

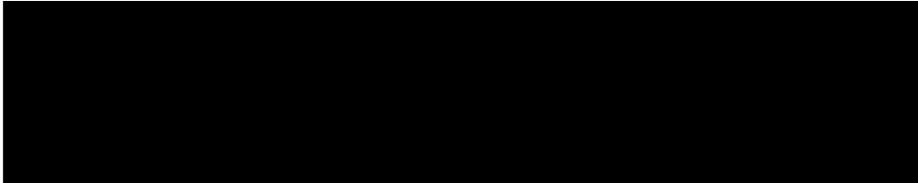
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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 05 082 51476 Office: VERMONT SERVICE CENTER

Date: NOV 06 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:

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
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 appeal will be dismissed.

The petitioner claims to be a branch office of [REDACTED] – Coperasa located in Peru. The petitioner states that the United States entity is engaged in "foreign business." Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of president.

The director denied the petition concluding that the record contains insufficient evidence to demonstrate: (1) that the beneficiary will be employed in a managerial or executive capacity; and, (2) that the United States entity and the foreign entity are doing business as required by the regulations.

The petitioner subsequently filed an appeal on July 28, 2005. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the beneficiary "is the only person in charge to perform the managerial duties to carry out our business plan." The petitioner further asserts that the petitioning organization and the foreign entity are doing business. The petitioner submits a brief statement 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 first issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

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 January 31, 2005. In support of the petition, the petitioner submitted the beneficiary's resume. The resume does not clearly indicate the job duties performed by the beneficiary in the past year as the general manager of the U.S. entity. Instead, the beneficiary's resume generally outlines the beneficiary's experience in his entire career.

On February 28, 2005, the director requested additional information in order to proceed with the petition. In part, the director requested that the petitioner submit evidence that establishes the duties performed by the beneficiary in the past year and the duties he will perform if the petition is extended. In addition, the director requested a detailed statement explaining the exact job duties for each employee in the U.S. company, including their educational background, and prior job experience, and evidence that these employees are actually hired by the U.S. company.

In its response, the petitioner submitted a detailed job description for the position offered to the beneficiary. The job duties were described as the following:

- Provide fiscal administrative management, control budgets, revenues and expenditures.
- Identify, contact and do follow up on potential customers.
- Create, implement and follow up sales strategies to achieve global business objectives.
- Identify, contact and do follow up on potential suppliers.
- Develop and implement communication to ensure diffusion of inventory and services to customers in all geographic locations.

- Plan, organize and prepare the technical and economic proposals for customers and distributors.
- Build a database to ensure consistency of information contained in proposals.
- Help to ensure sales quotas.
- Negotiate commercial alliances with potential suppliers in the United States.
- Negotiate commercial alliances with potential distributors abroad.
- Provide assistant and routine consultation to users of electrical and mining equipment.
- Recommend selection and acquisition of electrical and mining equipment and services.
- Organize, monitor and supervise office and administrative support services to achieve productivity and to achieve desired goals.

In addition, the petitioner submitted the duties to be carried out by the beneficiary if the extension of stay is approved. The list of duties included traveling to Peru, Bolivia, Argentina and Brazil mainly to “subscribe contracts of representation with distributors” in those markets. In addition, the petitioner indicated that the beneficiary “will participate in every technical and commercial event related to electricity, oil and mining in or abroad the United States.”

The petitioner also submitted a letter from the beneficiary indicating that the U.S. company has hired the beneficiary as the President and General Manager of the U.S. entity, and has hired one additional employee who is “in charge of the Administrative Area.”

On July 1, 2005, the director denied the petition on the ground that the petitioner did not sufficiently demonstrate that the beneficiary will be hired in an executive or managerial capacity with the U.S. entity.

On appeal, the petitioner asserts that “at the present time the beneficiary, who is the President and main Executive of the Society, is the only person in charge to perform the managerial duties to carry out our business plan.”

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).

The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the

beneficiary's duties include "provide fiscal administrative management, control budgets, revenues and expenditures," and "develop and implement communication to ensure diffusion of inventory and services to customers in all geographic locations." Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The description also includes several non-qualifying duties such as the beneficiary will "identify, contact and do follow up on potential customers," "create, implement and follow up sales strategies to achieve global business objectives," "identify, contact and do follow up on potential suppliers," and "negotiate commercial alliances with potential suppliers in the United States." Without further explanation, these duties suggest that the beneficiary is directly involved in the company's marketing, sales and promotion activities rather than supervising others who perform non-managerial duties related to these functions. An employee who "primarily" performs the tasks necessary to produce a product or provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International* 19 I & N Dec. 593, 604 (Comm. 1988).

