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

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ADMINISTRATIVE APPEALS OFFICE
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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

FILE: EAC-01-121-51703 Office: VERMONT SERVICE CENTER

Date: NOV 19 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, 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 a new company engaged in the acquisition and operation of convenience stores in the United States. It seeks to temporarily employ the beneficiary in the United States as president of the organization. In a decision dated December 5, 2001, the director denied the petition finding that the beneficiary was not acting in a primarily managerial or executive capacity. The petitioner filed a Motion to Reopen and Reconsider, providing an affidavit and additional documentation, and asserted that CIS "misunderstood both the nature of the [petitioner's] enterprise and the job duties to be performed by the beneficiary in connection with that enterprise." The director issued a second decision granting the motion to reopen, but again concluded that the beneficiary would not be employed as a manager, as the term is defined in the regulations, because the beneficiary would not be supervising professional employees.

In an appeal dated April 6, 2002, petitioner's counsel asserted that the petitioner's "start-up operation," which was established to purchase several convenience stores, will be able to support a managerial position within one year of approval of the petition, and therefore, satisfies the criteria required in the regulations. Counsel indicated that a brief and evidence would be provided to the AAO within thirty days of the appeal. To date, after a thorough review of the record, neither counsel nor the petitioner has submitted any subsequent documentation.

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)(v) further states if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed

in a new office in the United States, the petitioner shall submit evidence that:

- (i) sufficient physical premises to house the new office have been secured;
- (ii) 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;
- (iii) 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 organization structure of the foreign entity.

In the present case, the issue is whether the petitioner has established that, within one year, the U.S. operation will be able to support a managerial or executive position.

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 initial petition, the petitioner indicated that it seeks to employ the beneficiary as President to direct the acquisition and operation of convenience stores. The petitioner submitted a letter stating that it employed nine individuals, all of whom will report to the beneficiary, and that the beneficiary's duties as a Managing Partner would include the following:

[O]verall operations, including the hiring and firing of all personnel, establishing work schedules, reviewing inventory and register records prepared by

shift managers, reviewing monthly reports . . . and reconciling same with internal records, selecting an accountant for preparation and filing of all financial reports.

In a notice dated March 23, 2001, the director requested additional information in support of a qualifying relationship between the foreign and U.S. entities, the managerial responsibilities of the beneficiary abroad, an organizational chart of the foreign entity, a breakdown of the proposed job duties of the beneficiary in the U.S. entity, and the management and personnel structure of the U.S. entity. As the director's request for additional evidence is included in the record, the specific requests posed by the director will not be repeated herein.

In response to the director's request for information regarding the U.S. entity, the petitioner indicated that it anticipated hiring four individuals: an operations analyst, a financial analyst, an account executive and a part-time administrative assistant. The petitioner also provided a proposed organizational chart and a proposed list of job duties for the Operations Director/Partner, Director Partner, operations analyst, financial analyst, account executive and administrative assistant. The proposed organizational chart indicated that the beneficiary would be employed as the Operations Director/Partner, and that all four employees would report to both the beneficiary and the other Director/Partner.

In a notice dated June 26, 2001, the director requested further information pertaining solely to the U.S. entity. Specifically, the director asked that the petitioner submit a detailed copy of the business plan, evidence that office premises have been secured, the number of employees hired, the number of convenience stores acquired, and evidence that the beneficiary, as a 50% partner in the U.S. entity, will be employed for a temporary period in the United States.

In the petitioner's response to the director's second request, the petitioner submitted, among other things, a second organizational chart that listed the beneficiary as Partner/Director of Finance rather than the Operations Director, as previously noted. The other partner of the petitioning organization was listed as Partner/Director of Operations. According to the revised chart, two employees would report to the beneficiary, a sales/purchasing manager and a bookkeeper. A brief description of the duties of the sales manager and

bookkeeper was provided. However, there was no information regarding their educational background.

In his initial decision, the director determined that the beneficiary did not meet the requirements of a manager or executive as defined in 8 C.F.R. §§ 214.2(1)(1)(ii)(B) and (C). In his decision, the director stated that the beneficiary would not be supervising other supervisory, professional, or managerial employees, nor would the beneficiary be managing an essential function or department of the organization since the organization is comprised of one convenience store. He also noted that even if the petitioner were to expand its holdings to include other convenience stores, "nothing in the record suggests that those potential additions to your holdings will require the services of supervisory professional managers who would report to the beneficiary." In regards to the executive role, the director found that the beneficiary's responsibilities of hiring workers, increasing inventory, and establishing relationships with "an eye to future acquisitions of other small convenience stores" was not sufficient to establish that the beneficiary would be acting in an executive capacity. Therefore, the director denied the petition.

The petitioner submitted a Motion to Reopen and Reconsider, stating first that the beneficiary should be considered a functional manager, as permitted by the regulations. In addition, petitioner's counsel indicated that the CIS did not give sufficient weight to the fact that the petitioning entity is a new organization and "therefore the level of proof regarding the beneficiary's managerial duties is reduced." Because the petitioner is a start-up operation, and because it has demonstrated a "good faith business plan," counsel asserts that the petitioner has met the requirements outlined in the regulations.

