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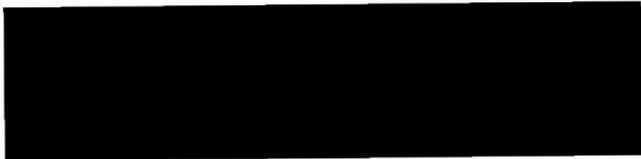
FILE: LIN 04 239 50152 Office: NEBRASKA SERVICE CENTER Date: AUG 30 2006

IN RE: Petitioner:  
Beneficiary:



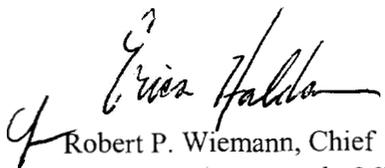
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Nebraska 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, [REDACTED] claims to be a computer support, sales and services business. In addition, the petitioner claims to be a subsidiary of Boss Data SAC located in Lima, Peru. Accordingly, the United States entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager for two years. 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 general manager.

The director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner states that the beneficiary is employed in a managerial capacity and the director erred by denying the petitioner based on the current staffing level of the United States company. In addition, counsel for the petitioner states that the beneficiary carries out an essential function of the U.S. company, and asserts that the director failed to consider the U.S. company's expansion plans. Counsel submits a brief in support of the appeal.

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 has been and will be employed in a primarily managerial or executive capacity.

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 nonimmigrant petition was filed on August 24, 2004. The Form I-129 indicates that the beneficiary will be employed in the position of Vice President and General Manager for the petitioner. The beneficiary's proposed duties in the U.S. are described as the following: "Beneficiary will continue to meet customers' needs for software and hardware products and services. In addition, he will acquire computer systems and accessories for repair and export. He will develop and market bi-lingual software for small and medium-sized businesses. He will open and oversee operations of small store."

In addition, the petitioner submitted the beneficiary's current duties that he has also performed for the past year from October 2003 through September 2004. The duties include the following:

Begin start-up operations of new subsidiary company: Northwest General Services: Boss Data. Obtain premises for office, seek out clients and market services to the greater King County, Washington metropolitan area.

Represent the interests of the controlling foreign parent company, Boss Data – S.A.C.

Carry out systems consulting, analysis, technical services and marketing of computer equipment, accessories and software to various clients in the greater King County, Washington area.

Procure and deliver on office cleaning contracts

Hire employee and supervise employee

Oversee accounts and payroll

Carry out any other necessary executive and managerial duties as Vice President of Northwest General Services – Boss Data and as an agent of Boss Data – S.A.C.

Furthermore, the petitioner submitted a list of duties the beneficiary will hold for September 2004 through September 2006. The list includes the following:

**1. Sales and Services**

Continue to meet customers' needs for software and hardware products and services. Continue to supervise current employee and hire future employees.

**2. Hardware Division**

Acquire working obsolete computer systems such as CPU's that contain Pentium II and Pentium III processors and export them to the underdeveloped countries of Latin America. Example: Shipment to Peru and marketing strategy to obtain and sell such equipment

Acquire malfunctioning computers that are repairable, for export to parent company in Peru where they will be repaired and marketed.

Acquire used hardware system parts and repair them in preparation for export to Peru. Example: Scanner, Plotters, etc.

**3. Software Division**

Develop and market software for small and medium-sized businesses. These include models of inventory control, stocks, accounting, balance. All these must comply with requests of the State and Federal Government. The software is to be developed in 2 languages: English and Spanish.

**4. Managerial Tasks**

Open a small store where the main objective is to buy obsolete and used systems, and to then sell or export these reconstructed and improved systems.

Hire personnel for the store and prepare a team of sales agents (2 salespersons) which will support the software and services division.

The director denied the petition on February 2, 2005 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director also observed that since the United States company consists of only one other employee, in addition to the beneficiary, it is likely that the beneficiary will perform the duties required for the functions and day-to-day operations of the business, rather than oversee the functions and/or the personnel that perform those duties.

On appeal, counsel for the petitioner asserts:

It was noted in the proposed duties for the two-year extension that the beneficiary would be hiring personnel for the store as well as a team of 2 sales agents. It is unreasonable to use the actual duties performed by the beneficiary against him in the context of the extension application. It is to be expected that in a new U.S. office situation, the petitioner would perform a fair amount of non-managerial tasks because of the small size of the operation. However, the September 2004 through September 2006 proposed duties for the beneficiary include the following managerial duties:

Continue to supervise current employees and hire and supervise future employees.

