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

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, D.C. 20536



FILE: SRC-02-094-50337 Office: TEXAS SERVICE CENTER

Date: DEC 9 - 2003

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for 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:



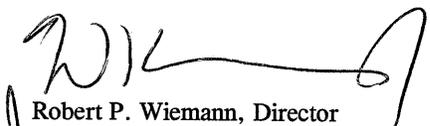
**INSTRUCTIONS:**

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
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 is a Texas corporation engaged in acquiring businesses for investment and development. Specifically, at the time of filing the petition, the petitioner had established two convenience stores. One convenience store is in operation, but the site for the second is not yet available. The petitioner also has plans to open two additional convenience stores and a restaurant. The petitioner seeks to extend the employment of the beneficiary as president and director in its new office. The director denied the petition, concluding that the petitioner had failed to establish that it could support a managerial or executive position.

On appeal, petitioner's counsel asserts that the director's denial of the petition was unsupported by the evidence and contrary to the law. Counsel submitted a brief in support of the beneficiary being classified as an executive.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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(1)(3) further 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 (1)(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.

Further, pursuant to 8 C.F.R. § 214.2(l)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(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 issue in this proceeding is whether the beneficiary will be employed in the U.S. company in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 petition, the petitioner declared that the beneficiary directs, oversees, and controls the day-to-day operations of the corporation. As an executive of the company, the beneficiary will receive an annual salary of \$30,000. It is also noted that the beneficiary holds an "academic degree" and has five years of experience in business management. In addition, the petitioner submitted a letter, signed by the beneficiary as president, outlining the beneficiary's duties as follows:

- Establish policies and procedures for marketing, sales, inventory requisition, contract procurement and contract negotiation;
- Direct the hiring, firing, supervision and placement of employees;
- Develop, implement and revise as necessary company policies, procedures and business plans;
- Oversee and evaluate the implementation of company policies, procedures and plans and provide ongoing assessment as to the extent to which the same are achieved;
- Formulate strategies to establish and develop the new enterprise and oversee the implementation of such strategies;
- Plan, develop and implement *business expansion* strategies for new enterprise, oversee staffing and investigate adding potential additional locations once the main retail establishment is in place;
- Research and develop plans to establish and expand regional sales, including company promotional and marketing schemes;
- Evaluate, assess and revise current financial operations, budget, procedures, policies, accounts and other aspects of the enterprise on an on-going basis

with a view toward achieving corporate goals.  
(emphasis in the original)

In a request for evidence, the director requested the following additional evidence as it pertains to this issue: (1) the number of individuals employed by the U.S. company; (2) whether the employees are considered managers or professionals; (3) tax forms, including IRS Forms 940 and 941, reflecting the current employees of the petitioner; (4) information as to how the beneficiary qualifies as an executive; (5) a detailed list of the beneficiary's duties; and, (6) the names and job titles of the beneficiary's subordinates.

In response, petitioner's counsel asserted that the beneficiary qualifies as an executive because "he does not engage in the day to day management of the investment, but has hired employees to manage the enterprise." Counsel also attached a copy of the petitioner's letter, which was already submitted with the petition, and noted that reference should be made to it for a more detailed description of the beneficiary's job duties. No further information pertaining to the beneficiary's position as an executive was provided.

In regards to the petitioner's employees, counsel submitted two lists titled "[a]t C-store" and "[a]t Restaurant" that identified individuals employed at two businesses established by the petitioner.<sup>1</sup> The "C-store" employed twelve individuals, which included the beneficiary as executive director, one manager, two assistant managers, and eight cashiers. The "Restaurant" was identified as employing nineteen individuals, which included the beneficiary, two managers, two assistant managers, four shift leaders, four cashiers, two cooks, one dish washer, and three steam table operators. Counsel further referred to the employees as "managerial, administrative and assistants, [but] not professional." Also submitted were "New Hire Reporting Forms," which identified fourteen of the above named employees, and thirteen IRS Forms W-4, which identified all but fourteen of the "new hires." No forms were provided for the remaining seventeen claimed employees.

The petitioner also submitted a quarterly tax return and an employer's quarterly report for one of its convenience stores, which was acquired after the date of filing the petition. On each form, the petitioner noted it employed eleven individuals,

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<sup>1</sup> It is unclear from the record which of the petitioner's businesses is considered the "C-store."

yet did not list the names, social security numbers, or wages of the employees in the space provided.

In her decision, the director concluded that the petitioner had failed to establish that it could support an executive position in which the beneficiary would be relieved from performing non-qualifying duties. The director found that the beneficiary was not overseeing the business, but rather performing the day-to-day functions of managing the convenience store. As there were no individuals employed by the petitioner who would relieve the beneficiary from performing the non-executive duties, the director could not find that the beneficiary was employed as an executive.

