

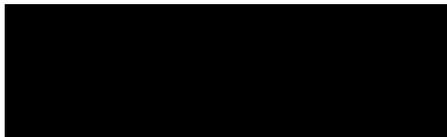
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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



File: EAC 01 080 51908 Office: VERMONT SERVICE CENTER Date:

DEC 18 2003

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)

SELF-REPRESENTED

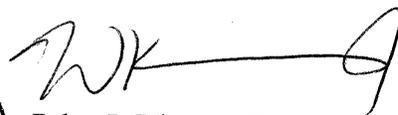
**INSTRUCTIONS:**

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 which 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 Director, Vermont 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 described as being in the hospitality industry and is interested in investing in commercial property. It seeks authorization to employ the beneficiary temporarily in the United States as a manager. The director determined that beneficiary has not been and will not be employed in a primarily managerial capacity.

On appeal, the petitioner submits a brief and previously submitted documents.<sup>1</sup> The petitioner asserts that the beneficiary functions as a manager in the foreign entity.

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(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.

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

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<sup>1</sup> The petitioner will be considered self-represented. The individual who signed the Form G-28, prepared this instant case, and filed the appeal is not qualified to act as an attorney or representative in this proceeding as defined in the regulations as 8 C.F.R. § 292.1 (a).

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.

At issue in this proceeding is whether the beneficiary has been performing primarily executive or managerial job duties and whether the petitioner will support a managerial or executive position within one year.

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.

The foreign entity, [REDACTED] (d.b.a. [REDACTED]) submitted a letter with the initial petition describing the beneficiary's current duties as Managing Partner. The foreign entity is described as conducting business as "General Merchants." [REDACTED] Business Partnership Agreement states that its business is a "Grocery & Off License." The partners are listed as [REDACTED] (the beneficiary) and his spouse, [REDACTED], with each owning 50% of the business.

The petitioner, [REDACTED] located in New Jersey, stated it is a wholly-owned subsidiary of [REDACTED]. The form I-129 states that the petitioner will be in the hospitality industry. According to its business plan, the petitioner also proposes to operate as investors and dealers.

The beneficiary's duties abroad were described by the foreign entity, in pertinent part, as follows:

He manages the overall operations of the business with full charge of general administration, marketing, sales, purchase and business development.

Controls administration, finance, government related matters, contract, and is in charge for personnel and other related activities of the business, to conduct the same in an orderly manner to ensure smooth and efficient operation overall. Oversees the function related to accounting, and taxation.

Directs activities and increases the sales of the company. Meets potential customers, maintains liaison with other companies and large consumers of the company's products. Deals with and decides day-by-day operations of the company.

He is assisted by staff in due performance for his duties for the company. The staff reports to the beneficiary. He has the authority to hire and fire staff as necessary. The beneficiary reports direct to the Board of Partners.

On February 10, 2001 the director issued a request for additional evidence requesting the following:

Additional evidence that would show that the beneficiary is employed in a qualifying managerial or executive capacity abroad.

A complete position description for all your employees abroad, including one for the beneficiary's position. A breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

A list of foreign employees that were supervised by the beneficiary that identifies each employee's position title, as well as the minimum education and experience requirements for the position.

Additional evidence to establish that the beneficiary will be employed in an executive or managerial capacity in the U.S. firm including one for the beneficiary's position. A breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

A copy of your business plan for commencing your start-up company in the United States, giving specific dates (time-table) for each proposed action, for the two years starting with the date of filing the petition, December 11, 2000.

The petitioner re-submitted the initial petition's supporting documents in response to the request for evidence. This resubmitted evidence included the same business plan for the U.S. entity. Also included in the initial petition were organizational charts for both the foreign entity and the U.S. entity. The foreign entity submitted a letter describing the beneficiary's duties as a general manager overseas. The petitioner submitted a letter describing the beneficiary's proposed duties.

The director denied the petition noting that the record does not persuasively demonstrate that the preponderance of the beneficiary's duties are primarily managerial or executive in nature. Though requested, the petitioner did not provide a position description for all the individuals employed in the beneficiary's department in the foreign company. Specifically, the petitioner did not provide a position description for the beneficiary's position that clearly identifies his day-to-day activities nor did the petitioner submit a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

The director found that petitioner elected to not provide a credible and comprehensive business plan for its start-up organization. The director found that the actual products and services to be provided by the beneficiary have not been identified and cannot be discerned in the evidence of record. The director determined that the beneficiary did not show who its target customers would be nor how it planned to move the new office in the direction where, within one year, it will be functioning in a manner that would require a manager or executive.

Additionally, the director states that the petitioner elected to not provide a position description for all the individuals employed at the U.S. entity including one for the beneficiary's position that clearly identifies their day to day activities, nor did the petitioner submit a breakdown of hours devoted to each of the employees' proposed job duties on a weekly basis. Based on the evidence, the director presumed that the beneficiary would be engaged primarily in the non-managerial, day-to-day operations involved in producing a product or providing a service. Furthermore, the petitioner did not establish that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the corporation

In summary, the director found that the record did not persuasively demonstrate that the preponderance of the beneficiary's duties are primarily managerial or executive in nature. The director also found that the petitioner did not demonstrate through the provision of credible documentary evidence that the new office will be functioning in a manner that would support an executive or

managerial position within one year of approval of the petition.