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on the totality of the record whether the description of the beneficiary's duties represents a credible account of the beneficiary's role within the organizational hierarchy. As noted by the director, the record does not demonstrate that the petitioner has any employees to perform the routine non-executive and non-managerial functions of the business.

On review, 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. The petitioner has not demonstrated that the U.S. company has hired additional employees who would relieve the beneficiary from performing primarily non-qualifying duties associated with operating a business. The beneficiary submitted a letter indicating that the company also hired an employee in the administrative area, however, the petitioner did not submit any documentation to establish that this individual was actually hired by the company. The petitioner did not submit pay stubs, Federal Tax Returns or the company's Employer's Quarterly Reports to establish that the U.S. entity has hired the beneficiary and one additional employee. 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)).

As the United States company has not hired any employees, it is reasonable to assume, and has not been proven otherwise, that the beneficiary will be performing all sales, 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 new businesses, negotiating contracts, paying bills, and performing marketing functions. Again, an employee who "primarily" performs the tasks necessary to produce a

product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int’l.*, 19 I&N Dec. 593, 604 (Comm. 1988). 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. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the United States 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 petitioner does not have sufficient staffing after one year to relieve the beneficiary from primarily performing non-qualifying 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. For the foregoing reasons, the appeal will be dismissed.

The second issue in this proceeding is whether the United States entity is doing 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 (l)(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.

The nonimmigrant petition was filed on January 31, 2005. The petitioner did not submit any documentation to support that the U.S. entity has been doing business during the prior year. On February 28, 2004, the director specifically requested that the petitioner submit evidence demonstrating that the United States entity and the foreign organization has engaged in the regular, systematic and continuous provisions of goods or services. In its response, the beneficiary submitted a letter from the beneficiary

stating that the foreign organization and the United States entity has been doing business. In addition, the petitioner submitted a list of the petitioner's clients; a list of North American suppliers of electric and mining equipment; copies of correspondence received from North American manufacturers of mining equipment and suppliers "with whom [the petitioner] will engage in commercial agreement," and several documents that were not translated into English. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The director denied the petition on the ground that the petitioner did not establish that the U.S. entity is doing business. On appeal, the petitioner states that the U.S. entity "is not, nor will be, a mere office or agency of a qualified organization."

On review, the evidence submitted is insufficient to establish that the U.S. entity has been or is engaged in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. 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)).

The petitioner submitted a list of the petitioner's clients and a list of North American suppliers of electric and mining equipment. The petitioner did not submit any documentation to demonstrate that the U.S. entity is currently doing business such as financial statements, bank statements, IRS Federal Tax Returns, and/or copies of invoices. A letter from the beneficiary himself declaring that the U.S. entity is doing business is not sufficient evidence to demonstrate that the U.S. entity is engaged in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. In addition, the petitioner failed to demonstrate that the U.S. entity has any assets, inventory or salaried employees. 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)). It is implausible that a company is doing business if it has not hired any additional individuals to run the business operations. The petitioner does not explain how the U.S. company was doing business with only one employee. 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).

In addition, as noted above, the petitioner submitted copies of correspondence received from North American manufacturers of mining equipment "with whom we will engage in commercial agreement." 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 regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the

petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner failed to provide sufficient evidence to establish that a qualifying relationship exists between the foreign company and the petitioner. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer is the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). In the instant petition, the petitioner claims that the U.S. entity is a branch office of the foreign company.

In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982) (stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies of IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity. In the instant matter, the petitioner did not submit any evidence to demonstrate that the petitioner has opened a branch office in the United States. Thus, the appeal will be dismissed.

Beyond the decision of the director, the petitioner indicated that the beneficiary and his spouse each own 99.98 percent of the foreign entity, and thereby of the petitioning company. 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 this matter, the petitioner has not furnished evidence that the

beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. The petitioner indicated on Form I-129 that it is seeking to extend the beneficiary's status perpetually. For this additional reason, the appeal must be dismissed and the petition denied.

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 denial. 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.

**ORDER:** The appeal is dismissed.

