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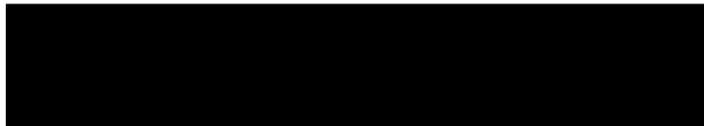
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3000
Washington, DC 20529



**U.S. Citizenship
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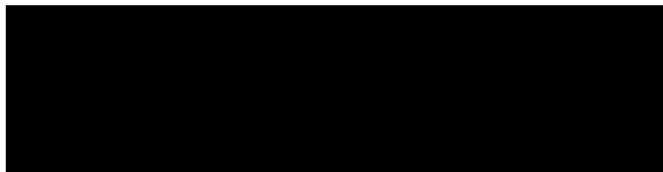
FILE: WAC 06 150 52165 Office: CALIFORNIA SERVICE CENTER Date: **SEP 06 2007**

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 filed this nonimmigrant petition seeking to extend the employment of its president and general manager 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, a Georgia corporation, claims to be the subsidiary of Rodriguez y Asociados S.C., located in Maracaibo, Venezuela. The petitioner claims to be an accounting firm. 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 an additional three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous and that, contrary to the director's findings, the petitioner is qualified for the benefit sought. In support of this contention, counsel submits a brief and additional evidence.

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) 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 primary issue in this 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.

In a letter dated March 27, 2006, the petitioner stated that it currently employed two persons, including the beneficiary. With regard to the need for the beneficiary's services and the duties she would perform, the petitioner provided the following description:

Beneficiary has been employed with the U.S. company since the approval of our original L-1A visa in April 2005. As President and General Manager of [the petitioner], [the beneficiary] directs and oversees all operations. She has been responsible for overseeing all aspects of our operations, directing and coordinating activities of our personnel; has been responsible [for] personnel, budget preparation and control; has studied and implement[ed] management methods in order to improve workflow, simplify procedures and processes, and implement cost reductions; has directed the financial activities of the company, and directed the preparation of reports which summarize the position of the business and forecast the future business activity and financial position of the Company; has planned, developed and established major economic objectives and policies for the company, including cost reduction and control; has overseen the preparation of reports for solutions of administrative problems and plan[ned] and develop[ed] methods and procedures for carrying out the companies [sic] activities to be implemented by those under her command; has reviewed activity reports and financial statements to determine progress and status in attaining objectives and revis[ing] objectives and plans in accordance with future conditions; has directed and coordinated formulation of financial programs to provide funding for new or continuing operations to maximize results on investments, and to increase productivity; has planned and developed labor, and public relations policies designed to improve company's image and relations with customers, employees and public.

The petitioner further explained that to date, the beneficiary hired one other professional employee, namely [REDACTED], in the position of accountant. In support of this contention, the petitioner submitted its quarterly tax returns for the quarters ending June 30, 2005, September 30, 2005, and December 31, 2005, all

of which indicate that the beneficiary and [REDACTED] were on the petitioner's payroll during those quarters. The petitioner further claimed that the beneficiary frequently utilized the services of contract accountants on an as-needed basis.

On April 19, 2006, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit an organizational chart for the petitioner; a more detailed description of the beneficiary's duties; and a list of all subordinates of the beneficiary, with a description of each person's position title, duties and educational backgrounds.

In a response dated June 30, 2006, the petitioner provided an organizational chart, which demonstrated that the beneficiary directly supervised [REDACTED] as originally claimed. The chart indicated that as president, the beneficiary oversaw [REDACTED] as the manager of accounting and taxes. Additionally, the chart indicated that the beneficiary would also oversee a manager of operations, a position that was vacant at the time of the chart's submission. With regard to the beneficiary's duties and the director's request for a more detailed description, the petitioner restated in its June 30, 2007 letter the description quoted above and provided an additional list of duties created by the petitioner. This document stated:

[The beneficiary] has been responsible for assuring the comply [sic] of the mission, vision, values, and social goals of [the petitioner].

In order to do this and as a Chief Executive Office[r] she performs the following tasks:

- General Administration
- Operation Management
- Legal Consultancy, and
- External Audit

Among her basic tasks, she has been responsible for the [petitioner's] operations since November 2004 to present. Also responsible for the office space opening (first in Buford and [then] in Norcross, both in the metropolitan zone of Atlanta) and the relationship with [its] customers from the headquarter . . . in Venezuela.

She has developed new business for the United States Branch.

