

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave, N.W. Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

D1



File: SRC 03 157 51669 Office: TEXAS SERVICE CENTER Date: MAR 17 2005

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

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

IN BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

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

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its 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 claims to be the subsidiary of [REDACTED], located in Hyderabad, India, and is engaged in retail trade. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that (1) the petitioner had been doing business as defined by the regulations during the previous year; and (2) the beneficiary had been and will continue to 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, the petitioner contends that the denial was based on an incorrect interpretation and application of the law, and that Citizenship and Immigration Services (CIS) based the denial on incorrect factual assumptions. In support of these contentions, the petitioner 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) 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 management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The first issue in this matter is whether the petitioner has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(b). The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term “doing business” as “the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.” In this matter, the “previous year” for purposes of the doing business analysis is from May 6, 2002 (the date the initial petition was granted) through May 6, 2003 (the date of the initial petition’s expiration).

In this matter, the petitioner acquired a Conoco gas station and convenience store in November of 2002, and was intending to acquire similar interests in an Exxon gas station and convenience store at the time of the filing of the petition.<sup>1</sup> The director found the initial evidence submitted by the petitioner to be insufficient to establish that the petitioner had been doing business. Consequently, the director issued a request for evidence on June 16, 2003, which required the petitioner to submit documentation evidencing the business conducted by the petitioner in the previous year. In a response dated August 11, 2003, the petitioner provided a Motor Fuel Supply Agreement with

---

<sup>1</sup> The petitioner submits a copy of a Letter of Intent to Lease Property and Business Assets for Chestnut Exxon, Inc. which is dated May 1, 2003. The petitioner has not provided any evidence that it has begun operating this location, nor that it employs any of the persons named on the accompanying organizational chart. As a result, the AAO will focus on the organizational structure and business operations of the Conoco station for purposes of this decision.

Conoco, which outlined the guidelines under which the petitioner must operate, in addition to copies of invoices and purchase orders for convenience store merchandise.

The director denied the petition, finding that the language of the Motor Fuel Supply Agreement indicated that the petitioner did not have “full control of the product.” The director concluded that as a result of this language, the petitioner could not have been doing business as required by the regulations.

On appeal, the petitioner restates the definition of “doing business,” and asserts that there is no requirement for the petitioner to have full control of a product in order to satisfy the requirements of the definition. The petitioner continues by asserting that this narrow basis for denial indicates an assumption by the director that the petitioner’s only product is gasoline. The petitioner contends that the director failed to acknowledge the additional products and services provided by the petitioner in its operation of the convenience store, and claims “the denial has no basis in the law as written in the relevant regulations.”

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the past year. However, the AAO’s basis for denial differs from that of the director.

When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). In this matter, the director merely states that the petitioner had not demonstrated that it had full control of the product, and fails to explain how this conclusion undermines eligibility under the regulations. Although the appeal will be dismissed, the AAO notes that the director based her decision, in part, on an improper standard. The director’s comments are inappropriate. The director should not hold a petitioner to her undefined and unsupported view of “full control of the product.” The director does not discuss the extensive documentation submitted by the petitioner, such as invoices and purchase orders, which was clearly submitted as evidence of the petitioner’s business operations for the previous year.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted indicates that the petitioner began operating the Conoco gas station and convenience store in November of 2002. Specifically, the record contains copies of its Cigarette and/or Tobacco Products Tax Permit and its Sales and Use Tax Permit, both dated November 6, 2002, as well as a letter entitled “Notice of Acceptance as an S-Corporation,” dated November 8, 2002. The petitioner submitted numerous invoices evidencing the purchase of food items and tobacco products beginning in December of 2002, and further provided evidence of wages paid to employees beginning in December of 2002. Finally, the petitioner submitted copies of its monthly “Operations Analysis” reports, beginning in November of 2002, which demonstrated the petitioner’s sales, wages paid, and operating costs.

