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FILE: SRC 02 081 50108 Office: TEXAS SERVICE CENTER Date: **APR 12 2004**

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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner [REDACTED] states that it is a branch of an Indian company, [REDACTED]. The petitioner states that it is an import, export, and retail gas station business. The U.S. entity was incorporated in the State of Texas on January 22, 1999. In October 2000, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). CIS approved the petition as valid from January 12, 2001 through January 12, 2002. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's vice president and chief executive officer at an annual salary of \$50,000.

On September 11, 2002, the director determined that the beneficiary did not qualify as a manager or an executive. Consequently, the director denied the petition.

On appeal, counsel asserts that the beneficiary's proposed duties are primarily managerial and executive.

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 meet certain criteria. 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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 (l)(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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), 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;

¹ As explained in this decision, the petitioner is not a branch office and has no qualifying relationship with the Indian company.

(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.

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.

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(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are *either* in an executive *or* managerial capacity. *Id.* Counsel's brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

Initially, on Form I-129, the petitioner depicted the beneficiary as: "[T]he Senior-most Corporate Officer in charge of planning, expansion, hiring, banking, accounting, marketing, budget, etc."

In a January 5, 2002 letter attached to the Form I-129, the petitioner elaborated on the beneficiary's proposed duties for the U.S. entity. Specifically, the beneficiary will:

- direct the entire U.S. organization;
- direct and be in complete control of the company's financial, marketing and administrative duties;
- establish and enforce corporate policy;
- have authority to bind, negotiate, and enter into contracts . . . [and] banking relationships;
- sign banking notes and borrow money on the company's behalf;
- have full authority to hire, train and fire subordinates.
- be in charge of corporate finance, marketing and expansion and growth of the company;
- preside over any board meetings;
- be responsible for the creation of business plans and corporate development;
- establish and enforce corporate policy, over which he will exercise complete discretionary authority;
- be in full control of developing and executing the petitioner's business plans, marketing strategies, and advertising campaigns and promotions; and
- establish, enforce and be in full control of plans and policy in regard to corporate expansion and development (which include having full control of the company's finances, negotiating contracts, and obtaining credit).

(Bullets added.)

The petitioner attached an organizational chart to the Form I-129. The chart depicted the beneficiary as supervising a manager (Sheenaz Ali). Sheenaz Ali supervises an assistant manager (Jemini Amen), a customer service coordinator (position open), and a marketing coordinator (position open).² According to the chart, the beneficiary also supervises an import-export manager (position open) who, in turn, supervises an import coordinator (position open) and an export coordinator (position open). Finally, the beneficiary supervises an officer manager (position open) who, in turn, supervises "staff" (position open).

On March 1, 2002, the director asked the petitioner to provide additional evidence about the beneficiary's duties including: (1) the percentage of time the beneficiary spends on each of his tasks and (2) detailed information about the employees whom the beneficiary supervises. On March 29, 2002, the petitioner described the percentages of time the beneficiary devotes to each of his claimed duties:

Marketing: [The beneficiary] spends the majority of his time, 60% in marketing and promotion

Recruiting and Training: [The beneficiary] spends 5% percent of his time recruiting and training subordinate managers.

Expansion: [The beneficiary spends 20% of his time searching for other investment opportunities in the United States.

Financials: [The beneficiary] spends 15% of his time handling financial matters within the company including the [petitioner's] banking as well as the [petitioner's] various budgets

The petitioner's March 29, 2002 response also described the gas station employees' duties:

Manager: Manage day-to-day operations of store; order supplies. Monitor inventory. Supervise and train employees, assign job duties, work schedules and evaluate performance. Perform daily accounting of funds and prepare banking transactions; reconcile cash with receipts. Maintain payroll and tax accounts.

Cashier: Assist Manager with day-to-day operations of the store.

The response did not describe the duties associated with the open positions that appear on the organizational chart. Additionally, the petitioner's March 29, 2002 stated:

[The beneficiary] continues to pursue the import-export business as well. He is in the process of opening up a 500 sq feet [sic] show room [sic] and an office for displaying the [Indian entity's] leather goods for import to the United States. The showroom is [in] the construction

² The petitioner apparently owns a 51 percent interest in Shenaaz Ali Enterprises, Inc., which in turn purchased a gas station, Zebulon Chevron, in January 2001. The petitioner's March 29, 2002 response to the director's March 1, 2002 request for evidence indicates that the manager and assistant manager work at the gas station.

stage. The company plans to hire a sales person and an administrative assistant as soon as the show room [*sic*] opens.

The duties and percentages of time listed above are too broad to convey an understanding of the beneficiary's daily activities. For example, in several instances, the duties referred to establishing and enforcing corporate policies; nevertheless, the petitioner failed to identify the policies. Furthermore, the petitioner often described the beneficiary as directing the U.S. entity, exercising complete control over various activities, and negotiating contracts and banking relationships. The petitioner did not, however, define directing, controlling, or negotiating.

