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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

DN

[REDACTED]

FILE: SRC-02-041-50707 Office: TEXAS SERVICE CENTER

Date: **NOV 19 2003**

IN RE: Petitioner:
Beneficiary:

[REDACTED]

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:

[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 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

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The Director, Texas Service Center, denied the petition for an extension of 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 a metal cast manufacturer that is also operating a "new [printing] division," which handles printing projects in the state of Georgia. It seeks to extend the temporary employment of the beneficiary as president of the U.S. organization, and, on November 13, 2001, petitioned to have the beneficiary's L-1A status extended. In a decision dated June 11, 2002, the director denied the petition stating that the petitioner, as a new office, failed to establish it would support a managerial or executive position, and therefore, the beneficiary would not be employed in a primarily managerial or executive capacity. In addition, the director noted that, as the petitioner stated that the U.S. operation was a franchise, there may not be a qualifying relationship between the foreign and U.S. companies.

On appeal, petitioner's counsel asserts that sufficient evidence has been submitted to establish that: (1) the beneficiary is employed in a managerial capacity; (2) the beneficiary has successfully completed the necessary steps to start the petitioner's new operations; (3) petitioner has undertaken significant business activities; (4) petitioner is presently in business pursuant to its original business plan and has opened a division of the company that focuses on printing services; (5) petitioner will hire three employees and seven workers in the next twelve months; and, (6) petitioner's parent company has gross revenues exceeding four million dollars and 150 employees. Counsel requested an additional thirty days from the date of filing, July 17, 2002, to submit additional evidence, including business, transactional and financial information. To date, more than a year and a half later, careful review of the record reveals no subsequent submission; all other documentation in the record predates the issuance of the notice of decision.

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(l)(14)(ii) further states that a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(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)(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 first issue the AAO will address is whether the beneficiary has been or 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:

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 both the petition for an extension and the response to the director's request for evidence, the petitioner described the beneficiary's duties in the petitioning organization as the following:

- Evaluate feasibility of business plan, assess new account opportunities and make business presentations to clients;

- Negotiate sales, lease, equipment and other contracts;
- Plan, organize, and implement organizational structure of the corporation including accounting, human resource and sales divisions;
- Serve as liaising [sic] with parent company regarding market trends;
- Make major recommendations on strategic expenditures, market research, exploratory development, and import/export opportunities;
- Direct the management of the import/export and overall business;
- Conduct negotiations with U.S. financial institutions regarding funding potential for import/export; and,
- Exercise a wide latitude of discretionary decision-making authority, including the authority to bind parent corporation.

The foreign company also submitted a letter in support of the extension, summarizing the same job duties as stated above, and stating that the beneficiary will develop the marketing strategy of programs within the U.S. markets and review activity reports and financial statements to determine progress in attaining objectives.

In a notice dated January 24, 2002, the director requested that the petitioner submit the following additional evidence: the petitioner's State Employer's Quarterly Tax Return for the year 2001; the U.S. company's organizational chart; the petitioner's current staffing level, including each employee's job title, duties, and educational background; and, the beneficiary's duties for the past year, indicating the percentage of time spent performing each duty.

As noted above, in response to the request for a percentage breakdown of the beneficiary's duties for the past year, the petitioner submitted a statement of "key responsibilities" that outlined the same job functions as listed in the petition. The petitioner did not assign a percentage of time spent on each

activity. The petitioner submitted an organizational chart that reflects the beneficiary's position as "president" reporting directly to the board of directors. Subordinate to the beneficiary is the vice-president who, according to the chart, oversees the import/export department, the accounting department, the human resource department, and the metal products department. Although there were support personnel listed under each department, no job titles, duties, or educational backgrounds were provided.

In a decision dated June 11, 2002, the director denied the petition indicating that the petitioner failed to "show that a wide range of daily functions associated with running a business and the actual time devoted to these duties would not exceed that which is spent in purely managerial or executives duties for the company." The director concluded that as the sole employee, the beneficiary could not be supervising a subordinate staff of professional, managerial, or supervisory personnel, and therefore, was not employed in a primarily managerial or executive capacity.

