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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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U.S. Citizenship  
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Services

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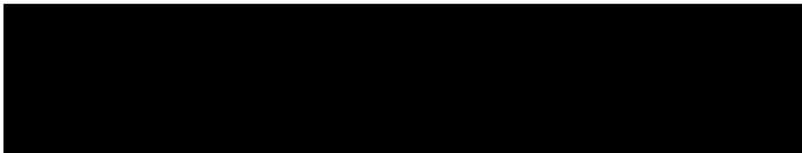
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DATE: **MAR 20 2012** Office: VERMONT SERVICE CENTER FILE:

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:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 beneficiary's employment as a 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 Texas limited liability company, states that it operates an oilfield equipment supply business. The petitioner claims to be a subsidiary of [REDACTED] located in Netherlands. The beneficiary was previously granted L-1A classification for a period of one year in order to open a new office in the United States, and the petitioner now seeks to extend his status so that he may continue to serve as the U.S. company's general manager.

The director denied the petition, concluding that the petitioner failed to 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 for the petitioner seeks to clarify the nature of the duties performed by the beneficiary. Counsel submits a brief and additional documentary evidence in support of the appeal.

## **I. The Law**

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(I)(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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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.

## **II. The Issue on Appeal**

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States 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 filed the Form I-129, Petition for a Nonimmigrant Worker, on April 13, 2009. The petitioner indicated on the Form I-129 that it is operating an oilfield equipment supply business with no employees and gross annual income of \$488,179.52. The petitioner stated that the beneficiary performs the following duties in his capacity as General Manager:

Responsible for the development of Central and South American Markets. Implement venture and quality policies. Determine goals to be achieved in relation to the policies. Determine functions and powers of the functionaries [sic] as well as carry out personnel management and needs.

The petitioner further described the beneficiary's duties in a letter dated April 8, 2009:

The beneficiary's expertise is now utilized from our office in The Woodlands, Texas, in the executive capacity of General Manager. The beneficiary is responsible for the development of the Central and South American markets. Also, he follows up on quotes and evaluates orders. The beneficiary is still responsible for directing and overseeing the creation, implementation and monitoring of a quality system, sales and marketing operations as well as business investment plans for the company. The beneficiary has the final authority regarding expansion strategies for the petitioner, and explores further business investments. He utilizes his knowledge of the internal operations of the parent company to establish policies and procedures that are in line with our long-range corporate goals. In order to expand our business, he develops and executes business strategies for the distribution of products and providing service. The beneficiary also oversees and formulates company policies and

executes product expansion strategies for the petitioner. In order to optimize development opportunities, he reviews and analyzes opportunities for partnerships. In addition, he directs all facets of sales and distribution, as well as oversees our overall financial administration.

Moreover, the beneficiary is vital to the successful development of this endeavor and is responsible for planning and implementing the expansion of our business. The beneficiary exercises discretion over the daily operations and establishes the organization structure of the petitioner. He oversees personnel needs and consultations, conducts interviews, provides inventory training requirements and sets up training plans.

The director issued a request for additional evidence ("RFE") on May 31, 2009 in which she instructed the petitioner to submit, *inter alia*, the following: (1) a copy of the company's organizational chart clearly identifying the beneficiary's position and the employees he supervises by name and job title, including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis, as well as the educational requirements needed to fulfill their positions; (2) a comprehensive description of the beneficiary's duties, and the management and personnel structure of the U.S. entity, including information regarding the number of subordinate supervisors working under the beneficiary's management, their job titles and job duties, the amount of time the beneficiary devotes to managerial duties versus non-managerial duties, and the degree of discretionary authority the beneficiary has over day-to-day operations; (3) a complete copy of the company's Form 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2008; (4) copies of the Forms W-2 and Form 1099s issues by the United States entity in 2008; (6) photographs of the interior and exterior of the premises the petitioner has secured for the United States entity; and, (7) evidence that establishes the financial status of the United States organization.

