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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: SRC 01 157 56525 Office: TEXAS SERVICE CENTER Date: FEB 27 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)

IN BEHALF OF PETITIONER: [Redacted]

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INSTRUCTIONS:

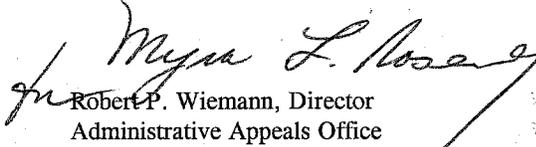
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is described as being engaged in import/export and retail sales. The record indicates that the beneficiary originally was granted L-1 classification as a manager or executive. Currently, the petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States in the capacity of a manager or executive, namely as its president and chief executive officer. The director determined that the petitioner had not established that the beneficiary would be employed in a qualifying managerial or executive capacity. The director also determined that the petitioner had provided insufficient evidence of its intention to employ the beneficiary in the United States temporarily.

On appeal, counsel presents a brief and additional documentation.

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 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 seeks to enter the United States temporarily to continue 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.

To obtain an extension of a visa petition's validity, 8 C.F.R. § 214.2(l)(4) states, in pertinent part:

- (i) *Individual petition.* The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

The first issue to be addressed in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity.

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

"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:

"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 Form I-129, Petition for a Nonimmigrant Worker, for an extension, was filed on April 18, 2001. The petitioner has indicated that the beneficiary will be paid \$37,200.00 per year. The last petition for extension was filed on March 17, 2000, and was approved as valid for one year from April 21, 2000 through April 21, 2001.

The articles of incorporation indicate that the petitioner was established in the State of Georgia on October 27, 1999. At the time that the petitioner filed the initial petition upon which this extension is based, the petitioner was considered a "new office." Therefore, the following provisions at 8 C.F.R. § 214.2(l)(14)(ii) also shall apply:

New offices. A visa petition under section 101(a)(15)(L) 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)(iii)(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.

It is noted that the record contains a properly signed Form G-28, Notice of Entry of Appearance as Attorney or Representative, dated April 13, 2001. A second Form G-28 submitted with the appeal is dated October 16, 2001; however, the second notice is signed by a new representative and the beneficiary, and is not signed by the petitioner's official representative, as indicated in the initial petition's submission.

8 C.F.R. § 103.3(a)(1)(iii)(B) states, in pertinent part:

Meaning of affected party. For purposes of this

section and sections 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter.

8 C.F.R. § 103.3(a)(2)(i) states, in pertinent part: "The affected party shall file an appeal on Form I-290B." 8 C.F.R. § 103.3(a)(2)(v) states:

Improperly filed appeal--(A) Appeal filed by person or entity not entitled to file it--(1) Rejection without refund of filing fee. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

8 C.F.R. § 103.2(a)(3) states, in pertinent part:

An applicant or petitioner may be represented by an attorney in the United States...A beneficiary of a petition is not a recognized party in such a proceeding...Where a notice of representation is submitted that is not properly signed, the application or petition will be processed as if the notice had not been submitted.

8 C.F.R. § 292.4 states, in pertinent part:

During proceedings before the Service, substitution may be permitted upon the written withdrawal of the attorney or representative of record, or upon notification of the new attorney or representative.

No written withdrawal of the first attorney is included in the record. It is noted that the second Form G-28 is signed by the beneficiary. Therefore, under 8 C.F.R. § 292.4, Appearances, the first Form G-28 must be considered the only appropriately filed Form G-28.

The appeal has not been filed by the petitioner, or by any entity with legal standing in the proceeding, but rather, by unrecognized counsel for the beneficiary. Therefore, the appeal has not been properly filed. However, in the interest of due process, the matter will be reviewed on certification pursuant to 8 C.F.R. § 103.4.

On appeal, counsel states that the petitioner has established two retail jewelry and perfume outlets, Prestige Jewelers and Perfume Sensation, and is expanding even further. Counsel also states

that the beneficiary opened the perfume store in October 2000, and the jewelry store in February 2001. Counsel states that the beneficiary "oversaw the expansion of Prestige Jewelers from a cart-venue to a kiosk" in June 2001. Counsel also states that the foreign entity has decided to expand its growth to wholesale, that the beneficiary has been actively involved in finding vendors for this new venture, and that the beneficiary traveled to Houston and Atlanta in August 2001 to establish contact with potential vendors for the foreign entity's clothing lines. Counsel indicates that business cards from these potential vendors have been attached as evidence of the beneficiary's travels. Counsel also states that the petitioner hopes to expand into the gas station/convenience store business and has included a "Letter of Intent to Buy" for such an enterprise.