The petitioner appealed indicating that the beneficiary was employed in a managerial capacity. As the assertions of petitioner's counsel are listed above, they will not be restated.

On review, the record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. Pursuant to 8 C.F.R. § 214.2(1)(3)(v)(C), within one year of the approval of a petition for an individual employed in a new office, the U.S. operation must be able to support an executive or managerial position. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

The petitioner is a metal manufacturing company that, at the time of filing the petition for an extension, employed the beneficiary only. Although the number of employees supervised or the size of an organization alone is not determinative of whether an individual is functioning in a managerial or executive capacity, either factor may be considered when other irregularities exist. See *Systronics Corp. v. I.N.S.*, 153 F.Supp. 2d 7 (D.D.C. 2001). The size of the personnel staff is especially important when determining whether the petitioner has sufficient staff to relieve the beneficiary from performing non-qualifying duties. *Id.* Although the petitioner asserts in its response to the director's request for the evidence that during the year 2002 it hired three additional employees, and anticipated hiring seven more within the next year, the

applicable time period is when the petition was filed. As the petition for an extension was filed on November 13, 2001, it is on this date that the evidence must be reviewed. 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).

In the present case, it is irrelevant that the petitioner hired three employees in the year 2002 to work in the marketing and human resources department. On November 13, 2001, the applicable date, the petitioner employed the beneficiary only. Therefore, there were no other employees during that time who could relieve the beneficiary from performing non-managerial or non-executive duties. Further, on August 24, 2001, one year following the approval of the original petition, the beneficiary was still the only employee of the petitioner. As there was no one else to perform the organization's non-qualifying duties, such as the import and export of the goods, the AAO cannot find that the petitioner is able to support a managerial or executive position as required by statute.

In addition, although the beneficiary is described as "directing the management of the import/export and overall business," if there are no employees subordinate to the beneficiary, it can only be assumed that the beneficiary is also providing the import and export services of the petitioning company. Also, as the petitioner has only submitted limited information pertaining to the printing franchise, it can be assumed that the petitioner is performing the actual printing and other services provided by the printing company. 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).

Finally, the petitioner failed to submit evidence pertaining to its staffing levels as requested by the director. Specifically, the director asked that the petitioner provide each employee's job title, duties, the percentage of time allocated to these duties, and educational background. Because the petitioner did not present evidence that specifically defined the duties of the beneficiary's subordinates, the AAO cannot conclude that the beneficiary served as a manager or executive. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (DC Cir. 1991).

For the foregoing reasons, the AAO cannot find that the beneficiary will be employed in a primarily managerial or executive capacity.

The AAO will next address the issue of whether the petitioner and the foreign entity are qualifying organizations. The director found that because the petitioner indicated that the U.S. operation was a franchise, there may not be a qualifying relationship between the foreign and United States companies. The president of the foreign company asserted in a letter filed with the petition that the U.S. company, a subsidiary of the foreign company, entered into a franchise agreement to provide printing services. In a separate letter from counsel, petitioner's counsel referred to "the development of a printing franchise" by the petitioner. As the petitioner failed to submit the franchise agreement indicating the specific parties to the agreement, the AAO cannot conclude that a qualifying relationship exists. An association between two entities in the form of a licensing or franchise agreement is insufficient to establish a qualifying relationship. See *Matter of Schick*, 13 I&N Dec. 647 (Regl. Commr. 1970). As the appeal will be dismissed for the foregoing reasons, this issue need not be further addressed.

Beyond the decision of the director, the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2 (1)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's original petition expired on August 24, 2001. However, the petition for an extension of the beneficiary's L-1A status was filed on November 13, 2001, almost two months following the valid status of the beneficiary. This filing date is substantiated by the post office mailing label, included in the record, which reflects a mailing date of November 10, 2001 with second day delivery. The label has a stamped delivery date of November 13, 2001. Therefore, the petitioner failed to file a timely petition extension, and thus is precluded from extending the L-1A status of the beneficiary.

Further, pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the beneficiary's status expired on August 24, 2001, and the

extension petition was not filed until November 13, 2001, the beneficiary is ineligible for an extension of stay in the United States.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.