In a letter submitted in response to the RFE, the petitioner submits a comprehensive description of the beneficiary's duties:

The General Manager is expected to make decisions regarding the day-to-day activities of the company as well as conduct and supervise these same activities. The petitioner has as primary purpose to develop the Latin American market for the [REDACTED] group of companies. It will be the responsibility of the beneficiary to develop the Central and South American market to the overall benefit of both the U.S. as well as the Dutch entity. The General Manager of the beneficiary will be the one ultimately responsible for performing these activities. He will be expected to travel to numerous countries in this region and develop relations with the customers in order to expand the markets served by the company. The duties performed there will include the signing of contracts for orders with customers, as well as the entering into agreements for representation in those markets that the General Manager finds of importance. The General Manager will be expected to manage the relations with both the customers and representatives and will be the contact person for any and all matters with regards to the Central and South American market.

The petitioner indicated that the following responsibilities and tasks are also required of the General Manager:

- determining venture policy;
- determining and achieving quality policy with the accompanied goals;
- determining powers and responsibilities for functionaries;
- the acquisition or leasing of property, both tangible and intangible;
- sign contracts/agreements and perform duties in connection with those contracts/agreements;
- maintain and manage the company's bank accounts and financial issues;
- procuring insurance for the company against liabilities;
- provide all members of the LLC with information regarding the company's financial position
- to ensure that the company is paid all money that it is owed, as well as manage and settle any and all claims against the company;
- judging quality system;
- authorize changes to the company handbook, procedures and work instructions;
- follow-up quote;
- evaluate work orders;
- develop Central and South American markets;
- carry out personnel management, personnel needs, consultation personnel, carry out functioning interviews, inventory training requirements, set up training plans.

The AAO notes that the petitioner submitted a letter dated May 17, 2009 in which it described each of the above duties in detail and submitted a table detailing the percentage of time spent on various duties. The petitioner depicted the percentage of time the beneficiary spends of each duty as follows:

Financial Budgetary issues	20%
Determination of price margins	15%
Consultation with the Petitioner's parent company	15%
Meet/talk with vendors	10%
Meet/talk with customers	10%
Order evaluation	10%
Seek/Develop new opportunities	10%
Updating/changing quality manual	5%
General administrative tasks	5%

The petitioner indicated that the purpose of establishing the United States company was to ensure closer proximity and enhanced communications with its vendors and customers. The petitioner also submitted an organizational schematic indicating that the General Manager was slated to oversee four professional positions that will include an [REDACTED] Manager and a Commercial Assistant. The petitioner indicates that no employees have been hired over the course of the previous year; however, the positions are expected to be fulfilled over the next several years.

The petitioner also submitted the General Manager's diary for the period April 20, 2009 until May 10, 2009 describing the day-to-day duties of the position, along with photographs of the company's virtual office and evidence of the company's financial status. The petitioner provided copies of the Form 941, Employer's Quarterly Federal Tax Return for the third and fourth quarter of 2008, along with profit and loss statements, a balance sheet and copies of company bank statements for January 2009 through April 2009.

Counsel explained that the company has been under constant pressure due to intense competition in Latin America resulting in the company continuing to try to obtain lower prices on the equipment sought by its customers. Counsel noted that the lowering of price margins has affected the cash available for other expenditures including the hiring of a financial assistant. Counsel asserted that instead of hiring financial assistant, the company decided to use an outside accounting firm that provides the General Manager with regular updates on the financial status of the operation. Counsel further explains that the General Manager delegates some administrative tasks back to the petitioner's parent company.

The director denied the petition noting that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

On appeal, the petitioner indicates that the beneficiary functions at a senior level within the organization hierarchy in that he is the head of the United States office and oversees, directs and manages every aspect of the petitioner's U.S. operations.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

As a preliminary matter, we acknowledge the petitioner's claims that it may take several years to move beyond the start-up or development phase of operations. The AAO also acknowledges that a downturn in the economy over the initial year of operation may have postponed original start-up timelines. However, we emphasize that the L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. By allowing multiple petitions under the more lenient standard, USCIS would in effect allow foreign entities to create under-funded, understaffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii). The petitioner concedes the U.S. company was not staffed at the time of filing.

