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FILE: SRC 04 235 52246 Office: TEXAS SERVICE CENTER Date: **SEP 26 2006**

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

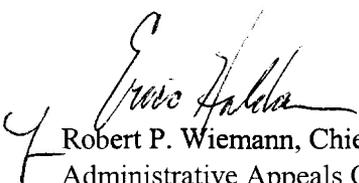
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 summarily dismissed.

The petitioner, a Georgia limited liability company, claims to be a subsidiary of World of Plastics – Plastienvases, CIA, LTDA located in Quito, Ecuador. The petitioner states that the United States entity is engaged in the business of exporting, manufacturing, buying, selling and commercial distribution of supplies related to the plastic industry. 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. The petitioner seeks to employ the beneficiary in the position of managing partner of its new office in the United States for a period of three years.

The director denied the petition, concluding that the petitioner did not establish the following two requirements: 1) that sufficient physical premises to house the new office have been secured; and 2) that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

The petitioner subsequently filed an appeal on March 21, 2005. Counsel indicated on Form I-1290B that she would submit a brief and/or evidence to the AAO within 30 days. As no additional evidence has been incorporated into the record, the AAO contacted counsel by facsimile on August 24, 2006 to request that counsel acknowledge whether the brief and/or evidence were subsequently submitted, and, if applicable, to afford counsel an opportunity to re-submit the documents. Counsel for the petitioner did not respond to the AAO. Accordingly, the record will be considered complete.

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.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition. Counsel's general objections to the denial of the petition, without specifically identifying any errors on the part of the director or providing new evidence to support that the beneficiary will be employed in a primarily managerial or executive capacity within one year and that the petitioner has obtained sufficient physical premises for the U.S. entity, are simply insufficient to overcome the well-founded and logical conclusions the director reached based on the evidence submitted by the petitioner. 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 assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I & N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I & N Dec. 503, 506 (BIA 1980).

On review, it appears that the petitioner did not submit any evidence documenting sufficient physical premises to house the new office in the United States as required under the regulations 8 C.F.R. § 214.2(l)(3)(v). On October 19, 2004, the director requested that the petitioner submit evidence of the lease or purchase contract of facilities in which to conduct business in the United States. In the petitioner's response dated December 29, 2004, counsel for the petitioner stated the following:

Since the company has been doing business in the US for less than a year, it only has a small office with the necessary office equipment to start making contacts and business. As the manager is seeking to change his visa status to L-1, the company is not able to launch into full operations that would require cosmetic painting, storing, and repair of acquired pieces of equipment in a warehouse. Upon approval of his [the beneficiary] application to change status, the company is planning to immediately lease a warehouse that will include electrical service of about 100KWA necessary to run and repair pieces of machinery.

The petitioner did not submit any evidence that the petitioner actually has leased the above-mentioned office space. In addition, it appears that an office is not sufficient space for a company that plans to buy large machinery for production of plastics. The business plan indicates that the company needs a warehouse in order house "2 blowmolders, 3 to 6 injection molders, and 304 metal mechanical and auxiliary equipment." 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 office is not sufficient physical premises in order to commence the type of business outlined in the petitioner's business plan. Further, the petitioner failed to submit a lease agreement for its claimed office space. 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)).

If a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation 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" through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

Upon review of the record, the petitioner did not submit sufficient evidence to establish that the beneficiary will be employed in an executive capacity in the United States within one year.

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). On review, the petitioner has 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 being "in charge of all activities related to starting up the company including hiring staff," and "investigate the importation of flowers from Ecuador to the US as an adjunct business activity." The petitioner did not, however, define the beneficiary's goals and policies, or clarify the role of the subordinates that the beneficiary will supervise.

The description also includes several non-qualifying duties such as "setting up a facility in Atlanta that will have the capacity for production and warehouse capability," and "develop and implement marketing strategies that will increase the exportation of machinery and equipment to Ecuador and other markets in South America." 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. 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 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 petitioner indicated that it plans to hire one secretary and two certified mechanics by the end of the year. Thus, it appears that the only individual in charge of running the business and managing the sales, marketing, payroll, inventory, purchasing, exporting, customer service and finance operations will be the beneficiary himself. It appears that the secretary will be in charge of the administrative tasks for the office, and the mechanics will work with the repair and configuration of the equipment and machinery, however, the beneficiary is the only employee who will perform the majority of the operational tasks required in running a business. Accordingly, the director reasonably concluded that the beneficiary as the petitioner's only managerial employee 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. 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).

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial capacity. The job duties of the beneficiary's

position abroad submitted by the petitioner are vague and contain non-qualifying duties. For example, the petitioner stated that the beneficiary's duties in the position he held abroad as international and marketing coordinator included, "responsible for coordinating the work or plant operations, assuring quality and compliance with scheduling requirements," and "coordinate product development and sales, especially international sales." The petitioner did not, however, define the beneficiary's goals and policies, or clarify the role of the subordinates that the beneficiary will supervise. It appears that the beneficiary supervised a secretary and two mechanics. Since there are currently no employees in sales and marketing operations for the company, it appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. 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 sufficient 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. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

On October 19, 2004, the director requested that the petitioner submit evidence documenting the foreign employment of the beneficiary including the position title; a list of the duties; the percentage of time spent on each duty; the number of subordinate managers/supervisors or other employees who report directly to the beneficiary; a brief description of their job titles and duties; the qualifications required in order to fill the position the beneficiary held; and the beneficiary's position within the organizational hierarchy.

On December 29, 2004, the petitioner responded to the director and failed to submit the requested documentation. Instead, the petitioner submitted information regarding the position offered to the beneficiary with the United States entity. Thus, the AAO cannot determine whether the beneficiary supervised any subordinate staff while employed by the foreign entity or if the beneficiary was primarily responsible for managing an "essential function" within the organization. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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 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. Inasmuch as counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the petitioner has not sustained that burden. Therefore, the appeal will be summarily dismissed.

ORDER: The appeal is summarily dismissed.