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File: SRC 05 044 50225 Office: TEXAS SERVICE CENTER Date: JUN 05 2007

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

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

IN BEHALF OF PETITIONER: 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.


Robert F. 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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability company organized in the State of Florida that is engaged in the trading of precious stones. The petitioner claims that it is the affiliate of [REDACTED] located in Geneva, Switzerland. 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.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity, or (2) the petitioner had been doing business for the previous year.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts briefly on the Form I-290B that the director erred in finding that the petitioner had not met the requirements for extension.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

With the initial petition, the petitioner submitted two letters dated December 1, 2004. The first letter indicated that it was an outline of the petition and claimed that the beneficiary's job duties included the following:

- Directing the management of the organization[;]
- Establishing long term goals and policies (business planning);
- Reporting to the board of directors;
- Locating contractual relationships;
- Establishing relations with customers and the public in general;
- Developing marketing and advertising strategies around the Region;
- Conducting marketing and profitability studies to promote and to direct corporate expansion.

The second letter provided the following additional list of the beneficiary's duties:

- Develops primary goals, operating plans, policies, and short and long range objectives for the organization.
- Implements these objectives following Board of Directors' approval.
- Directs and coordinates activities to achieve profit and return on capital.
- Establishes organizational structure and delegates authority to subordinates.
- Leads the organization towards objectives, meets with and advises other executives and reviews results of business operations.
- Determines action plans to meet needs of stakeholders.
- Represents organization to financial community, major customers, government agencies, shareholders, and the public.

Additionally, an organizational chart was submitted, which demonstrated that the beneficiary was partner/founder of the petitioner. Under a different chain of command, the chart listed Michel Scheiss, Operations; Olivier Bernicat, Sales/PR; and Veronique Fradkoff, Secretary.

Finally, the petitioner's quarterly tax return for the quarter ending 9/30/2004 was submitted, along with the petitioner's most recent payroll check register for the month of October 2004. The October 2004 payroll indicated that wages were paid to the beneficiary, [REDACTED], and [REDACTED] during this period. [REDACTED] was not listed on the October payroll.

On December 13, 2004, the director requested additional evidence. Specifically, the director requested evidence of the petitioner's current staffing level, along with a more definitive statement of the beneficiary's duties for the previous year. Additionally, a brief statement describing the duties and position titles of the beneficiary's subordinates was requested, along with the educational backgrounds of any professional employees. Finally, the director asked who in the company was responsible for the purchase and sale of the precious stones.

In response, the petitioner submitted a letter dated January 10, 2005 with additional evidence. Regarding the director's request for more details regarding the beneficiary's duties for the previous year, the petitioner provided the following list:¹

- **Directing the management of the organization[;]**
- **Establishing long term goals and policies (business planning);**
- Day to day discretionary decision making[;]
- **Reporting to the board of directors;**
- Recruiting and supervising staff as well as contracting with [a]nd directing subcontractors (including professionals such as lawyers, insurance consultants, accountants)[;]
- Training employees, including the establishment of personnel policies and institutions of benefit programs such as health insurance, workers compensation and pension plans;
- **Locating, negotiating, and procuring contractual relationships;**
- Inventory management such as developing systems for checks of sale and purchases;
- **Establishing relations with customers and the public in general;**
- **Developing marketing and advertising strategies around the Region;**
- Creation of systems and budgeting controls;
- Securing banking and other financial services[.]

The petitioner submitted an updated organizational chart which also demonstrated the hierarchy of the foreign entity. The updated chart now showed the beneficiary directly supervising N [REDACTED] whose title was now "Manager," not "Operations," as indicated on the first chart. [REDACTED] again was listed as overseeing [REDACTED], whose title had changed from "Sales/PR" to "PR/Customer Relations," as well as Veronique

¹ Please note that the duties in bold text are identical to those initially listed in the December 1, 2004 letters.

