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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: EAC 01 168 53112 Office: VERMONT SERVICE CENTER Date: DEC 12 2003

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)

ON BEHALF OF PETITIONER:
[Redacted]

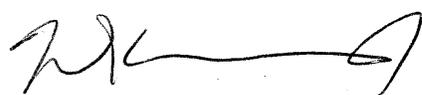
INSTRUCTIONS:

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 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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a merchandise wholesaler business, specializing in news items. It seeks to employ the beneficiary temporarily in the United States as the manager of its new office for one year. The director determined that the petitioner failed to establish that within one year, the beneficiary would function at a senior level within the organizational hierarchy, and that the evidence did not establish that the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties. The director also determined that the record lacked sufficient evidence to establish that the new office would support a managerial or executive position within one year.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties will be managerial or executive in nature and that the U.S. entity as a new office will be in a position to support the beneficiary as manager or executive within one year of operation.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or

her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(1)(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 (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 with 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 serves 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(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2001 as a merchandise wholesaler business, whose principal activity is the operation of a newsstand and convenience store. The petitioner states that the U.S. entity is a branch office, located in Mambai, India. The petitioner declares one employee and \$250,000 in anticipated gross annual income. The petitioner seeks the beneficiary's services in order to open a new office and render services as an operations manager for a period of one year, at a yearly salary of \$32,000.

The first issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity, in that the U.S. entity will be able to support a managerial or executive position within one year of operation as a new office.

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 described the beneficiary's proposed job responsibilities as manager as follows:

Analyzing the market conditions in New York and other parts of the United States to determine an appropriate marketing policy; determining the scope of business operations in the United States and designing appropriate operational and managerial structures in order to get this company to be fully operational and profitable; Be responsible for all aspects of operating the company, including selection of location, personal matters, pricing policies, determination of products to be offered, negotiations with appropriate business partners etc. The duties will also include overseeing and managing the finances of the company, including review and determination of appropriate strategies to make the company profitable; Developing and implementing plans for both short-term as well as long-term growth; [and] determine and set corporate policies, goals and objectives. [sic]

In response to the director's request for additional evidence, counsel stated that the duties of the beneficiary as a manager are as follows:

[The beneficiary] is responsible for formulation of all policies regarding the export and import sections of our business, including determination of appropriate designs, sampling and product specifications. He is in charge of the marketing team, including decisions regarding hiring and appropriate stock levels, personnel management and other issues involving administration and operations. Coordinating between clients and the production department. Managing activities of international traffic division of import-export agency and negotiates settlements between foreign and domestic shippers. Plan and direct flow of air and surface traffic moving to overseas destinations. Supervise workers engaged in receiving and shipping freight, documentation, way billing, assessing charges, and collecting fees for shipments. Negotiation with domestic customers, as intermediary for foreign customers, to resolve problems and arrive at mutual agreements. Negotiate with foreign shipping interests to contract for reciprocal freight-handling

agreements. Examine invoices and shipping manifests for conformity to tariff and customs regulations. Contact customs officials to effect release of incoming freight and resolve customs delays. Prepare reports of transactions to facilitate billing of shippers and foreign carriers. Etc.

In a letter dated June 17, 2001, in response to the director's request for additional evidence a representative of the parent company in reference to the beneficiary's duties stated as follows:

As Operations Manager [the beneficiary] has to research and analyze market and economic data that affects the long term and short term demand for any company's products [The beneficiary] will have to analyze the impact of such market and economic forces on the demand for our products which include: restaurant supplies, . . . candy, . . . films Such analysis of long term and short term impact of economic and market forces could take up to and including 5 hours per week.

The second most important task of the alien beneficiary will be: collection, compilation, classification and analysis of data on customer preferences. Such collection is expected to be done through both figures of sales of our retailers and also through direct field testing for our products.

In the instant case, the individual would be expected to collect, compile, classify and analyze consumer preferences with regard to ethnic food products (Asian and South Asian), ethnic video's etc This aspect of work of the alien beneficiary will take at least 15 hours.

Analyze the marketing strategies of the company, including pricing, distributional structures, advertisement and develop effective strategies to increase market share. In order to be able to do this, the alien would have to not merely analyze and understand our own marketing strategies, but also our competitor['s] strategies. Additionally, he would also have to analyze the impact of our competitor['s] strategies on our market share The above tasks will take about 15 hours per week.

Finally, the incumbent will also be expected to review our current distributional channels and design better distributional channels. This would imply analysis of existing contracts, exclusivity agreements, pricing structures and recommending changes depending on their effectiveness and compliance. Such duties will require broad understanding of market behavior and contract behavior. This will take about 3 to 5 hours. In addition, miscellaneous work will account for an additional 3 to 5 hours.

The director determined that the record lacked sufficient evidence to establish that the new office would be able to support a managerial or executive position within one year, that the record did not establish that within one year the beneficiary would function at a senior level within an organizational hierarchy, and that there was insufficient evidence to show that the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties. Accordingly, the director denied the petition.

On appeal, counsel asserts that the director's decision was "erroneous" and that the petitioner has, in fact, provided sufficient evidence to show that the beneficiary will be employed in the United States in a managerial or executive capacity. Counsel further reiterates the beneficiary's proposed services and duties. Counsel continues by listing the proposed duties of the subordinate employees, which is very similar to the organizational chart of the foreign entity.

