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FILE: SRC 04 217 50229 Office: TEXAS SERVICE CENTER Date: OCT 19 2006

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
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 appeal will be dismissed.

The petitioner claims to be a Texas corporation and an affiliate of Impulsora de Lubricantes y Aditivos, S.A. de C.V. located in Mexico. The petitioner states that the United States entity is engaged in the sales and distribution of automotive and lubricant products. 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 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 additional years in order to continue to fill the position of president.

On October 1, 2004, the director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity.

On November 1, 2004, the petitioner's counsel timely submitted the instant appeal. On appeal, counsel for the petitioner asserts that the U.S. entity showed sufficient growth in the first year of operations and at the current rate of growth, the U.S. entity will increase its income of over 50% by the second year of operation. Counsel for the petitioner also states that the position offered to the beneficiary is managerial/executive in nature since he is the "sole person establishing and directing the financial and representative goals of the company." Further, counsel for the petitioner indicates that the U.S. entity employs the beneficiary as president, the vice president of sales and marketing, and recently hired an assistant secretary. Counsel for the petitioner also indicates that the U.S. entity will hire additional employees at a future date as the "Petitioner's business and distribution operations are properly organized and fully functional." Counsel submits a brief and additional documentation 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 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 9, 2004. The Form I-129 indicates that the beneficiary will continue to be employed in the position of president. In the letter of support, the petitioner described the duties to be performed by the beneficiary as the following:

In connection with its desire to expand and market its proprietary line of automotive products and lubricants, [the petitioner] wishes to continue to employ on a full-time, temporary basis a President to implement the distribution and market its proprietary line to the United States. The President will continue to exercise all decision-making authority and administrate all day-to-day activities. He will continue to have full-discretionary [sic] authority over the hiring and firing of all company personnel and coordinates all liaising activities involving international marketing between [the petitioner] and U.S. companies. He will continue to establish all financial goals, objectives and operations as well as develop the local market and procurement base. He will continue to oversee the research and analysis of new product lines and determine the feasibility of marketing same into Mexico [sic]. He will continue to oversee all the day-to-day international marketing and trade operations involving proper documentation, letter of credit, new venture planning, budgeting and global purchasing and licensing. He will continue to have sole discretionary authority in determining and directing all financial goals and policies by determining investment projects.

On August 18, 2004, the director requested an organizational chart of the U.S. company, specifying the beneficiary's position within the organizational hierarchy, as well as the names, job titles and duties of the

employees the beneficiary supervises. In addition, the director requested copies of the company's Texas Employer's Quarterly Reports and the Employer's Quarterly Federal Tax Return, Form 941, for 2004.

In the response, the petitioner submitted an organizational chart for the U.S. entity indicating the beneficiary as president supervises an assistant secretary and the vice president of marketing. The chart also indicated that the assistant secretary supervises two administrative employees, whose positions were not filled, and the vice president of marketing supervises one salesperson position which was also not filled at the time of filing the petition. The petitioner indicated that the vice president of marketing is "in charge of the company's sales and marketing programs," while the assistant secretary is "in charge of compliance reporting for financial institutions and government agencies."

In addition, the petitioner submitted the Employer's Quarterly Federal Tax Return, Form 941, and the Texas Employer's Quarterly Report for the first and second quarter of 2004. According to the submitted documentation, the U.S. company employed two employees, rather than three employees as indicated on the organizational chart. The petitioner's quarterly wage report did not confirm the employment of the individual identified as the petitioner's "assistant secretary."

The director denied the petition on October 1, 2004 stating that the submitted evidence is not persuasive in establishing that the position is in a capacity that is managerial or executive in nature. The director noted that the Employer's Quarterly Federal Tax Return and the Texas Employer's Quarterly Report indicated that the U.S. entity only hired two employees rather than three employees as indicated on the organizational chart. Thus, the beneficiary will only supervise the vice president of marketing. The director concluded that the petitioner has not demonstrated that the duties to be performed by the beneficiary will be primarily those of an executive or managerial nature.

On appeal, counsel for the petitioner submits the company's IRS Form 941, Employer's Quarterly Federal Tax Return for the quarter ending on September 20, 2004 to establish that the Assistant Secretary has indeed been hired in August 2004. In addition, counsel for the petitioner explains why the U.S entity has not hired administrative employees and sales personnel stating the following:

The U.S. company is currently spending time developing and converting the sales and distribution of products from Mexican resources before adding on highly specialized employees to the staff. Such personnel must be added as the Petitioner's business and distribution operations are properly organized and fully functional. The business must come 1st and the employees then are needed to implement the business. The Houston office is still only one-year old, but is growing.

