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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 Eye Street N.W.
Washington, D.C. 20536

NOV 07 2003

File: SRC 03 049 50652 Office: TEXAS SERVICE CENTER Date:

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)

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 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as owning a gas station with an attached retail store. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily executive capacity.

On appeal, counsel asserts that the director erred in denying the nonimmigrant petition because "the [b]eneficiary's duties satisfy the requirements of executive and managerial capacity as set out in the INA regulations."

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.

Furthermore, 8 C.F.R. § 214.2(1)(14)(ii) states that 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 (1)(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 United States petitioner was incorporated in 2001 and states that it is a 51 percent owned subsidiary of Sunshine Agencies, located in Karachi, Pakistan. The initial petition was approved and was valid from February 1, 2002 until January 31, 2003, in order to open a new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$30,000. In the instant petition, on the Form I-129, the petitioner declares four employees and a projected \$150,000 in gross revenues.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a 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 instant petition, the Form I-129 listed the beneficiary's title as president. The petitioner submitted a letter that described the beneficiary as "responsible for overseeing the entire operation. He has full discretion to make all financial decisions, hiring & firing of managers, & executive decisions concerning the welfare of [the petitioner]." This letter also stated that as "[p]resident and [e]xecutive [d]irector, [the beneficiary] is responsible for overall direction and operation of the company. He is involved in all facets of the business including new hires of the management staff, establishment of financial relations, business expenditures and corporate planning and strategy."

The director issued a request for additional evidence asking the petitioner to list the four employees of the petitioner and state their job titles. In response to the request for evidence, the petitioner provided the list of four employees, which included the beneficiary, with job titles and duties. The petitioner listed the following duties for the beneficiary:

- a) Overall management of the corporate affairs & periodic

- review of its performance [sic] of short & longterm [sic] objectuves.[sic]
- b) Supervision & control of business activities.
 - c) Management of staff, finance & contacts.
 - d) Sales polices [sic] & pricing of merchandise.
 - e) Hiring & firing of staff.
 - f) Inventory control policies.
 - g) Business control policies.
 - h) Business development policies.
 - i) Legal matters.
 - j) Co-ordinate with CPA for monthly, Quarterly [sic] & yearly tax returns.
 - k) Any other assignment [sic] related to business growth.

The remaining three employees are listed as a procurement manager and two cashiers.

In the director's decision, the director determined that the petitioner has not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. Also, the director determined that the petitioner has not established 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 business.

On appeal, counsel expands on the beneficiary's previously provided job description and states the beneficiary's responsibilities include:

- a) Management of the overall operation of business
- b) Supervises and controls the work of other employees. The beneficiary directs the work of the store manager who manages subordinate employees.
- c) Has authority to recruit employees, as well as terminate their employment if need be.
- d) Oversees the daily activities of company store by supervising and consulting with his store manager.

It is noted that the petitioner and counsel never effectively clarified whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. Regardless, the petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel states that "it is not required for L-1A classification

that the [b]eneficiary be supervising other professionals or managers." However, the AAO notes that counsel asserts on appeal "the [b]eneficiary's duties satisfy the requirements of executive and managerial capacity as set out in the INA regulations." Therefore, as stated above, the petitioner must establish that the beneficiary meet all the elements listed for both an executive and a manager.

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)(ii).

The beneficiary's duties listed in the instant petition employs words and phrases such as "overseeing," "establishment of financial relations, business expenditures and corporate planning and strategy," "overall management of the corporate affairs & periodic review of its performance [sic] of short and longterm [sic] objectuves [sic]," "policies". These words and phrases are, however, generalities. For example, they do not identify what concrete "policies" which the beneficiary will develop, plan or establish. The petitioner does not describe in detail the duties the beneficiary supposedly performs.

In sum, the petitioner described the beneficiary's duties in general terms, largely paraphrasing the statutory and regulatory executive and managerial requirements. The petitioner's vague descriptions provide insufficient detail to allow CIS to determine what are the beneficiary's responsibilities. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Additionally, counsel explains that the petitioner engages in a type of business "which commonly employs persons who do not necessarily have qualifications that fall within the meaning of 'professionals and managers'." Counsel asserts that the common practice of the industry "involves the management of individuals who are considered *general* managers per se by way of vocational experience rather than holding a bachelor's degree." [Emphasis in original.] Therefore, counsel asserts, "the [b]eneficiary's management of the establishment operated by the [p]etitioner involves activities that encompass the direction and coordination of managerial staff." This explanation does not satisfy the requirement that the beneficiary, to act in a primarily managerial capacity, must supervise and control the work of other supervisory, professional, or managerial employees, or manage an essential function within the organization, or a department or

subdivision of the organization. 8 U.S.C. § 1101(a)(44)(A)(ii). In effect, counsel concedes that the beneficiary does not supervise professionals or managers, as those terms are defined in the Act.

Even though the petitioner and counsel keep expanding the beneficiary's job duties, all the descriptions are vague and general. Based on the record of proceeding the petitioner has not sufficiently demonstrated how the duties of the beneficiary will be primarily executive or managerial in nature and how he will not perform day-to-day functions of the company.

Furthermore, in its response to the request for evidence, the petitioner submitted Form 1120 Corporate Income Tax Return for tax year 2002, signed on April 14, 2003, that indicated that the deduction listed for salaries and wages was \$3,040. However, on appeal the petitioner submitted Form 1120 Corporate Income Tax Return for tax year 2002, signed on May 15, 2003, which showed that the deduction listed for salaries and wages was \$25,580. The petitioner does not explain this discrepancy. 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). The submitted documents necessarily raise questions regarding the reliability of the remaining evidence. *Id.*

In the instant petition the Form I-129 stated that the petitioner employed four persons. On appeal counsel asserts "the denial is incorrect in its assertion that the firm employs four [personnel]; the [beneficiary], a procurement manager and two cashiers. In the fourth quarter of 2002, M.K. International added two employees." Counsel explains because of a change in business climate "[the petitioner] now employee's [sic] two (2) full time [sic] employees on its night shift." However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

On appeal, counsel emphasizes that the petitioner is currently underway with expansion plans. Counsel states that "[the beneficiary] will oversee the operation of company stores. Individual store managers will report directly to [the beneficiary]." However, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for the petition to be based on future hiring of personnel or acquisition of additional businesses. If the business is not sufficiently operational after one year, the

petitioner is ineligible by regulation for an extension. In the instant case, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has not established how the beneficiary acts in a primarily executive or managerial capacity. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.