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File: SRC 03 175 52902 Office: TEXAS SERVICE CENTER Date: **SEP 02 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:
[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, Director
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 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 Texas that is engaged in the assembly, wholesale, and retail sale of computer systems and will soon be engaging in the retail sale of automobiles. The petitioner claims that it is the subsidiary of Mir Motors, located in Karachi, Pakistan. 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 more years.

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

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director erred in his findings, and claims that the evidence contained in the record clearly established that the beneficiary qualified as an executive. In support of these contentions, counsel submits a detailed brief and additional evidence.

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 primary issue in this matter is whether the beneficiary will 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 the initial petition, counsel submitted a letter from the petitioner dated June 5, 2003. In this letter, the petitioner claimed that it currently employed three employees and retained one independent contractor. With regard to the beneficiary's role in the petitioner's organization, the petitioner stated:

As President of [the petitioner], [the beneficiary] has done and will continue to do the following duties:

- Manage and oversee all aspects of the business;
- Hire, train, and fire employees;
- Manage all business expansion, including what lines of business to enter and where the stores or lots would be located;
- Make decisions concerning the purchases of major items;
- Do the business' financial planning;
- Decide what kind of marketing strategy to take with the public or with dealers.

The petitioner also submitted copies of Forms W-4, Employer's Withholding Allowance Certificate, for the beneficiary and two other employees, signed on April 1, 2003, April 15, 2003, and June 30, 2003.¹ In addition, the petitioner's Form 941 for the quarters ending December 31, 2002 and March 31, 2003 were submitted without attachments. Finally, the petitioner submitted a copy of its Independent Contractor Agreement, dated January 1, 2003 as evidence that it employed one contract employee.

¹ The last W-4 form, which was prepared by the beneficiary, was signed and dated on June 30, 2003 and submitted with the petition. The AAO notes that the petition was filed on June 9, 2003, twenty-one days prior to the date on the W-4. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The director found the initial evidence submitted to be insufficient and consequently issued a request for additional evidence on August 13, 2003. Although the director's request focused more specifically on the beneficiary's employment abroad, the petitioner was also requested to submit additional evidence pertaining to its contract employee, as well as the current business status of the petitioner.

In a response dated October 31, 2003, the petitioner submitted a sworn affidavit from the beneficiary, dated October 27, 2003, which addressed the director's questions. The beneficiary provided an overview of the employees working for both of the petitioner's business and explained the nature of his employment abroad.

On March 19, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the beneficiary would not be supervising a subordinate staff of managers, supervisors, or professionals.

On appeal, counsel restates the beneficiary's duties and alleges a number of factors which he feels renders the director's decision erroneous. Counsel criticizes the director's focus on the managerial aspect of the beneficiary's position and points out that the director did not appear to consider his eligibility under executive capacity. Furthermore, counsel asserts that the director failed to consider the beneficiary's qualifications as a function manager and that she drew biased inferences about the beneficiary's qualifications from a misplaced reliance on staffing levels. Finally, counsel asserts that the denial was erroneous in light of the overall stage of development of the petitioner.

Upon review, counsel's assertions are not persuasive. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is an executive by virtue of his position title, experience, and associated duties. However, the description of duties provided by counsel is vague and fails to specify the exact nature of the claimed executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The description of the beneficiary's duties, provided in the initial letter of support, is vague and seems to merely paraphrase the regulatory definitions. Specifically, the identification of duties such as "hire, train, and fire employees" and "manage and oversee all aspects of the business" do little to clarify what the beneficiary does on an average workday.

The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties, it appears that the majority of his time is devoted to the company's marketing and acquisitions. For example, his stated duties include "decid[ing] what kind of marketing strategy to take with the public or with dealers" and "mak[ing] decisions concerning purchases of major items." 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 contends that the director erred by narrowly reviewing the beneficiary's qualifications as a manager instead of as an executive and asserts that the beneficiary is the sole executive of the petitioner and, as president, operates in an executive capacity. However, counsel simultaneously on appeal alleges for the first time that the beneficiary is a function manager and also claims that the beneficiary does in fact supervise professional employees so that he is a qualified manager. These assertions are not persuasive. Counsel does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. (To provide a petitioner with all available options, CIS customarily examines the beneficiary's eligibility under both statutory definitions). In this case, however, counsel on appeal is essentially claiming that the beneficiary is employed as a hybrid "executive/manager" and relies on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Counsel also asserts that the director erroneously relied on the petitioner's staffing levels as a basis for the denial. Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The beneficiary stated the following about the U.S. petitioner:

[The petitioner] consists of two businesses: first, a computer and electronic parts business which has been operating since approximately September 2002; and second, a used car dealership which has been operating since we obtained our Automobile Dealer's License on June 18, 2003.