█ whose title had also changed from “Secretary” to Administrator.” A brief description of their duties was also submitted. Finally, the petitioner indicated that both the beneficiary and Mr. Scheiss were engaged in the purchase and sale of the precious stones.

On January 25, 2005, the director denied the petition. The director determined that the record did not contain sufficient evidence to show that the beneficiary would be employed in a managerial or executive capacity. She specifically noted that aside from the petitioner’s assertions, there was no documentary evidence to support its claim that the beneficiary’s position was in a qualifying capacity, and focused on the claim that the beneficiary himself would engage in the purchase and sale of the precious stones.

On appeal, the petitioner asserts that the director wrongly assumed that because the petitioner was a new business and because the beneficiary had less than one year to introduce █ to the gemstone business, the beneficiary was thus not functioning as an executive. The petitioner asserts that the director erroneously categorized the beneficiary as the “trainer” and █ as the “trainee” and ignored the fact that the beneficiary has adequately prepared █ to take over for him in this area. No additional evidence is submitted.

Upon review, the petitioner’s assertions are not persuasive. 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(1)(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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

In this matter, the petitioner failed to provide an adequate description of the beneficiary’s proposed duties with the extension request. Instead, it merely provided a brief, generalized synopsis in the initial support documentation submitted with the petition. 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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 must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity.

Despite the contentions of the petitioner, it cannot be determined that the beneficiary will be employed in a managerial or executive capacity in the United States merely because the claim is made in the record. 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)). In the instant matter, the petitioner has failed to establish that it will employ the beneficiary in a predominantly managerial or executive position as required by 8 C.F.R. § 214.2(1)(3). Specifically, the description of duties was too vague and specifically

failed to address the key focus of the petitioner's business, namely the acquisition and resale of precious stones. Although the petitioner readily admitted that the beneficiary engaged in both the purchase and sale of diamonds in response to the director's request, the three different lists the petitioner provided of the beneficiary's duties all fail to address or even acknowledge these critical tasks essential to the petitioner's fledgling business. Furthermore, the petitioner failed to sufficiently respond to the director's request for a more specific description of the beneficiary's duties for the previous year, especially given that the January 10, 2005 response consisted mainly of duties that had previously been listed and deemed insufficient. 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).

As discussed above, this failure to provide a detailed overview of the beneficiary's actual duties, coupled with the petitioner's claims that the beneficiary actively engaged in the non-qualifying duties of purchasing and selling precious stones, renders it impossible to conclude with certainty the exact nature of the beneficiary's duties. 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).

Moreover, the petitioner has also failed to submit sufficient evidence to support its claims on appeal, namely that [REDACTED] handled these day-to-day tasks and is sufficiently skilled enough to relieve the beneficiary from performing these non-qualifying duties. In the request for evidence, in addition to a definitive statement describing the employment of the beneficiary and descriptions and titles of his subordinates, the director requested "evidence of the current staffing level in the United States." (Emphasis added). While the petitioner did submit a statement discussing the duties and positions of the beneficiary's alleged subordinates, no definitive evidence such as payroll records or quarterly tax returns were submitted to corroborate the claim that [REDACTED] was employed by the petitioner when the extension request was filed on December 3, 2004. The only evidence contained in the record is the payroll summary for the month of October 2004, which shows that the beneficiary, [REDACTED] and [REDACTED] were employed by the petitioner, but not [REDACTED].

