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U.S. Citizenship
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Services

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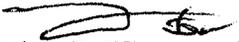
IN RE: Petitioner:
Beneficiary:

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)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its president 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 Texas and is described as being engaged in the business of "investment and sales." The petitioner claims a qualifying relationship with Corporacion Merolex, C.A. of Venezuela. 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 three years.

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 executive or managerial capacity; or (2) the petitioner had been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

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 the director erred and that the record establishes that the beneficiary will be employed primarily in an executive capacity. Counsel further asserts that the record establishes that the petitioner had been doing business for the previous year. Counsel argues that the director failed to properly consider the evidence in the record. In support of the appeal, counsel submits a brief.

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 executive capacity.

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 in the initial petition 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. However, on appeal,

counsel to the petitioner clearly and repeatedly indicates that the petitioner is seeking to classify the beneficiary as an executive employee. Therefore, the AAO will limit its consideration of this appeal to this classification.

The only description of the beneficiary's duties appears in a letter dated June 28, 2004. This letter, which was submitted with the original "new office" petition, was resubmitted with the current petition and quoted by counsel in his appellate brief. Counsel asserts that the following description "clearly described [the beneficiary's] duties as President" of the petitioner:

As President, [the beneficiary's] position in the United States subsidiary will be to oversee and direct the initial development of the new corporate office including the establishment of corporate financial and management goals. His duties will include the hiring of staff and independent contractors and delegating work to the appropriate entities. He will be responsible for reviewing monthly financial and marketing reports and determining the appropriate corporate goals in response to these reports. In sum, [the beneficiary] will have the authority to develop and guide the overall operational and policy management of the United States affiliate during his period of residency.

Counsel described the petitioner's business in a letter dated July 17, 2005 as being "engaged in business and investment in the United States." Counsel elaborated as follows:

One such venture is the establishment of an [sic] subsidiary corporation and investment opportunity. On March 25, 2004, [the beneficiary] and [the petitioner] incorporated German Cars Auto Shop, L.L.C. ("German Cars") under the laws of Texas.

Counsel previously asserted in his letter of July 6, 2004, that the petitioner owns 100% of German Cars. However, the 2004 IRS Form 1065 for German Cars indicates that the petitioner only owns 49% of German Cars. An unrelated party, [REDACTED] owns the remaining 51% interest.

The petitioner also provided payroll records, a Form 941, and tax documentation indicating that the petitioner had one employee in 2005 and no employees in 2004. The petitioner's single employee in 2005 was not the beneficiary. However, the petitioner also provided payroll records and a Form 941 indicating that German Cars employed four people, including the beneficiary, in the quarter preceding the filing of the petition.

On July 21, 2005, the director requested additional evidence. Specifically, the director requested additional evidence regarding the staffing of the petitioner and evidence that the petitioner and the foreign entity have been doing business.

In response, the petitioner provided Forms 941 for both the petitioner and German Cars for the second quarter of 2005. These forms indicate that, while the petitioner still employed its single employee during this time period, German Cars replaced three of its four employees. However, the beneficiary was still employed by German Cars, along with three other employees, during this period and was not employed by the petitioner.

The petitioner also provided a letter dated July 27, 2005 in which it asserts that it employs eight people and

owns 50% of German Cars. All of the employees are described as either automobile service employees or receptionists. While the petitioner and counsel indicate that the petitioner employs, and the beneficiary supervises, a "general manager," the petitioner fails to reveal the identity of this general manager. Therefore, the record is unclear as to whether the beneficiary is actually the general manager or the position is vacant. The record also does not explain why the wage reports for both entities identify a total of five employees while the petitioner lists eight employees excluding the beneficiary.

Finally, the petitioner provided invoices indicating that the petitioner, in addition to "investing" in German Cars, also sold equipment in October and November 2004 and in May and June 2005. Counsel confirmed in his letter dated August 14, 2005 that the petitioner began selling equipment in October 2004, almost three months after the "new office" petition was approved. Other than a lease, tax documents, bank statements and letters, letters from the purchasers of the equipment described in the invoices, and counsel's statements, no other evidence of the petitioner's business activities was presented.

On August 25, 2005, the director denied the petition. The director concluded, *inter alia*, that the petitioner failed to establish that the beneficiary will be employed primarily in an executive or managerial capacity.

On appeal, counsel to the petitioner asserts that the director erred and that the record establishes that the beneficiary will be employed primarily in an executive capacity.

Upon review, the petitioner's assertions are not persuasive. It should be noted that the AAO carefully reviewed all of the evidence presented by the petitioner, both initially and in response to the Request for Evidence, and that this decision is being rendered after the AAO's thorough review of this evidence and counsel's brief.

