneficiary spends more than 75% of his time performing executive functions: meeting clients, negotiating contracts and reviewing business prospects for the business." The petitioner further stated that the beneficiary supervised a small staff, including one permanent employee, who served as general manager, and four part-time drivers.

On October 23, 2003 the director denied the petition. The director determined that the evidence in the record, despite the petitioner's detailed response to the request for evidence, failed to establish that the beneficiary functioned at a senior level within the organization. Specifically, the director concluded that the evidence was insufficient to show that the beneficiary supervised professional, managerial or supervisory employees or that he was primarily engaged in managerial or executive activities. In addition, the director noted that the beneficiary appeared to be the only full time employee of the petitioner, and thus concluded that he was most likely performing the tasks necessary to provide the goods and services to the petitioner's customers.

On appeal, the petitioner claims that the beneficiary's duties are executive in nature, and that the description of duties previously provided was varied and detailed, and not vague as claimed by the director. Additionally, the petitioner contends that the beneficiary supervises the work of other supervisory employees within the two companies, and states that his time is spent "in overall delegation of authority of the managers and supervisors" of both of the petitioner's companies. The petitioner further states that it employs two part-time employees, namely [REDACTED] and [REDACTED], as well as "a full-set of employees other than the petitioner" who provide sales and services to its clients. No additional documentary evidence supporting these contentions was submitted.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the evidence in the record, it appears that the beneficiary will not be acting in a primarily 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). Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner claims that the beneficiary's duties are almost exclusively managerial and executive, yet the list of duties provided in response to the director's request for evidence includes a significant number of non-qualifying tasks. For example, the petitioner states in its response to the request for evidence that the beneficiary spends the majority of his time "meeting clients, negotiating contracts, and reviewing business prospects for the business." In addition, the petitioner claims that the beneficiary also corresponds with banks, creditors, and other financial parties, and occasionally visits the major automobile auction sites in the Mid-Atlantic region of the United States. Clearly, the beneficiary is performing marketing and sales-related services that will create a basis for marketing the petitioner's product in the United States. 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).

Since by definition, it does not appear the statement of duties provided qualifies the beneficiary for the benefit sought, the AAO will alternatively look for the beneficiary's qualifications as a supervisor in a managerial capacity. The petitioner claims that the beneficiary supervises the other employees in the U.S. company. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

Despite the director's specific request, the qualifications of each of the alleged subordinate positions were not provided by the petitioner, nor was a description of their weekly duties provided. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

On appeal, the petitioner reasserts that the beneficiary in fact oversees supervisory employees. As stated above, however, the petitioner has failed to provide any details with regard to these employees and their title and job duties. The only positions identified by name were those of the general manager and the drivers. Most importantly, however, the petitioner has failed to provide any documentary evidence that it actually employs these alleged subordinates. The petitioner submitted a W-2 form for 2002 for its general manager, [REDACTED] demonstrating wages paid in the amount of \$5,820.80. No additional documentation has been provided which would indicate that the petitioner in fact employs other employees under the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without pay stubs, quarterly tax returns, or cancelled paychecks, the AAO cannot conclude that the petitioner in fact employs a subordinate staff.

Therefore, the record as it currently stands indicates that the petitioner definitely employed the beneficiary and one general manager, who appeared to be a part-time employee based on the low wages reflected by his W-2 form. Since the petitioner claims to own and operate two distinct businesses but has failed to document the presence of other employees, it stands to reason that the beneficiary performs the majority of the day-to-day tasks essential to the petitioner's business operations. As previously discussed, 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. at 604.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). On Form I-129, the petitioner claims that the U.S. entity is the subsidiary of the foreign entity. In the documentation accompanying the petition, the petitioner claims that the beneficiary is the sole owner of both the U.S. entity and the foreign entity. However, the petitioner's Form 1120, U.S. Corporation Tax Return, Schedule K, indicates that no one individual or corporation owned 50% or more of the corporation's voting stock. In addition, the line requesting the number of shareholders is left blank. No additional documentation of ownership, such as stock certificates, ledger, or minutes of relevant shareholder meetings have been provided to corroborate the petitioner's claims.

Generally, stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must 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 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. In this matter, there is no documentary evidence supporting the petitioner's claim that a qualifying relationship exists between the two entities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). For this additional reason, the petition may not be approved.

Finally, in the event that the beneficiary is actually the sole owner of both companies, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.