On appeal, the petitioner reiterates the description of the beneficiary's job duties at the foreign entity and does not provide any additional credible documentary evidence that strengthens its argument that the beneficiary has been engaged in primarily managerial job duties as defined by 8 U.S.C. § 1101(a)(44)(A).

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(iv). The petitioner must provide evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved special knowledge and that the alien's prior education, training, and employment qualifies him or her to perform the intended services in the United States.

The foreign entity, according to partnership agreement on record, operates as a Grocery and Off-License. The record indicates that SPAR is a small grocery store with a limited inventory. The petitioner provided sales invoices from K Mart Wholesaler that lists merchandise that [REDACTED] purchased from them and sold on its business premises. This merchandise includes, cigarettes, alcoholic beverages, and groceries. The petitioner states that the beneficiary has been employed as the Managing Partner of this grocery store and that there are two employees in addition to the beneficiary. Mrs. [REDACTED] (the beneficiary's spouse), is employed as a Manager and is listed in the Partnership Agreement as a 50% owner of [REDACTED]. On appeal, the petitioner has not provided a detailed job description but merely states that she manages the business operations. The third employee is Mr. [REDACTED] whose title has not been provided. The petitioner states that Mr. [REDACTED] renders secretarial and other managerial services and supports the beneficiary's operations."

On appeal, the petitioner resubmits the letter from the foreign entity that was provided in the initial petition that generally describes the duties of the beneficiary at the parent company. This letter states that the beneficiary "directs activities and increases the sales of the company. He meets potential customers, maintains liaison with other companies and large consumers, of the company's products."

In the appeal, the petitioner elaborates on the description of the beneficiary's duties. The petitioner employs words and phrases such as "steer the function of the company", "evaluate the basic feasibility of the business", "directs the overall business operations" and "analyzes the operating procedures". These words and phrases are generalities. For example, the petitioner does not identify what operating procedures the beneficiary analyzes or describe how the beneficiary directs the overall business operation.

Additionally, the petitioner explains that as part of the beneficiary's duties he "directs the marketing policy of the company. He reviews the market trends and analyze [sic] the same to determine the consumer needs, evaluate the market potential in terms of volume . . . develops the overall marketing strategy and organize effective sales of the company's products." Marketing duties, by definition, qualify as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or provide a service 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).

The petitioner asserts that the supervision of staff is not essential to determine the eligibility for the L-1. However, if the beneficiary does not manage a staff then it must be demonstrated that he manages an essential function. As stated in the regulations "if no other employee is directly supervised, [the alien] functions at a senior level within the organizational hierarchy or with respect to the function managed". 8 C.F.R. § 214.2(1)(ii)(B)(3).

It is unclear if the petitioner asserts that the beneficiary is a function manager instead of a manager who supervises a staff. Based on the record before the AAO, the beneficiary does not supervise and control the work of other supervisory, professional, or managerial employees. Additionally, the petitioner has not stated that the beneficiary manages a function or component of the foreign entity and that the function is an essential function.

Based on the record of this proceeding, the petitioner has not provided sufficient evidence to establish that the beneficiary has been employed primarily in a managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary has been managing a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties. Based on the evidence submitted, it cannot be found that the beneficiary has been employed in a primarily executive or managerial capacity. The appeal is dismissed.

It is noted that the petitioner provided documents that indicate SPAR is owned as a partnership with the two partners being the beneficiary, Mr. [REDACTED] as a 50 percent owner and

his wife [REDACTED] as a 50 percent owner. It is noted that [REDACTED] is also referred to as [REDACTED] and also works at SPAR as a manager. Additionally, [REDACTED] is listed as a member of the board of directors for the U.S. entity, Gossops Parade. [REDACTED] applied for an L-2 dependent application based on the instant petition.

Beyond the decision of the director, the petition indicates that the beneficiary and his spouse each own 50 percent of the foreign entity, and thereby of the petitioning company. 8 C.F.R. § 214.2(1)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this case, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. In addition, the fact that both owners of the original foreign corporation are the beneficiary and dependant in this instant petition raises the question of whether the parent organization will still be doing business so that a qualifying relationship exists pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G). As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

In addition to the decision of the director, there are inconsistencies regarding the existence of the foreign parent company. The Business Partnership Agreement is dated August 1, 1997 and states that the beneficiary and his spouse became partners in August 1997. However, the pre-printed partnership agreement form states that the form itself was revised and updated in 1998 and 1999. Additionally, the Inland Revenue Tax Form SA104 Partnership (Short) states that the beneficiary stopped being a partner in a Grocery, Off-License on February 15, 1998. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

Finally, it is noted that the Form I-129 requests a change of change of status for Mr. [REDACTED]. However, Mr. [REDACTED] is not eligible for a change of status because he entered the United States under the Visa Waiver program as found in the regulations at 8 C.F.R. § 248.3(f).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been

met.

**ORDER:** The appeal is dismissed.