Title 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 Citizenship and Immigration Services (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 United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 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. Individuals will not be deemed executives under the statute simply because they have executive titles or because they "direct" the enterprise as the owners or sole managerial employees. 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.*

In this matter, the petitioner has provided a vague and nonspecific job description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, while the petitioner identifies the beneficiary's duties as primarily setting goals and guiding "the overall operational and policy management" of the United States operation, the petitioner fails to specifically define these goals or policies or to provide any credible description of the beneficiary's duties. 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). 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). Absent a credible and detailed description of the beneficiary's duties, it cannot be concluded that he is employed primarily in an executive capacity.¹

Based on the record as presented, it appears as if the beneficiary is primarily the first-line supervisor of the employees providing automobile repair and maintenance services. An executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Therefore, these duties may not be used to classify the beneficiary as an executive. While the petitioner does not need to establish that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees in order to classify him as an executive, the petitioner must still establish that the beneficiary will be primarily employed as an executive. As the supervision of non-supervisory or non-professional employees is not a duty which could qualify the beneficiary as an executive, the petitioner's listing of these duties for the beneficiary may not result in his classification as an executive unless it can be demonstrated that he is otherwise primarily performing executive duties. In this matter, the petitioner has not established that the beneficiary will primarily perform executive duties since the job description lists either non-qualifying duties, i.e., acting as a first-line supervisor, or vaguely described duties, which may or may not be qualifying.

It is appropriate for 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

¹It is noted that the director concluded in her decision that CIS "understands the other four employees will provide the actual services and not the beneficiary." In reviewing the record, the AAO disagrees with this statement and hereby withdraws this conclusion. As indicated above, the record is entirely devoid of any coherent job description for the beneficiary, or for the subordinate employees, which could provide CIS with an understanding as to what he and the other employees will actually do on a day-to-day basis. Consequently, the record does not establish that the beneficiary will not provide services directly to customers.

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 record is rife with inconsistencies. For example, while the petitioner and counsel assert that the petitioner has eight employees, the wage reports for the petitioner and German Cars indicate that these two companies have never employed more than five people. Moreover, while counsel indicates in his letter dated July 6, 2004 that the petitioner owns 100% of German Cars, the petitioner asserts in its letter of July 5, 2005 that it owns 50% of German Cars and the petitioner's 2004 IRS Form 1065 shows that the petitioner only owns 49% of German Cars. 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). 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. *Id.* at 591.

Accordingly, the petitioner has not established that the beneficiary will be primarily engaged in performing executive duties, and the petition may not be approved for that reason.²

Beyond the decision of the director, a related matter is whether the beneficiary will be employed by a qualifying organization.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

Evidence that the United States and the foreign entity are still 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."

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

²As indicated above, while the petitioner appears not to be claiming that the beneficiary may be classified as a manager, the record would nevertheless fail to support this assertion. The AAO concludes, beyond the decision of the director, that the petitioner has not established that the beneficiary will be primarily employed as a manager for the same reasons articulated above.

As explained above, the record indicates that the beneficiary is and will be an employee of German Cars and not of the petitioner. The petitioner alleges that it owns and controls German Cars, a Texas limited liability company. As the petitioner is owned and controlled by the foreign entity, if the petitioner is established to own and control German Cars, then a qualifying relationship between the foreign entity and German Cars would be established. However, as explained above, the record contains serious inconsistencies regarding the ownership and control of German Cars. In fact, the only objective evidence regarding ownership and control, i.e., the 2004 IRS Form 1065, Schedule K, indicates that the petitioner owns 49% of German Cars. Therefore, as the petitioner has not established that the beneficiary is employed by a qualifying organization, the petition may not be approved for this additional reason.

The second issue in the present matter is whether the petitioner has been "doing business" for the preceding year.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

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[.]

"Doing Business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization." 8 C.F.R. § 214.2(l)(1)(ii)(H).

As explained above, the petitioner provided invoices indicating that the petitioner, in addition to purchasing a minority interest in German Cars, also sold equipment in October and November 2004 and in May and June 2005. Counsel confirmed in his letter dated August 14, 2005 that the petitioner began selling equipment in October 2004, almost three months after the "new office" petition was approved. Other than a lease, tax documents, bank statements and letters, letters from the purchasers of the equipment described in the invoices, and counsel's statements, no other evidence of the petitioner's business activities was presented.

In view of the above, the AAO agrees that the petitioner has not established that it has been "doing business" in a regular, systematic, and continuous manner for the required one-year period. First, the petitioner's acquisition of a minority interest in German Cars is not "doing business." Likewise, the business activities of German Cars cannot be used to establish that the petitioner is "doing business" since German Cars has not been established to be a qualifying organization. Second, the petitioner's occasional sale of equipment to a handful of customers is not "doing business." As explained above, the petitioner must establish that it continuously, systematically, and regularly provided goods and services. However, the record indicates that the petitioner sold equipment to a few customers on a few occasions in late 2004 and mid 2005. Not only did the petitioner fail to engage in any measurable business activity until three months after the approval of the initial "new office" petition, the petitioner engaged in business thereafter episodically. While the size of these few transactions may have been substantial, the record is devoid of any evidence establishing that the infrequency of these transactions is customary for the type of business in question.

Accordingly, the petitioner has not established that the petitioner had been "doing business" during the year preceding the filing of the petition, and the petition may not be approved for that reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

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.