Again, 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. Merely claiming that the beneficiary is relieved of non-qualifying duties by an employee who is not listed on the petitioner's most recent payroll records will not establish eligibility in this matter. Furthermore, although [REDACTED] and [REDACTED] apparently were employed by the petitioner at the time of filing, their position descriptions and duties do not include the fundamental task of acquiring the precious stones. Absent evidence to the contrary, it appears that the beneficiary will be the one responsible for the acquisition and sale of the precious stones, tasks critical to the continued operations of the petitioner and, as noted above, considered to be non-qualifying. An employee who primarily performs the tasks necessary to produce a product or to provide

² While the AAO notes that a quarterly report for the third quarter of 2004 is contained in the record, and that this report indicated that [REDACTED] was employed during that period, the more recent records covering the time immediately preceding the filing of the petition do not reflect his employment.

services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

In conclusion, the petitioner failed to specifically articulate the nature of the beneficiary's duties. In fact, the evidence contained in the record is contradictory in many ways, and these inconsistencies have not been clarified. As such, the record does not contain sufficient evidence to show that the petitioner will employ the beneficiary in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" 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."

In this matter, the petitioner claims that it is engaged in the retail sale of precious stones, with a specific focus on diamonds. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business based on the minimal documentation of business transactions provided for the previous year.

With the initial petition, the petitioner claimed in its support letters of December 1, 2004 that it was currently transacting business in the United States, and was looking to expand into the Latin American market. The petitioner submitted copies of its business bank statements and a financial statement dated September 30, 2004. However, no copies of invoices or evidence of sales transactions were submitted.

Consequently, in the request for evidence issued on December 13, 2004, the director requested documentation establishing that the petitioner had been doing business during the previous year as required by the regulations. In the response filed on January 10, 2005, the petitioner submitted a number of invoices covering the second half of 2004. On appeal, the petitioner infers that it was not conducting business during the entire year, but claims that its gross receipts, which totaled in excess of two million dollars in a six-month period,

were certainly sufficient evidence that the petitioner's business was operational. The petitioner further contends that business was slow to start since the beneficiary did not arrive in the United States until four months after the initial petition was approved.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. The regulatory definition of doing business requires evidence that a qualifying organization is engaged in "the regular, systematic, and continuous provision of goods and/or services." The regulations further apply this provision to the entire year preceding a request for extension, not just a select group of months during this period.

The record indicates that the beneficiary was granted a one-year period of stay from January 7, 2004 to January 6, 2005 to open a new office; however, the record indicates that the beneficiary did not enter the United States until April 28, 2004. Although the petitioner was incorporated in October of 2003 and claimed to be actively transacting business in the United States, there is no indication of any business activities until June 2004, as verified by the invoices provided by the petitioner in response to the request for evidence. In addition, there is no documentation or information regarding the activities of the beneficiary and the petitioner during the time period prior to June 2004.

Based on this limited information, it is clear that the petitioner was not doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claims that business is generally slow to start in this industry and that the beneficiary's late arrival in the United States contributed to this problem. However, the record is devoid of an explanation as to what the petitioner did between October 2003 and June 2004, and further lacks any explanation or documentation regarding other activities engaged in by the petitioner to promote its business during this period. The fact that the petitioner did not commence operations until June 2004, six months prior to the new office petition's expiration, does not excuse the petitioner from meeting the regulatory requirements.

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 a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted at the time of filing confirmed that the petitioner had not been conducting business as required. Although it appears that the petitioner began consistently expanding its business after the beneficiary's arrival and, as it states on appeal, that its sales had been increasing since the expiration of the beneficiary's initial stay, this does not automatically entitle the petitioner to an extension of the beneficiary's L-1A classification, because it does not change the fact that the petitioner failed to conduct regular, systematic, and continuous business during the previous year. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial or executive capacity. The minimal documentation contained in the record regarding the beneficiary's duties pertains solely to his position in the United States, and makes little or no reference to his actual duties abroad. The petitioner merely claims that the beneficiary has served as the founder and a partner of the foreign entity for the past ten years. Once again,

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. Merely claiming that the beneficiary was employed abroad in a qualifying capacity, without providing documentary evidence or more definitive details, will not satisfy the petitioner's burden of proof in these proceedings. For this additional reason, the petition may not be approved.

In addition, the petitioner indicates that the beneficiary is the sole owner of the foreign entity and the majority owner of the petitioner. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(1)(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 the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.