Additionally, the petitioner generally paraphrased the statutory definitions of "managerial" and "executive" capacity. See sections 101(a)(44)(A)(i), (iv) and 101(a)(44)(B)(iii) of the Act. For example, the petitioner depicted the beneficiary as having full authority to hire, train, and fire subordinates as well as exercise complete discretionary authority over corporate policy.

Going on record without supporting documentary evidence is insufficient for the purpose of meeting 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).

Moreover, the petitioner admitted that the beneficiary "spends the majority of his time . . . in marketing and promotion." Specifically, the response to the request for evidence stated that the beneficiary will occupy 60 percent of his time in marketing and promotion and another 20 percent of his time searching for investment opportunities in the United States. Thus, marketing tasks amount to at least 80 percent of the beneficiary's responsibilities. Marketing duties, by definition, qualify as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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). Thus, the record clearly indicates that the beneficiary's duties are not primarily executive or managerial.

Finally, the petitioner has not demonstrated that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel. See section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

In this matter, the petitioner supervises one employee, a gas station manager who performs the day-to-day functions of the gas station. The relevant question is whether the supervised position requires advanced education. The organizational chart and the response to the request for evidence provide no information about the required education for the gas station position. Therefore, it is unclear whether the manager

performs tasks that require at least a baccalaureate degree. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Further, the description of the gas station manager's duties are too general to convey an understanding of the managerial position. Counsel does not define in terms of frequencies or examples what such terms "manage day-to-day operations," "monitor inventory," "supervise and train employees," "assign job duties," or "evaluate performance" mean. As explained above, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*. Additionally, specifics are an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The manager's duties are similar to many of the beneficiary's proposed tasks. For instance, both the beneficiary and gas station manager are responsible for training employees, accounting duties, and general financial tasks. Therefore, it is unlikely that the gas station manager would be able to relieve the beneficiary of his nonqualifying responsibilities.

Additionally, the petitioner claims that the beneficiary's claimed managerial and executive status stems, in part, from supervising a number of unfilled positions and "continu[ing] to pursue [an] import-export business." CIS may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Therefore, the future hiring of additional employees or creation of a business cannot show that the beneficiary's proposed duties qualify as primarily managerial or executive.

On appeal, counsel cites *Mars Jewelers v. INS*, 702 F.Supp. 1570 (N.D. Ga. 1988), for the proposition that managers at smaller companies can qualify for the L-1 visa. The AAO acknowledges that an entity's size does not necessarily decide the question of managerial or executive capacity. See Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, the duties of the proffered position must be the critical factor. Section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). As established previously, however, the beneficiary is largely performing tasks required to provide a service or produce a product. Thus, regardless of the U.S. entity's size, the petitioner has not established that the beneficiary is primarily functioning as an executive or a manager.

Counsel also cites several unpublished cases to support its position that the beneficiary is a manager or an executive. Counsel, however, did not attach copies of the cases; therefore, it is impossible to gauge the unpublished cases' relevance. Although AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. 8 C.F.R. § 103.3(c). Consequently, because the cited cases are unpublished, they have no precedential effect in this matter.

In sum, the beneficiary's marketing duties, vaguely defined responsibilities, and supervision of a non-professional, non-managerial staff preclude CIS from classifying the beneficiary as a manager or executive.

Beyond the decision of the director, the AAO notes that the petitioner has not established that a qualifying relationship exists between the United States and Indian entities. The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (I)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operation division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 595 (Comm. 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International, supra*.

In 1999, the Indian entity, Latit Leathers, owned 51 percent of the stock in the petitioner. Nadia Hassam owned the remaining 49 percent. Under this structure, the U.S. entity was a subsidiary to the Indian entity. In January 2001, the beneficiary purchased Nadia Hassam's 49 percent share in the petitioner. Also, the beneficiary purchased two percent of the 51 percent which the Indian entity held in the petitioner. Thus, at the time the current petition was filed, the beneficiary owned 51 percent of the petitioner, while the Indian entity owned 49 percent of the petitioner. The U.S. entity is, in turn, no longer a subsidiary of the Indian entity.

Furthermore, the record further reveals that, at the time the current petition was filed, three persons owned shares in the Indian entity:

Ashraf Madatli Jamal	33%
Alimohamed Shermohamed Jamal	34%
Shermohamed Karmadi Ukani	33%

As noted above, the beneficiary owns 51 percent of the U.S. entity, while the Indian entity owns the remaining 49 percent. Thus, the record does not show that the two companies are owned and controlled by the same parent or individual, or that the two companies are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. No affiliate relationship, therefore, exists between the two companies.

The record contains no evidence showing that the petitioner has become the parent to the Indian operation. Also, the record contains no Internal Revenue Service Form 1120-F tax return forms. Branch offices of foreign corporations must file Form 1120-F. Thus, the petitioner is not a branch of the Indian entity.

In sum, the record suggests that no qualifying relationship existed between the Indian and United States entities when the current petition was filed. For this additional 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.