In a brief submitted on appeal, counsel asserted that the U.S. petitioning organization would support employment of the beneficiary as an executive. Counsel claimed that the beneficiary, as a major stockholder and chief executive officer of the corporation, has wide latitude in discretionary decision making and receives only general supervision from any other entity or individual. Counsel further asserted that the beneficiary's role as an executive is clearly indicated in his "having acquired, staffed and implemented the operations of two separate business operations and proceeded with the purchase of an additional three retail stores within the first start-up year of the U.S. enterprise." As a result of the beneficiary's improvement, modification, and expansion of the business operations, counsel suggested that the beneficiary has clearly been engaged in an executive position.

On review, the record is not persuasive in establishing that the beneficiary will be employed in the U.S. organization in a primarily managerial or executive capacity. Pursuant to 8 C.F.R. § 214.2 (1)(3)(v)(C), within one year of the approval of a petition for an individual employed in a new office, the U.S. operation must be able to support an executive or managerial position. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

In examining the managerial or executive 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(1)(3)(ii). The petitioner has failed to provide a comprehensive, detailed description of the beneficiary's duties as an executive of the petitioning organization. Although the petitioner provided

eight statements pertaining to the beneficiary's job duties, the majority are simply restatements of the descriptions already given. For instance, the petitioner claims that the beneficiary will "plan, develop and implement business expansion strategies for [the] new enterprise," "formulate strategies to establish and develop the new enterprise," "develop, implement and revise as necessary company policies," and "oversee and evaluate the implementation of company policies." These four statements, although phrased differently, identify the same job functions. It is impossible to infer from the descriptions provided the beneficiary's role as an executive in the organization. Simply 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, 193-94 (Reg. Comm. 1972).

The petitioner failed to submit any detailed evidence, either on appeal or in response to the director's request, pertaining to the beneficiary's specific job functions. The director specifically asked that a detailed description of the beneficiary's job be provided. However, counsel resubmitted a letter already in the record in which the majority of information provided was merely assertions from the beneficiary himself, as president of the petitioning organization. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is executive or managerial in nature, and what proportion is actually non-executive. See *Rep. of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In addition, counsel, in response to the director's request, declared that the beneficiary qualifies as an executive because "he does not engage in the day to day management of the investment, but has hired employees to manage the enterprise." This argument is circular. Simply restating a portion of the regulations as proof that the beneficiary is acting as an executive is not sufficient to establish an executive capacity. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As noted above, counsel asserted that the beneficiary supervised individuals who relieve him from performing the day-to-day management of the organization. The employees were identified

as managers, assistant managers, shift leaders, and cashiers. However, there are several inconsistencies in the record which indicate that the beneficiary is not relieved from performing non-qualifying duties. First, the petitioner has not clearly identified the employees of the one convenience store presently being operated by the petitioner. The new hire forms and IRS Form W-4 submitted by the petitioner indicate those employees who were hired to work in one of the convenience stores the petitioner anticipates opening at a future date. As these forms are the only evidence submitted to substantiate the presence of subordinate employees, the AAO cannot conclude that the convenience store currently operated by the petitioner has any employees to perform the non-qualifying duties of the business. Therefore, it must be assumed, and has not been proven otherwise, that the beneficiary is performing non-managerial and non-executive functions of the business. 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).

Second, a strict reading of the nature of the petitioner's business undermines counsel's assertion that managers and assistant managers in the convenience relieve the beneficiary from performing non-qualifying duties. The petitioner declared on the I-129 petition that it was engaged in acquiring sites for investment and development. The petitioner's described business is not running a convenience store or restaurant. Therefore, the petitioner is obligated to provide evidence that there are subordinate employees who relieve the beneficiary from performing the non-qualifying duties of acquiring sites or businesses for development, such as investigating potential locations for future stores, performing market research of the business to be acquired, or obtaining contractors for the development. As the petitioner failed to submit any evidence supporting such, the AAO cannot conclude that the beneficiary is performing primarily managerial or executive job duties. Again, 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. *Id.*

The petitioner has not established that the U.S. business, after one year of operation, is able to support an executive or managerial position. The petition was approved on January 29, 2001, thereby requiring the petitioner to be sufficiently operational by January 29, 2002. The majority of the evidence

in the record pertains to businesses that the beneficiary anticipates opening at a future date, rather than those currently operating. 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, 249 (Reg. Comm. 1978). As it has determined that the U.S. company cannot employ the beneficiary in an executive or managerial position, the petitioner is ineligible by regulation for an extension.

Beyond the decision of the director is the issue of whether the foreign and U.S. companies are qualifying organizations. Throughout the record, the two organizations have been referred to as both affiliates and as a "parent and branch office." In addition, counsel identified the foreign company as a sole proprietorship, while the petitioner declared that the foreign business was a partnership. In the same letter from the petitioner, dated January 27, 2002, the petitioner claimed that there would be "two partners" running the business abroad while the beneficiary is employed in the United States. No additional evidence was submitted regarding the existence of a second partner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). These inconsistencies preclude a finding that the foreign and U.S. businesses are qualifying organizations. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.