Counsel states that the petitioner has hired five United States workers, "all of whom work under the supervision and management of the beneficiary." Counsel states:

He [the beneficiary] is essential to the continued expansion of Paramount Tradelink, and is currently in the midst of several projects that require his continued attention. One of these projects includes setting up the import/export aspect of the U.S. branch, such as in the import of Prestige Creations clothing lines to the potential vendors [REDACTED] consulted with during his Houston and Atlanta business trips. [REDACTED] will be performing essential [sic] the same role in this process as he did in that of setting up the retail outlets; he will be scouting for locations, negotiating contracts, and hiring personnel who will oversee the daily operations of this aspect of the company.

The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1990).

Counsel also asserts that the beneficiary has been performing in an executive capacity, and has obtained the physical premises of the company, developed and implemented policies, and staffed the retail outlets. Counsel states that the beneficiary does not participate in the daily operation of the outlets, but only guides the company on a "general executive/management level," and ensures that the goals and policies of the petitioner are being met. Counsel states that the beneficiary's hard work has resulted in the establishment of two retail outlets, "providing both jobs and revenue for the U.S. economy."

Included in the record are two State of Georgia Certificates of Registration, dated October 5, 2000 and March 1, 2000,

respectively, for [REDACTED] (variety stores) and [REDACTED] Inc." (jewelry-sporting). Both companies are listed with the same addresses at [REDACTED], with a "location" listed [REDACTED] Georgia.

It is noted that the petitioner's initial location was a cart space in the center of a shopping mall location. Now, the petitioner indicates that the business has grown a bit and has advanced to a kiosk-type location, also in the center of the shopping mall. Neither of these spaces exceeds 100 square feet in dimension.

Lease agreements for the perfume store indicate the following:

| Leased space | Lease date | Lease period |
|--------------|------------|---------------------|
| 81 sq. ft. | 10/05/00 | 10/05/00 - 12/31/00 |
| 81 sq. ft. | 01/26/01 | 02/01/01 - 07/31/01 |
| 81 sq. ft. | 06/04/01 | 08/01/01 - 01/31/02 |

Lease agreements for the jewelry store indicate:

| Leased space | Lease date | Lease period |
|--------------|------------|---------------------|
| 81 sq. ft. | 01/26/01 | 07/22/01 - 07/21/02 |
| 81 sq. ft. | 02/02/01 | 02/22/01 - 07/21/01 |
| 100 sq. ft. | 06/01/01 | 06/01/01 - 05/31/02 |

No explanation is furnished of the petitioner's apparent homelessness and lapse of any business location for the first business, the perfume store, during the entire month of January 2001.

The petitioner has submitted its profit and loss statements for the period of January through May 2001 indicating an income of \$15,207.16 during that timeframe. The accountant preparing the petitioner's statements states:

A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

Limited reliance can be placed on the validity of the facts presented in the financial statements since the documentation submitted is neither an audited or complete statement of the petitioner's financial situation. No further supporting documentation is included in the record to reflect the assertions made in the financial documentation, or contained within the unaudited financial statements.

The petitioner's organizational chart indicates the beneficiary as the president and CEO of the company. This chart lists four sales associates, with a penciled-in addition of another "Sales" individual. It is not clear whether this addition was added to indicate another layer of supervision or simply to add another employee to the chart. No other information regarding this change is included in the record. Another hand-written submission lists five employees in addition to the beneficiary.

The petitioner also has submitted a self-generated "Payroll Summary" indicating payments made to 5 employees (other than the beneficiary) from January through March 2001.

Also included in the record is a copy of the petitioner's unsigned, undated Form 941, Employer's Quarterly Federal Tax Return, indicating a payment of \$7,939.82 to employees during the quarter ending December 31, 2000. This listing indicates that four employees, other than the beneficiary were paid wages ranging from \$1,987.41 to \$33.00 during the quarter.

Included in the record are copies of several business cards from Houston, Texas and Decatur, Georgia. Also included in the record are a few invoices of purchases made by the petitioner for jewelry and perfume. These invoices are dated from October 2000 to June 2001.

The petitioner also has submitted a letter dated September 10, 2001, indicating an intent to purchase a Chevron Food Mart gasoline and convenience store in Leesburg, Georgia, for \$35,000.00, including inventory, with a \$5,000.00 down payment. This evidence cannot be considered, as 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In an unsigned letter dated April 9, 2001, Mohammedali Merchant, Vice-President and General Manager of the foreign entity, states that it is necessary to extend the beneficiary's stay in the United States "because [REDACTED] continues to be an important executive in our U.S. operations...." In this letter, the general manager states that the beneficiary served as president and CEO of the foreign entity from April 1995 until the date of his transfer to the United States company. He also states that the beneficiary's duties abroad included:

[D]irecting and coordinating the company's sales and financial departments. As such, he was responsible for formulating and administering departmental policies and developing long-range goals and objectives. His duties included reviewing analyses of activities, costs, and

forecast data to determine departmental progress toward the stated objectives.