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 definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of “manager” or “executive”).

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The petitioner's description of the beneficiary's duties fails to establish that the beneficiary would be engaged in primarily managerial or executive duties under the extended petition. While the AAO does not doubt that the beneficiary exercises discretionary authority over the U.S. company as its sole employee, and the petitioner has indicated that the majority of the administrative duties required by the operation are handled by either an outside accounting firm or its parent company, the petitioner has not submitted any evidence in support of these assertions. For example, the petitioner has not submitted any evidence that an outside accounting firm is relieving him of the day-to-day financial duties associated with the company, and for which the petitioner originally planned to hire a financial assistant. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner indicates that the beneficiary's primary role is to develop the Latin American market. He is expected to manage and control any and all of the business affairs of the company and make decisions regarding the day to day activities of the company *as well as conduct and supervise these same activities*. The fact that the beneficiary is required to both manage and conduct these tasks indicates that his role is not necessarily primarily managerial. The petitioner submitted voluminous evidence of its business activities during its first year of operations. This evidence includes requests for quotations received from customers, pricing and delivery time quotations prepared by the petitioner, purchase orders received from customers, purchase orders issued by the petitioner to its vendors, and sales invoices issued by the petitioner to its customers “for work it performed and the equipment it has supplied.” As the beneficiary is the company's sole employee, it is reasonable to conclude that his primary duties are to directly interact with customers and vendors in order to source, purchase, and sell equipment, and to coordinate all logistical and financial transactions associated with these duties.

To the extent that the company is doing business, the beneficiary is the sole employee available to perform the affairs of the company. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The actual duties themselves 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).

Furthermore, in response to USCIS's request, the petitioner submits photographs of virtual office space secured by the General Manager. While the original petition estimated that the U.S. company would require the General Manager to supervise four additional employees, no additional employees have been hired as of the date of filing the extension petition. Furthermore, based upon the photographs submitted, the office space secured for the United States operation accommodates only two workers. The petitioner has not explained who is performing the administrative tasks of the operation that were originally supposed to be alleviated by hiring a financial assistant and a commercial assistant. The petitioner also fails to indicate whether, if they were hired, where the physical premises of the company would be located since the physical premises secured for the company at this time will not accommodate more than one additional employee.

Essentially, the beneficiary, at the end of his one-year period in L-1A status, is performing non-managerial duties and continuing to lay a foundation for the petitioner's development of the Central and South American market to the overall benefit of both the U.S. as well as the Dutch entity. However, the regulations governing the extension of a new office petition require the petitioner to establish that it has grown to the extent that it requires the beneficiary to primarily perform qualifying duties pursuant to section 101(a)(44)(A) or (B) of the Act.

The record shows that the beneficiary was the petitioner's sole employee at the time the petition was filed. Counsel emphasized that the business relies on "developing relationships with vendors and customers in the Latin American market," and noted that the U.S. company is a "relatively flat operation as there are not very many levels of management." The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "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 (9<sup>th</sup> 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)). It is appropriate for USCIS 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).

Furthermore, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS 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 USCIS 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, or is otherwise not sufficiently operational, 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 primarily managerial or executive position.

At the time of filing, the petitioner was a one-year-old company established for the purpose of developing the Latin American market for its parent company Loosbrock Europe BV. The beneficiary, while charged with overall oversight of the business and making contacts with the executive officers of potential clients, is also the sole employee working for the U.S. company. Thus, it is reasonable to conclude, and has not been shown otherwise, that he provides any services the company is retained to provide, and performs all other administrative and operational tasks associated with the operation of the business. The petitioner has not established that it had a reasonable need for the beneficiary to perform primarily managerial or executive tasks as of the date of filing.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of her time on non-qualifying duties. Again, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

The petitioner has not demonstrated that the beneficiary, as a manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.