Also submitted with the petitioner's motion was an affidavit from the second partner of the petitioning organization attesting that the beneficiary will be performing the following managerial duties:

[D]irecting the operation, hiring key personnel, maintaining the financial records of the company, preparing the quarterly and annual tax filings required by the state and federal tax departments, establish and coordinate the marketing plans for this an [sic] future stores.

The director granted the motion to reopen, but again denied the petition. In his second decision the director stated that CIS is not persuaded that a manager of a convenience store who supervises non-professional staff qualifies as a manager as defined in the regulations. The director further noted that merely conferring the title of manager or president does not mean that the position is managerial or executive in nature.

On appeal, petitioner's counsel asserts that the director's decision ignores both law and facts, and states the following:

The facts are that the beneficiary will not be working as the 'head cashier' of a 'small convenience store' but rather as the Chief Officer of a partnership specifically organized to own and operate a number of stores whose gross sales will reasonable [sic] be equal [to] \$5 million to \$10 million a year. The law further provides that a start-up operation needs only show that there is a reasonable expectation that the operation will support a managerial position within one year not that it is presently supporting such a position.

The record does not support a finding that the beneficiary will be working in a primarily managerial or executive capacity within one year from the approval of the petition. In examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. 8 C.F.R. § 214.2 (1)(3)(ii). In the present case, although the petitioner submitted extensive documentation describing various positions in the partnership, there is no description provided for the beneficiary's particular position. Throughout the record, the beneficiary's position within the petitioning entity is referred to as: director, L-1A executive, president and chief executive, chief officer of partnership, managing partner, president, chief operating officer, operations director, and director of finance. In addition, in one organizational chart the beneficiary is named as the operations director; yet in the second organizational chart this position is designated to the other partner, not the beneficiary. The beneficiary is instead named as the director of finance, for which there is no specific description given. It is impossible to determine from the record exactly which role the beneficiary will perform in the petitioning organization. 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).

Even if the AAO were to speculate from the documentation submitted about the beneficiary's role as director of finance, the AAO is not persuaded that the beneficiary will perform in a primarily managerial or executive capacity. In the letter submitted by the petitioner with the original petition, the petitioner indicates that the beneficiary will "hire and train personnel," "establish work schedules," and "review inventory." The petitioner further provides in the partner's affidavit that the beneficiary will "direct the operation, hir[e] key personnel, maintain[] financial records, prepar[e] quarterly and annual tax filings, [and] establish and coordinate the marketing plans" These descriptions support a finding that the beneficiary will be performing the function of the finance department rather than managing the finance department. The petitioner admits in its affidavit that the beneficiary, himself, will prepare the tax returns for the partnership and maintain the financial records. Further, the petitioner states that the beneficiary will be responsible for, among other things, reviewing inventory. 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).

Further, the sales/purchasing manager and bookkeeper, the two employees the petitioner claims to be supervised by the beneficiary, will not relieve the beneficiary from performing these nonqualifying duties. The following job descriptions were submitted for the sales/purchasing manager and bookkeeper:

Sales/Purchasing Manager. Responsible for maintaining inventory and supplies for the operation of the store. Collects inventory work sheets from day and evening managers, compares prices for goods and supplies from various suppliers, verifies receipt of shipment against purchase orders.

Bookkeeper. Maintains the books and records of the store/partnership including the daily receipts. Prepares bank deposits, reviews bank statements, provides financial information for accountant, prepares and maintains payroll records, maintains financial records of inventory and supply purchases.

Neither of these jobs would appear to be professional in nature. As 8 C.F.R. § 214.2(l)(1)(ii)(B)(iv) specifically provides, "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." Although the sales/purchasing manager will maintain the inventory, the beneficiary will still be responsible for preparing quarterly and annual tax returns, and hiring and training personnel. In addition, it is unclear whether the bookkeeper will assume the role of maintaining all financial records of the petitioner, or whether he will only collect the necessary financial information for the beneficiary to complete the tax returns.

Finally, the assertions made by the petitioner and petitioner's counsel throughout the record are not sufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel asserts in the motion to reopen and reconsider that the U.S. operation, which claims to employ a work force of between ten and forty individuals, can reasonably anticipate the need for one or more managers or executives. Counsel also notes that "since the petitioner has demonstrated a good faith effort and a good faith business plan . . . , the alien has demonstrated his burden as set forth in both the regulations and the operating instructions." The petitioner further claims in the partner's affidavit that the beneficiary's "managerial and executive duties performed for the company abroad, his investment of \$300,000 into the new operation and his responsibility for the overall management of the new operation clearly indicates that he is a high level individual." It is a well-established rule that 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). In the present case, counsel has even implied that the U.S. operation employs ten to forty individuals, yet the organizational charts and the surrounding documentation reflect only nine employees. 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 (Reg. Comm. 1972).

As the petitioner has failed to provide sufficient evidence, the AAO cannot conclude that the beneficiary will be employed in a primarily managerial or executive capacity within one year after the new office has begun operating.

Beyond the decision of the director, another issue in the present case is whether the petitioner has submitted sufficient evidence regarding the financial ability of the foreign entity to remunerate the beneficiary as required in 8 C.F.R. § 214.2 (1)(3)(v)(C)(2). Although the petitioner submitted a balance sheet for the foreign entity, the currency is in rupees and not U.S. dollars. As the petition will be dismissed for the foregoing reasons, this issue need not be further addressed.

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.