Here, the writer indicates the beneficiary's duties in the United States:

██████████ is the executive responsible for overseeing the start-up and development of Prestige Creation's U.S. subsidiary. He is responsible for managing the day-to-day operations of Paramount Tradelink Inc. ██████████

██████████ supervises all financial and administrative operations for the company, over which he exercises complete discretionary authority. His duties included supervising the development and implementation of the Company's marketing strategies, including advertising campaigns and company promotions. ██████████ is responsible for recruiting and training the staff of the U.S. office.

Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In a submission from counsel dated July 9, 2001, in response to a request for additional evidence, counsel stated:

All US positions supervised by ██████████ are sales associates. Although no degree is required it is preferred and or a combination of education and extensive sales experience. Please note that Mr. Bhayani serves as an Executive of the company as well as managing an essential function.

Counsel also asserts that the beneficiary previously acted as an executive in both his role with the foreign entity and with the petitioner.

The petitioner also has submitted the organizational chart of the foreign entity indicating that "Prestige Creations" employs a total of 14 individuals, including the beneficiary. These employees are indicated as: a president/CEO [the beneficiary; elsewhere also listed as the "sole proprietor"]; a vice president/general manager; a vice-president/manager, a marketing manager; a material manager/quality controller; an "accountant, banking, billing and taxation;" an area sales manager for wholesale and retail; an upcountry wholesale salesman, two retail sales "girls," two storekeepers at the warehouse, and a "clerk" and a "peon." A 2001 organizational chart submitted by counsel depicts virtually an identical organizational representation.

The petitioner also has submitted copies of invoices for the

foreign entity. In another document from the foreign entity, it lists salaries for each employee with no other documentation to support its assertions.

Included in the record is an "Agreement for Sale & Transfer" dated September 5, 1997, for the purchase of a Super Bazaar Premises stall location in Mumbai, India, by the beneficiary. The beneficiary also purchased a "stall" in 1995. A partial document from the Office of the Inspector under the Bombay Shops and Establishments Act, 1948, states that the business known as "Prestige Creation" is involved in the "wholesale & retail of textile" and is located at "shop no. 38, Super Bazar" in Mumbai, India. It is not clear from the evidence submitted how these two "stall" locations within the bazaar can physically accommodate virtually all of the foreign entity's employees, at least seven of whom are listed as managers or executives.

The petitioner has provided insufficient evidence to demonstrate that the beneficiary's duties have been or will be primarily managerial or executive in nature. A manager or executive may manage or direct the management of a function of an organization. However, it must be clearly demonstrated that the function is not directly performed by the manager or executive. The petitioner has not established that the beneficiary functions at a senior level within an organizational hierarchy. The petitioner has not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The petitioner has not established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing the services of the corporation. The evidence in the record does not demonstrate that the beneficiary has been or will be involved in something other than performing the day-to-day functions and operational activities of the company. Upon review, it cannot be found that the beneficiary has been or will be employed in the United States in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The second issue raised by the director in his denial was whether the petitioner intended to employ the beneficiary in the United States temporarily.

8 C.F.R. § 214.2(1)(3)(vii) states:

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 evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States.

On appeal, counsel asserts that the beneficiary is the CEO of the foreign entity, and that the foreign entity is still doing business. Counsel also states that the majority of the beneficiary's family remains in India, that the beneficiary has no intention of abandoning the company or his family, and that he will be returning to India as soon as he has finished establishing the offices and infrastructure of the petitioner. No further evidence is included in the record to support the assertions made by counsel. Based upon the evidence in the record, it is not clear how the petitioner expects to satisfy the requirements of 8 C.F.R. § 214.2(1)(3)(vii). Therefore, the petition may not be approved for this additional reason.

Beyond the decision of the director, the documentation contained within the record raises the question of whether a qualifying relationship exists between the United States entity and the foreign entity. The petitioner indicates that it is a wholly owned subsidiary of Prestige Creations, the foreign entity. However, documentation in the record indicates that the foreign entity owns only 500 shares of 100,000 authorized shares of the petitioner's common stock. No other documentation of ownership, stock ledgers, or proof of purchase of the petitioner's stock is included in the record. In addition, the circumstances surrounding the foreign entity's existence, as they specifically pertain to establishing the beneficiary's qualifications as a manager or executive prior to entry into the United States, also are in question. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.