U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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D7

[redacted]

File: SRC 06 013 52854 Office: TEXAS SERVICE CENTER Date: APR 03 2008

IN RE: Petitioner: [redacted]

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)

IN BEHALF OF PETITIONER:

[redacted]

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as 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 under the laws of the State of Georgia and is allegedly engaged in the business of technology services and equipment sales.

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 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, counsel to the petitioner asserts that it is a "new office" as defined in the regulations and that the director erred by failing to apply the more lenient "new office" criteria found in 8 C.F.R. § 214.2(l)(3)(v). Counsel further argues that, because it meets those criteria applicable to "new offices," the petition should be approved.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a "new office," the petitioner shall submit evidence that:

> (A) Sufficient physical premises to house the new office have been secured;
>
> (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
>
> (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
>
> > *(1)* The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
> >
> > *(2)* The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
> >
> > *(3)* The organizational structure of the foreign entity.

A threshold issue in this matter is whether the petitioner is a "new office" for purposes of 8 C.F.R. § 214.2(l)(3) and, if so, whether the more lenient standards applicable to "new offices" should apply in this case.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as:

> [A]n organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less then one year.

Moreover, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

> [T]he 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 asserts under penalty of perjury in the Form I-129 that it was established in 1999, that it has three employees, and that it generates over $150,000.00 in gross revenue. The petitioner also indicated in the L Classification Supplement to Form I-129 that the beneficiary is not coming to the United States to open a new office. The petitioner further asserts in a letter dated July 11, 2005 that it "was founded

in 1999 and maintains its offices in Smyrna, GA."

As indicated above, 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. By requiring the petitioner to establish that the beneficiary will be employed as a manager or executive immediately upon his arrival in the United States, the director did not apply the "new office" criteria in 8 C.F.R. § 214.2(l)(3)(v) and implicitly determined that the petitioner is not a "new office" as defined in the regulations.

On appeal, counsel now asserts that the petitioner is a "new office" because it was organized as a limited liability company less than one year prior to the filing of the instant petition.

Upon review, counsel's assertions are not persuasive. It was not an error for the director to honor the petitioner's initial request to not apply the "new office" criteria found in 8 C.F.R. § 214.2(l)(3)(v).

As indicated above, the petitioner initially claimed to have been doing business in the United States since 1999. While the petitioner apparently changed the form of its business organization from sole proprietorship to limited liability company less than one year prior to the filing of the instant petition, the petitioner had nevertheless represented itself in the instant petition as an established business entity and had indicated that the beneficiary was not coming to the United States to open a "new office." If the petitioner had wanted to be treated as a "new office," it should have made this request when it filed the instant petition. On appeal, the petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Hence, the director properly applied the criteria applicable to fully formed business organizations and correctly required that the petitioner establish that the beneficiary will be employed in a managerial or executive capacity immediately upon his arrival in the United States.

Therefore, in view of the above, the primary 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.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner described the beneficiary's proposed job duties in the Form I-129 and in a letter dated July 11, 2005. As these descriptions are clearly delineated in the record, they will not be reproduced here. Generally, the beneficiary is described as defining product lines and distribution channels; creating a pricing strategy; and creating a promotions, marketing, and communications program. The petitioner also asserts in the Form I-129 that it employs three individuals.

On October 22, 2005, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the United States entity, detailed job descriptions for each employee, tax returns, and wage reports.

In response, the petitioner submitted an organizational chart showing the beneficiary reporting to the president of the petitioner. The beneficiary, however, is not shown to have any supervisory or managerial responsibilities over any existing employees. The positions shown to be subordinate to the beneficiary's position are vacant. The petitioner also submitted a job description for the president which indicates that this employee will allegedly direct and manage the organization. Finally, the petitioner submitted a letter dated December 15, 2005 in which it indicates that the petitioner has no W-2 employees. The beneficiary will be the petitioner's first employee.

On February 1, 2006, the director denied the petition. The director concluded that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel did not directly address the director's determination that the petitioner failed to establish that the beneficiary will be employed as an executive or manager.