Upon review, the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. The information provided by the petitioner describes the beneficiary's proposed duties only in broad and general terms. The petitioner has not provided a day-to-day description of the beneficiary's proposed duties and responsibilities. Furthermore, the following duties are without any context in which to reach a determination as to whether they would be qualifying: analyzing market conditions, determining the scope of business operations, responsible for all aspects of operating the U.S. entity, and overseeing and managing the finances of the company. The use of the position title "operations manager" is not sufficient to establish that the

beneficiary will be employed by the U.S. entity in a managerial or executive capacity.

Furthermore, there is no evidence to show how much of the time spent by the beneficiary will be allotted to managerial or executive duties and how much to other non-qualifying duties. The petitioner contends that the beneficiary will be manager of operations for the U.S. entity. However, rather than managing a major department, subdivision, function, or component of the organization, it appears that he will actually be performing the marketing and sales functions of the business. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service is not considered to be employed in a managerial or executive capacity. *Matter of Church of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The evidence submitted fails to establish that the U.S. entity will be able to support a managerial or executive position within one year; that the beneficiary would function at a senior level within an organizational hierarchy within one year; or that the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. See 8 C.F.R. § 214.2(1)(3)(v)(C). The business plan submitted by the petitioner fails to detail sufficient projections to establish that the U.S. entity will realize growth within one year sufficient to support a managerial or executive position. Although the evidence demonstrates that the petitioner intends to hire two new employees within one year of operation, the petitioner has not provided detailed position descriptions to show that they will be employed in other than non-professional positions. The evidence submitted is also insufficient to establish that the U.S. entity will be able to remunerate the beneficiary within one year of operation. Rather than the beneficiary functioning at a senior level within the organizational hierarchy within one year of operation, it appears from the record that he will continue to perform the functions of the organization and carry out the day-to-day services of the business. The evidence submitted by the petitioner, including business plan for the U.S. entity, is insufficient to substantiate the petitioner's contention that it will be able to support a managerial or executive position within one year.

On review of the complete record, it cannot be established that the beneficiary will be employed in a primarily managerial or

executive capacity. The vague position description is insufficient to establish that the beneficiary's proposed job duties will be managerial or executive in nature. The petitioner has failed to provide persuasive evidence to establish that the beneficiary will be managing the organization, or managing a department, subdivision, function, or component of the U.S. entity, at a senior level of the organization hierarchy, within one year of operation. The record does not demonstrate that the U.S. entity will contain within one year of operation, the organizational complexity to support a managerial or executive position. The record establishes that, at best, the beneficiary will be supervising non-professional employees and performing the day-to-day services of the organization, rather than functioning in a managerial or executive capacity.

A second issue in this proceeding is whether the petitioner has secured sufficient physical premises to house a new office. The petitioner, in response to the director's request for additional evidence that was issued on May 18, 2001, provided copies of a business agreement for a transfer of property between Monika, Inc., and Rahul News, Inc. dated, July 9, 2001. The agreement showed that Rahul News, Inc. acquired title, rights, and interest in a Candy and Newspaper business located at 175 Second Avenue, in New York City for the sum of \$40,000. The petitioner also submitted as evidence a copy of a lease agreement between Urban Associates and Monika Inc., showing that the premises known as 175 Second Avenue is a retail newsstand. The petitioner also submitted a copy of an Assignment and Assumption agreement dated July 9, 2001, between Rahul News, Inc. and Monika, Inc., for Store #4 at 179 Second Avenue in Manhattan. In response to the director's request for additional evidence counsel stated, "regarding physical premises to house the company-The petitioner has purchased a company in the United States along with all assets for the sum of US \$40,000." The petitioner also submitted details of the sale - asset purchase agreement (Exhibit E), bill of sale (Exhibit F), and a copy of the lease and assignment of lease (Exhibit G).

Although the director concluded that the petitioner had submitted sufficient evidence to establish that the petitioner had secured sufficient physical premises to house a new office, this decision must be overturned. The evidence contained in the record regarding this acquisition and assignment demonstrates that as of July 9, 2001, the petitioner secured physical premises to house the new office. However, the petition may not be approved as a sufficient physical premises to house the new office had not been secured at the time of the filing of the petition as required by 8

C.F.R. § 103.2(b)(12). It is noted that the petition in the instant matter was filed on April 28, 2001. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Com. 1978). The AAO cannot consider facts that come into being only subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981); *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). Therefore, the decision of the director is overturned as it relates to the petitioner's physical premises.

On appeal, the petitioner provides copies of a management agreement dated October 15, 2001, between Raju Jiwani, Suleman Virani, and F&D News, Inc. and Rahul News, Inc.; a copy of an Assignment of Lease Agreement between Mason Fruit & Produce Brokerage Company, Inc. and Suleman Virani and Raju Jiwani and Corner News Grocery, Inc. dated October 10, 2001; a Certificate of Incorporation of Corner News & Grocery, Inc. dated October 4, 2001; and other supporting real estate documents to establish the petitioner's ability to support a managerial or executive position within one year of operation. Again, there is no evidence to establish that the documents existed at the time of the petition was filed as required by the regulations. Therefore, the documents will not be considered in determining the beneficiary's eligibility.

Beyond the decision of the director, the petitioner has not established that the petitioner and the foreign entity maintains or will maintain a qualifying relationship pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G). The record contains minimal documentary evidence regarding the extent of ownership and control between the U.S. and foreign entities. As the appeal will be dismissed on other grounds, these issues 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.