Her main responsibilities have been:

- Supply real time financial and administrative information to the board of directors.
- Manage the subscribed Premium of [the foreign entity] with the insurance companies.
- Consultant services coordination received by [the foreign entity]
- Planning of office space opening in different cities of the country, as well as international location, especially in the United States.

Maintain relationship and contact with all departments of the organization which allows a good performance of activities and assigned functions; as well as with the government entities in order to make sure they comply with all local laws. She also maintains kind relationship with clients, suppliers, banks, and financial institutions that contribute to easy [sic] the assigned job directions.

On July 21, 2006, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would function at a senior level within the organization or that the beneficiary had sufficient subordinate staff to relieve her from performing non-qualifying duties. Moreover, the director noted that it appeared that the beneficiary was largely responsible for the performance of the petitioner's day-to-day tasks.

On appeal, counsel for the petitioner reasserts that the beneficiary, by virtue of her position as president, is by definition functioning in a managerial and/or executive capacity. Counsel contends that the director's finding that the description of duties was too broad is erroneous, and submits a description of chief executive positions as outlined by the U.S. Department of Labor's Occupational Information Network in support of the beneficiary's compliance with the regulations. Counsel further claims that the director erred by considering the petitioner's size and stage of development when rendering the decision.

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 initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of her duties; namely, she would function as president and general manager of the petitioner and oversee virtually all aspects of the business. Consequently, the director requested more specific information, including an overview of the petitioner's organizational structure in order to better comprehend the work environment of the beneficiary. The petitioner responded to this request, yet did not expand on the beneficiary's day-to-day duties. Instead, the petitioner resubmitted the a portion of the initially-submitted description of duties and submitted an additional broad overview of duties, prepared by the petitioner herself, that did little to clarify the beneficiary's actual day-to-day tasks. Also, a chart pertaining to the organizational structure and the number of workers on the petitioner's payroll created additional questions and discrepancies in the record.

Based on the evidence of record, the AAO is not convinced that the description of the duties of the beneficiary is an accurate portrayal of a typical workday. In sum, the description in the record claims that the beneficiary has the general responsibility of running and overseeing the entire operation of the petitioner. Additionally, the petitioner claims it provides accounting and tax preparation services to the Spanish-speaking community and presents evidence via invoices of the services it has rendered. However, the organizational chart and quarterly wage reports indicate that only the beneficiary and a manager of accounting and taxes are

employed by the petitioner. Despite claims of contractual accountants providing services to the petitioner on an as-needed basis, no evidence of their services was provided in response to the request for evidence, nor were they listed on the petitioner's organizational chart.¹ It appears, therefore, upon review of the limited position description in the record and the simultaneous expansion of the petitioner's taxation business with a small staff, that the beneficiary is directly responsible for all aspects of running the business and providing its services, including personnel supervision, customer service, and tax preparation services.

The fact that the record indicates that the beneficiary is performing tax preparation services clearly shows that she cannot be employed in a primarily managerial or executive position. These duties do not appear to fall directly under traditional managerial or executive duties as defined in the statute. While some of her stated duties, such as overseeing the entire operation of the petitioner, would generally be recognized as the responsibilities of a manager or executive, the vague descriptions provided and the lack of sufficient subordinate staff at the time of filing suggest that the beneficiary directly handles most aspects of the business herself, instead of managing these operations. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of 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). In this case, the petitioner has failed to do so.

¹ On appeal, counsel submits copies of four checks payable to Veronica Garcia, who is allegedly a contractual accountant for the petitioner. The checks, dated 3/7/06, 3/22/06, 7/29/06, and one of which is illegible, are not acceptable for two reasons.

First, one of the checks is illegible, and another is dated after the filing of the petition. 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). Second, of the two checks dated prior to the filing of the petition, the petitioner failed to submit these items in response to the request for evidence. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). Despite the director's request for clarification regarding additional staff members in the request for evidence, the petitioner failed to discuss any contractual accountants in the response to the request for evidence. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. Most troubling to the AAO is the fact that no explanation has been provided with regard to who performs the clerical and administrative duties of the company. With regard to the petitioner's size, the reasonable needs of the organization in relation to its overall purpose and stage of development must be considered and addressed when staffing levels are used as a determining factor in approving an L-1A petition. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in approving a visa for a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In addition, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

There is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act.

In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. Despite counsel's contentions on appeal, 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, it does not appear that the petitioner has yet reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner indicates that the beneficiary is the majority owner of the foreign entity, which in turn is the sole 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(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 the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that she will be transferred to an assignment abroad upon completion of her 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 at 1043.

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.