Open a small store where the main objective is to buy obsolete and used systems, and to then sell or export these reconstructed or improved systems.

Hire personnel for the store and prepare a team of sales agents (2 salespersons) which will support the software and services division.

Although the non-managerial/executive duties listed in the proposed duties are greater in number on the proposed duties list, a review of the weight to be given to the non-managerial/executive duties must take into account that there is another employee who would be taking on the bulk of these duties and would not have any responsibility for the managerial duties listed in the proposed duties list for September 2004 through September 2006.

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).

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of his current and proposed duties suggests that the beneficiary's actual duties are and will continue to be providing the services of the business.

The beneficiary's proposed job description includes vague duties such as the beneficiary will "continue to meet customers' needs for software and hardware products and services," and non-qualifying duties such as the beneficiary will "acquire working obsolete computer systems...and export them to underdeveloped

countries of Latin America,” “acquire malfunctioning computers that are repairable, for export,” “acquire used laser and other printers for export,” “acquire used hardware system parts and repair them,” and “develop and market software for small and medium-sized businesses.” It appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. In addition, the beneficiary’s duties at the time of filing also included procuring and delivering on office cleaning contracts, and carrying out systems consulting, analysis, technical services and marketing of computer equipment and software. 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).

According to the petitioner, in addition to the beneficiary, the company has hired a second employee. However, the petitioner never indicates the job title and job duties of this second employee. Thus, there is no evidence that the U.S. company has hired employees to perform the marketing, promotion, merchandising, repair, acquisition function, export operations and technical consulting services that are necessary to produce or provide services. As noted above, the petitioner indicated on the Form I-129 that the company has two employees. However, the petitioner has neither presented evidence to document the existence of this additional employee nor identified the specific services this individual provides. Additionally, the petitioner has not explained how the services of the second employee obviate the need for the beneficiary to primarily perform non-qualifying duties associated with the petitioner's marketing function. 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)(citing *Matter of Treasure Craft of California*, 14 I & N Dec. 190 (Reg. Comm. 1972)).

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. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties are managerial in nature, and what proportion are actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In addition, on appeal, the counsel for the petitioner stated “it was noted in the proposed duties for the two-year extension that the beneficiary would be hiring personnel for the store as well as a team of 2 agents.” 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). The petitioner has not submitted evidence to establish that the beneficiary supervised a subordinate staff at the time the petitioner was filed. Going on record without supporting documentary evidence is not sufficient to satisfy the petitioner's burden of proof in these proceedings. *Matter of Soffici*, 22 I & N Dec. at 165.

As the United States company has only two employees, it can only be assumed, and has not been proven otherwise, that the beneficiary is performing all sales, repair, technical consulting, acquisition and marketing functions and financial development, and all of the various operational tasks inherent in operating a company on a daily basis, such as acquiring products, maintaining inventory, repairing

equipment, paying bills, and handling export of products. 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.

On the Form 1-290B, counsel for the petitioner asserts that the beneficiary carries out the "essential function" of the subsidiary, and contends that it is therefore not necessary for the beneficiary to supervise employees.

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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. 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. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operations duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervising of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the beneficiary's job description included primarily non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not identified any other employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

Finally, on appeal, the counsel for petitioner asserts: "It is unreasonable to use the actual duties performed by the beneficiary against him in the context of the extension application. It is to be expected that in a new U.S. office situation, the petitioner would perform a fair amount of non-managerial tasks because of

the small size of the operations.” In the present matter, 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. 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 upon evidence submitted, it appears that the beneficiary has been and will be performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its president and general manager. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted a bank statement for July 6, 2004 through July 30, 2004 with an ending balance of \$1,575.06, a cash flow projection for 2004 and 2005, and a copy of the Washington State Quarterly tax return for August 2004. The information on the cash flow projections for the U.S. company are not substantiated by any additional evidence. The petitioner did not provide any invoices, copies of Federal Income tax returns, or customs forms. This is insufficient evidence to establish that the U.S. company is doing business. 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. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business during its initial year of business. For this additional reason the petition may not be approved.

In addition, the evidence is not persuasive that a qualifying relationship exists between the petitioner and a foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this case, the petitioner did not submit any evidence to support its claim that the United States company is majority-owned by the claimed parent company abroad. As general evidence of a petitioner's

claimed qualifying relationship, the petitioner may submit stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason the petition may not be approved.

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

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