While this evidence certainly is acceptable to show that the petitioner was doing business from November 2002 through May 2003, there is no documentation contained in the record that explains the petitioner's operations for the first six months of the beneficiary's stay. The definition clearly requires the continuous provision of goods and services, yet the petitioner has failed to submit evidence establishing its business activities for the remainder of the first year. The beneficiary was granted a one-year stay, beginning on May 6, 2003, in which to open a new office. There is no evidence of any business activity until November of 2003, which is six months after the beneficiary's visa was granted. The petitioner, therefore, has not established that it was regularly, systematically, and continuously providing goods and/or services during the entire year preceding the filing of the extension request. For this reason, the visa petition will not be approved.

The second 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.

In the initial petition, counsel submitted a letter from the U.S. petitioner, dated April 23, 2002, outlining the beneficiary's duties while employed in the United States. The petitioner described his duties as follows:

[The beneficiary] is responsible for identification of opportunities, solicitation, bidding, [and] negotiation of deals for purchase, investigation, financing, and [the] ultimate decision to acquire or not acquire the identified retail locations. He receives little or no supervision from anyone in the company.

As such, we believe he qualifies for extension of L1-A status as a senior manager of our company. [The beneficiary] has started executing [a] marketing plan which was submitted to [CIS] with the original petition.

On June 16, 2003, the director requested additional evidence. Specifically, the director requested more specific information with regard to the staffing of the gas station, including the exact positions held by the employees as well as their educational background.

In a response dated August 11, 2003, the petitioner submitted a timely reply in response to the director's request. Specifically, the petitioner submitted a statement with regard to the staffing of the Conoco station, which provided that there were four employees, including the beneficiary. The beneficiary, acting as president, was identified as performing purchasing as well as running the cash register. [REDACTED] identified as the manager, was designated with the evening shift, although no specific description of her duties during this shift was provided. [REDACTED] identified as a supervisor, was described as an employee who only worked on weekends and dealt with the paperwork. Finally, [REDACTED], a cashier, was identified as working on the morning shift. The first three employees were delegated as "graduates" with regard to their educational backgrounds, whereas [REDACTED] had only attained a 12<sup>th</sup> grade education.

On October 23, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the record indicated that the beneficiary would be engaged in the day-to-day operations of the business.

On appeal, the petitioner asserts that the director's decision constituted an incorrect factual assumption by [CIS], and that a detailed job statement outlining the beneficiary's duties was submitted. The petitioner alleges that this statement clearly established that the beneficiary was in charge of the business operation, had full control of business affairs, and did not engage in the day-to-day activities of the business. The petitioner resubmits a copy of this statement on appeal.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(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 is primarily employed in a managerial or executive capacity.

Prior to adjudication of the petition, the petitioner contended that the beneficiary had been employed in a capacity that was primarily managerial or executive in nature. In support of these contentions, the petitioner submitted a brief statement in its letter dated April 23, 2002 (provided above) as well as a brief statement on its "employee's history record." The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In this matter, 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 petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

Here, the petitioner claims that the beneficiary's duties are exclusively managerial or executive, yet the identified duties of the beneficiary in the record include non-managerial and non-executive tasks. For example, the petitioner states that the beneficiary will operate the cash register and is in charge of purchasing. Clearly, the beneficiary is performing client-related services that will create a basis for expanding the petitioner's market interest in the United States. 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).

In the appeal brief, the petitioner alleges that it provided a detailed and concise breakdown of the beneficiary's duties, and provides a copy of this document for reference. The document relied upon by the petitioner, however, is a detailed discussion of the beneficiary's duties *abroad* while working for the foreign entity, and not a description of the beneficiary's duties in the United States. This document, with a subtitle of "Managing Partner, [REDACTED], India," was submitted in response to the director's specific request for a detailed description of the beneficiary's duties while abroad. The petitioner, therefore, cannot rely on this description as an exact duplicate statement of the beneficiary's duties in the United States without providing corroborating evidence to support these contentions. 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).