In addition, counsel for the petitioner asserts that the position offered to the beneficiary is primarily managerial/executive in nature. Counsel for the petitioner further described the duties to be performed by the beneficiary as the following:

As President for [the petitioner], [the beneficiary] primarily directs management of and exercises total authority over all day-to-day activities and operations of the Petitioner's office. In effect, he is the function manager of all aspects of the U.S. representative function, a vital interface with the U.S. market and business customers. He exercises total discretionary decision-making and authority over the day-to-day operations

including personnel and financial decisions. He exercises total discretionary authority over all major corporate functions including the Company budget, and long-term financial goals and business plan. He also establishes the organizational goals and policies of the Company as the on site executive officer along with the Vice President. He directly supervises and controls the work of the Vice President thus indirectly supervising and controlling the activities of all company personnel. He is ultimately responsible for the return on the investment, the cash flow, and the overall corporate health and development of the Company. [The beneficiary] receives no supervision or direction from higher-level executives and reports only to the Board of Directors of [the petitioner].

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will 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.*

In addition, 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 beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. The beneficiary's job description includes vague duties such as the beneficiary will "exercise all decision-making authority and administrate all day-to-day activities," "have full-discretionary authority over the hiring and firing of all company personnel and coordinates all liaising activities involving international marketing between [the petitioner] and U.S. companies," "establish all financial goals, objectives and operations as well as develop the local market and procurement base," "exercises total discretionary authority over all major corporate functions including the Company budget, and long-term financial goals and business plan," and "establishes the organizational goals and policies of the Company as the on site executive officer along with the Vice President." Reciting the beneficiary's vague job responsibilities or broadly-cast 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 job description also includes several non-qualifying duties such as the beneficiary will "oversee the research and analysis of new product lines and determine the feasibility of marketing same into Mexico [sic]," and "oversee all the day-to-day international marketing and trade operations involving proper documentation, letter of credit, new venture planning, budgeting and global purchasing and licensing." Furthermore, a document submitted on appeal entitled "First Year Resume" for the U.S. company states

that all sales are being made through the President, Vice President, and through an outsourced company paid by commission. The petitioner has not submitted documentary evidence to confirm the existence of this external sales staff, and the petitioner's Profit and Loss statement for the year ended on September 30, 2004 does not include commission payments among the company's expenses. As the petitioner indicates that it will hire sales representatives in December 2005, it is reasonable to conclude that the beneficiary will continue to be responsible for sales of the petitioner's products. It appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. 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).

As noted above, the petitioner indicates that it will hire sales representatives in December 2005. On appeal, counsel for the petitioner explains that the company is currently in the development stage and more personnel will be hired in the future "as the Petitioner's business and distribution operations are properly organized and fully functional." 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).

According to the petitioner, in addition to the beneficiary, the company has hired a vice president of marketing and has recently hired an assistant secretary. The petitioner's quarterly wage report confirms that "A. Camarillo" was hired in August 2004 at a salary of \$400.00 per month. However, this individual did not appear on the organizational chart submitted in response to the director's request for evidence, and the record in fact contains no evidence of payments to the employee identified as the company's "assistant secretary," Robert Camp. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner's above-referenced "First Year Resume" indicates that the employee hired in August 2004 is a temporary administrative assistant responsible for maintaining books and assisting in processing receivables, payables and payroll. Neither of the beneficiary's subordinates has a staff to supervise. Thus, there is no evidence that the U.S. company has hired employees to perform the shipping, merchandising, purchasing, credit and accounting operations and budget that are necessary to produce or provide services. As the United States company has only three employees, it can be reasonably assumed, and has not been proven otherwise, that the beneficiary is directly performing purchasing, marketing, sales 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, monitoring shipments, paying bills, and customer service. 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 providing the services of the business rather than directing such activities through subordinate employees.

On appeal, counsel for the petitioner indicates that the beneficiary is a functional manager. However, the petitioner has not established that the beneficiary will be managing an essential function of the U.S.

company. 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.

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 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 salon and retail business. 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. at 604. The regulations 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 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 is not sufficiently operational after one year, 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. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists with the beneficiary's overseas employer. 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).

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.

As general evidence of a petitioner's claimed qualifying relationship, the company's annual report, the stock certificates, 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.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In the instant matter, the petitioner submitted a notarized "Certificate of Corporate Relationship" from the claimed Assistant Secretary of the U.S. entity indicating that "The Company [U.S. entity] and Impulsora de Lubricantes y Aditivos, S.A. de C.V. [the foreign parent company], a Mexican company, are both majority-owned subsidiaries of [REDACTED]. The petitioner did not submit any additional documentation. As mentioned above, a notarized letter from an employee of the U.S. entity is not sufficient evidence to demonstrate that the qualifying relationship is still present between the U.S. entity and the foreign company. For the foregoing reasons, the petitioner has not established that a qualifying relationship exists between the U.S. company and the beneficiary's foreign employer.

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 petitioner will be denied and the appeal dismissed 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.