The computer and electronic parts business is a wholesale business which operates under the name [of the petitioner]. Besides myself, the wholesale trade currently employs one independent contractor, [REDACTED] a/k/a [REDACTED]. [REDACTED] was a direct W-2 employee of our business in March and April 2003. He became an independent contractor with us in May 2003. In May 2003 he contracted with us for 48 hours; in June 2003, 18½ hours; in August 2003, 27 hours; in September 2003, 37 hours. Copies of his checks are

included. Because [REDACTED] began working with us in March 2003 and not 2002, we do not have any W-2 or 1099s for him. [REDACTED] performs technical work, consultation, repair, and installation for our business.

The petitioner went on to state that [REDACTED] possessed a Bachelor's degree in Electronics and Communication from Osmania University in Hyderabad, India.

With regard to the used car dealership, the beneficiary stated:

[The auto dealership] operated under the d/b/a [REDACTED]. Since opening in June 2003, we have purchased about 26 vehicles. We have sold 6 cars, with another 6 cars under contract, where the purchasers are making payments before being allowed [to] drive them off the lot. Besides myself, the auto dealership has one W-2 employee, [REDACTED]. He is a highly trained automobile technician.

The beneficiary finished his discussion of the business and staffing by stating that "we expect that Najma Begum will shortly return to perform services with our company as a Bookkeeper and Office Clerk" and stated that she would be employed 24 hours per week.

At the time of filing, therefore, the petitioner was a 1-year-old computer retailer and wholesaler that claimed to have a gross annual income of \$200,000. The petitioner claims it is now engaged in the sale of used cars in addition to its computer business. The firm employed the beneficiary as president, plus an independent contractor who was a specialist with automobiles, in addition to a computer technician. The petitioner also claimed that a part-time clerical worker would likely be returning, but it was unclear whether she was currently working for the petitioner. The petitioner did not submit sufficient evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company.

Although the beneficiary's affidavit attests to the fact that it employs one employee in the computer business and one employee in the automobile business, it is unclear who performs the day-to-day operations of the company. Who keeps the books for each company? Who handles marketing, inventory, accounting, and sales? The petitioner claims that the computer technician is an independent contractor whose hours vary. Although the director requested proof of his relationship with the petitioner, the petitioner advised it did not have a 1099 on record since he began working with the petitioner in this calendar year. 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. 158, 165 (Comm. 1998). Although the petitioner submitted copies of checks which allegedly represented the petitioner's compensation of this contractor, these checks are not canceled and it is unclear whether they represent true payments rendered. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In addition, the beneficiary in his affidavit claims that its other employee is a highly trained automobile technician. While commendable, it still does not clarify how an auto technician will relieve the beneficiary

from performing the essential and non-qualifying tasks required to continue the operation of the two businesses. It is unlikely that an untrained auto technician will simultaneously provide salesmanship and handle the books. Finally, although a Form W-4 was presented for the office technician, the beneficiary's affidavit claims that the petitioning enterprise expects her to return shortly." Consequently, it appears that the part-time clerical relief the petitioner relies upon is not even employed by the petitioner currently. Even if she was, she only works twenty four hours per week. It is unclear how one person, working 24 hours per week, could perform all office support and customer service functions required by two separate and distinct businesses.

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president, one auto technician, and one independent contractor working as a computer technician. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO notes that counsel relies heavily on *Mars Jewelers, Inc. v. Immigration and Naturalization Service*, 702 F. Supp. 1570 (N.D. Ga. 1988), in support of the premise that the director erred in examining the size of the petitioning entity in reaching the decision. However, counsel fails to recognize or discuss the subsequent holding in *Systronics*, which, as discussed above, permits CIS to examine an entity's size in relation to the reasonable needs of the entity. Consequently, counsel's reliance on *Mars Jewelers* is misplaced and will not be considered for purposes of this analysis.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business 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. Although counsel on appeal alleges that numerous new employees have been retained, this assertion is not persuasive, since the petitioner must establish eligibility at the time of filing. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Finally, the assertions of counsel on appeal are not supported by independent evidence. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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).

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).

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. For this 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. 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.