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Department of Homeland Security

Citizenship and Immigration Services

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**D7**

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



SEP 22 2003

File: EAC-02-001-53733 Office: Vermont 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, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a restaurant, seeks to employ the beneficiary temporarily in the United States as its manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity, or that the intended United States operation, within one year of the approval of the petition, would support an executive or managerial position.

On appeal, counsel submits a brief in rebuttal to the director's findings.

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.

Title 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 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.

The United States petitioner states that it is in partnership with [REDACTED] located in Leicester, England. The petitioner seeks to employ the beneficiary for a two-year period at an annual salary of \$35,000.

The first issue to be addressed in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity, and whether the U.S. operation, within one year of approval of the petition, will support an executive or managerial position.

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 petitioner described the beneficiary's proposed duties, in pertinent part, as follows:

The position requires [the beneficiary] to: (1) develop a local clientele loyal to the petitioner's restaurant; (2) promote the petitioner's U.S. restaurants in the local media in order to maintain and expand clientele; (3) identify new markets for food establishments; (4) develop marketing strategies to attract customers; (5) negotiate food supply contracts; (6) monitor food preparation and service; (7) hire and train employees; (8) hire and train supervisory employees, who can, in turn, monitor lower level employees. His functions as a manager are essential to the success of this business venture.

In his decision, the director noted that the petitioner planned to employ three or four "employment authorized" individuals during the next two years. The director further noted that one of these employees would function as head sales assistant and the other as head cook. The record does not contain complete position descriptions for any of the proposed employees nor does it indicate who would perform the U.S. company's operational duties.

On appeal, counsel argues, in pertinent part, that:

The petitioner has already indicated that he intends to open a regular Pakistani restaurant within one year. [The] petitioner will therefore be unable to be an alleged "first-line supervisor" at each location all the time. [The] petitioner fully intends to hire supervisory personnel at each business location who will be able to manage the other employees.

\* \* \*

[The] petitioner indicated in his response to the [Service's] Notice of Action his intent to hire two (2) full time employees within one year... The second full time employee will be will [sic] function as the head cook... One full time employee will function as the head sales assistant to work 40 hours per week at the counter. The head sales assistant will work along with and supervise other counter assistants... The two full time employees will report to [the beneficiary] about the day to day success of the business and about the performance of lower level employees.

\* \* \*

The petitioner's duties are currently not at a full senior function because his business is still a new office. [The] petitioner requests that he be afforded the opportunity to fulfill his current combination of first line duties with executive management for one year from the date of approval of this petition so that he can build his business up to a point where he can hire the requisite corporate ladder of lower level employees and lower level supervisors. [The] petitioner understands that he must subsequently prove his success in this venture in order to obtain an L-1 visa after the first year.

Duties described as developing a local clientele loyal to the petitioner's restaurant, promoting the petitioner's U.S. restaurants in the local media to maintain and expand clientele, identifying new markets for food establishments, and developing marketing strategies to attract customers are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as monitoring food preparation and service, and hiring and training employees have not been demonstrated to be managerial or executive in nature. The use of the position title of "manager" is not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description

beneficiary will be primarily managing the company or that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title.

Based on the evidence furnished, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

The petitioner has submitted a bank statement dated September 24, 2001, reflecting an available balance of \$5,000. The petitioner has not projected its first year revenues. As previously noted, the U.S. entity's proposed organizational structure is not clear. As such, the petitioner has not persuasively established that it will have the growth or the organizational complexity that warrants the hiring of a manager or executive. Therefore, the petitioner has not established that the intended U.S. operation, within one year of approval of the petition, will support an executive or managerial position. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the record contains insufficient evidence to demonstrate that the beneficiary was employed abroad in a primarily managerial or executive capacity. As the appeal will be dismissed on the grounds discussed, this issue 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.

**ORDER:** The appeal is dismissed.