The record indicates that there is a cashier for the morning shift, an evening shift employee, and a person who works only on weekends on the paperwork associated with the business. Consequently, it is reasonable to conclude that the beneficiary is required to perform much of the daily activities to keep this 24-hour business

running. It is unlikely that the morning shift and evening shift employees work seven days per week. In addition, there is no mention of any employee who is designated to work the afternoon shift, nor is there any mention of a stock clerk or gas station attendant. By its own admission, the petitioner acknowledges that the beneficiary performs menial, non-managerial tasks, such as operating the cash register. The actual duties themselves reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Since the record contains insufficient evidence to support the assertion that the beneficiary is primarily employed in an executive capacity, the AAO cannot conclude that the beneficiary will be employed in a primarily executive or managerial capacity.

The definitions of executive and managerial capacity 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 prove 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). In this case, the petitioner continually asserts that the beneficiary's position and duties associated therewith meet the regulatory definitions. In addition, the petitioner relies on the beneficiary's title of president as a conclusory measure from which to determine that he is performing high-level responsibilities. However, the second part of the test has not been satisfied. The record demonstrates that the beneficiary and three other employees are working at the U.S. entity. Since one employee works the night shift, one employee only works on weekends and only does paperwork, and the third is a morning shift cashier, there is insufficient evidence to conclude that the beneficiary *primarily* performs high-level duties. Although the beneficiary receives an officer's compensation in lieu of wages, the quarterly wage report prepared by the petitioner for the quarter ending March 31, 2003 indicates that the following net wages were paid to each of the remaining employees for this three-month period:

██████████ supervisor (weekends, paperwork):	\$1,385.25
██████████ (cashier, morning shift):	\$1,800.81
██████████ evening shift):	\$1,523.76

These figures indicate that on average, each of these employees earns approximately \$550.00 per month, or approximately \$137.50 per week. It is virtually impossible to conclude, therefore, that these three employees are employed on a full-time basis, given the minimum wage requirements of today. The petitioner did not provide any documentation establishing the hours worked by these employees. Consequently, given the fact that this is a 24-hour location and that the petitioner continually alleges that the beneficiary is a "large stakeholder" in the U.S. operation, it is reasonable to conclude that the beneficiary's duties are primarily non-managerial or non-executive in nature.

Finally, the petitioner relies on the intent to lease the Exxon location and the continued efforts of the beneficiary to find other investment opportunities as a basis upon which to extend the petition. These contentions are unacceptable for two reasons. First, 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, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation *one year* within the date of approval of the petition to support an executive or managerial position.

There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. The petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition will not be approved.

Beyond the decision of the director, the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's authorized period of stay expired on May 6, 2003. However, the petition for an extension of the beneficiary's L-1A status was filed on May 14, 2003, almost eight days following the expiration of the beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

In addition, the petitioner has failed to establish that a qualifying relationship exists between the foreign entity and the U.S. entity. The petitioner has submitted a copy of a stock certificate, dated April 11, 2002, evidencing that the foreign entity, [REDACTED] owns 1,000 shares in the U.S. petitioner. However, the Minutes of the Organizational Meeting of the Board of Directors of the petitioner, dated April 13, 2002, indicates that the beneficiary offered to purchase 10,000 shares of the petitioner's stock, and that this offer was subsequently accepted by the Board of Directors. Consequently, there are inconsistencies not clarified with regard to the true ownership of the U.S. petitioner. 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).

Since the petitioner claims to be a wholly-owned subsidiary of the foreign entity, the documentation currently contained in the record is inconsistent and thus contradicts this claim. In this case, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the complete minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. The petitioner has failed to provide sufficient evidence establishing the ownership composition of the U.S. entity. For this additional reason the petition will not be approved.

Furthermore, although the petitioner claims that it is a wholly-owned subsidiary of the foreign entity, there are problems with the petitioner's corporate composition. The petitioner submitted corporate documentation evidencing its status as an S-Corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See Internal Revenue Code, § 1361(b)(1999)*. A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. Accordingly, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved.

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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.