Upon review, the AAO concurs with the director's decision and will dismiss the appeal.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 petitioner must specifically state whether the beneficiary will be primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states generally that the beneficiary will define product lines and distribution channels; create a pricing strategy; and create a promotions, marketing, and communications program. However, the petitioner never defines its product, pricing, or marketing plans and never explains what, exactly, the beneficiary will do on a day-to-day basis to perform these many duties. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description does not establish that the beneficiary will actually perform managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary will devote to the many duties ascribed to him. This is particularly important in this matter because the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature when the tasks inherent to these duties are to be performed by the beneficiary. As the organizational chart and job descriptions fail to identify any *existing* employees who will relieve the beneficiary of the need to perform these non-qualifying tasks, it must be concluded that he will perform these tasks. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart and letter dated December 15, 2005, the petitioner has no employees. The beneficiary will be its first W-2 employee, and the president, who also allegedly owns and controls the organization, will supervise the beneficiary. Therefore, as the beneficiary will have no supervisory or managerial responsibilities, the petitioner has not established that he will supervise or control other employees. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.[1]

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day

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[1]While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. 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. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily **perform** non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will be primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

basis. Moreover, as explained above, the beneficiary will be performing the tasks necessary to produce a product or to provide a service. Finally, the job description for the "president" of the petitioner reveals that he will direct the organization and not the beneficiary. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

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 this case, the petition contains serious inconsistencies which undermine the credibility of the petition. For example, in the Form I-129, the petitioner asserts that it employs three persons and has gross revenue of over $150,000.00 and net income of over $100,000.00. However, the supporting documents provided in response to the director's Request for Evidence reveal that the petitioner does not have, and never had, any employees. Likewise, the tax documents for the owner of the predecessor sole proprietor, which he also submitted in response to the Request for Evidence, indicate that he generated $13,000.00 in gross receipts, and $9,557.00 in net profit, from the business in 2004. The petitioner offers no explanation for this serious inconsistency, and the averments in the Form I-129 appear to be simply false. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In view of the above, the AAO finds that the petitioner knowingly submitted the Form I-129 containing false statements in an effort to mislead CIS on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States. *See* 18 U.S.C. §§ 1001, 1546. The AAO hereby enters a finding of fraud.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner has also failed to establish that it has a qualifying relationship with the foreign entity.

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

> 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.

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." A "subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

In this matter, the petitioner, a limited liability company, asserts that it owns 51% of the foreign entity. In support of this assertion, the petitioner submitted a "Stock Agreement" dated May 1, 2005 as evidence that the foreign entity conveyed 51 out of 100 shares of stock to the petitioner thus establishing, if true, that the petitioner is the parent of the foreign employer, a subsidiary. However, the petitioner also submitted a "Bill of Sale of Business" dated March 28, 2005, which indicates that the beneficiary sold his 51% interest in the foreign employer to [redacted] the principal owner of the petitioner. Finally, the petitioner submitted a translated copy of the foreign entity's certificate of incorporation which indicates in Article 4 that the beneficiary owns a 30% interest, or 300 out of 1,000 shares, in the foreign entity.

Both the Bill of Sale of Business and the foreign entity's certificate of incorporation are fundamentally inconsistent with the petitioner's description of its ownership and acquisition of the foreign entity. Not only does the petitioner fail to explain its acquisition of a 51% interest in the foreign entity in May 1, 2005 when Mr. [redacted] had already acquired a 51% interest several months earlier, the petitioner does not address how the foreign entity could "sell" 51% of its stock when the translated certificate of incorporation indicates that all of the foreign entity's stock had already been issued to individuals. The petitioner also fails to address how the beneficiary could "sell" a 51% ownership interest in the foreign entity to anyone when the certificate of incorporation indicates that he only received a 30% ownership interest in 2002. 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. at 591-92.

Accordingly, the petitioner has not established that it and the foreign entity are qualifying organizations. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary has been employed abroad in an executive or managerial capacity. In response to the director's Request for Evidence, the petitioner submitted an organizational chart for the foreign entity and described the beneficiary's job duties abroad. As this chart and this description are clearly delineated in the record, they will not be reproduced here. Generally, the beneficiary is described as being engaged in sales, marketing, negotiating contracts with vendors and customers, and supervising two "sales engineers."

Upon review, the petitioner has not established that the beneficiary has been employed abroad in an executive or managerial capacity. In support of its petition, 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. Moreover, it appears that the beneficiary is primarily engaged in performing non-qualifying administrative or operational tasks, e.g., sales, marketing, and contracting. Likewise, the beneficiary appears to be a first-line supervisor of non-professional employees. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604. As the petitioner has vaguely described the beneficiary's two subordinate employees as engineers without fully disclosing their educational or skill levels, it cannot be confirmed that these employees are "professionals." Therefore, as it appears that the beneficiary is employed as a first-line supervisor and/or is performing the tasks necessary to provide a service or produce a product, the petitioner has not established that he is employed abroad in a managerial capacity.

Likewise, the petitioner has not established that the beneficiary has been employed abroad in an executive capacity. As explained above, the beneficiary is performing the tasks necessary to produce a product or to provide a service and/or is a first-line supervisor. Therefore, the petitioner has not established that the beneficiary has been employed abroad in an executive capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the petitioner knowingly submitted documents containing false statements in an effort to mislead CIS on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.