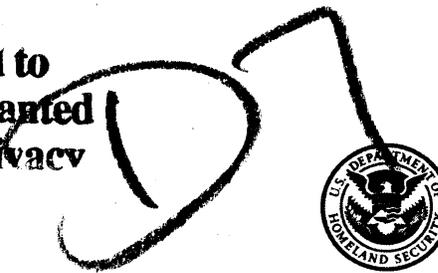


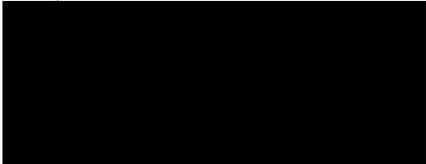
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U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536

**U.S. Citizenship  
and Immigration  
Services**



FILE: SRC 03 020 50083 Office: TEXAS SERVICE CENTER

Date: APR 13 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:

SELF-REPRESENTED

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 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 an importer and distributor of consumer goods and textiles. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and chief executive officer. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary's employment with the U.S. entity will be primarily in a managerial or executive capacity.

On appeal, the petitioner disagrees with the director's decision.

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)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary 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.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(I)(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 (1)(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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2001 as an importer and distributor of consumer goods and textiles. The petitioner claims that the U.S. entity is a subsidiary of Aggarwal Bearing Traders, located in India. The petitioner also claims to have two full-time and three part-time employees with a projected gross annual income of \$200,000. The petitioner seeks to extend the beneficiary's services as president and CEO for a period of three years, at a yearly salary of \$37,500.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity will be primarily managerial or executive in nature.

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 petition, the petitioner stated that the beneficiary's proposed duties included: "[M]anage all aspects of [the] company's operation. Entrusted with identification of potential market for consumer goods and textile[s] made ups for sale in [the] US after imported from abroad. Will set up purchase and sale channels. [sic]"

In a letter of support, dated October 20, 2002, a representative from the foreign entity stated that the beneficiary has been responsible for directing the management of the organization and for establishing the goals and policies of the company. He also stated that the beneficiary supervises the operation of the company on a short-term and long-term basis and that he enjoys full authority for making decisions. In addition, the representative stated that the beneficiary receives little to no supervision from any other person in the organization.

In response to the director's request for additional evidence, the petitioner stated that the beneficiary is responsible for formulating all company policies and strategies; determining employee selection guidelines and compensation packages; determining target markets and suppliers; establishing company productivity and profitability targets; and authorizing all payments and capital expenses.

In that same letter, the petitioner stated "[the U.S. entity] is still in the first year of our operation and in the process of planning phase with some activity, which will form the groundwork for our future operation. We have added staff recently and outsourced some functions."

The petitioner also provided a list of other claimed employees along with their respective duties:

Kuehne & Nagel: Forwarding and custom brokerage firm

Responsible for booking the shipment, shipping and freight, custom clearance, and delivery of merchandise.

Roshan Ajanee: CPA

Responsible for payroll, tax filing, and handling the accounts for the firm.

Indu and Careen: Two sales executives

Responsible for pursuing sales leads with prospective clients, performing road shows to market products, and participating in fairs and exhibitions targeting company products.

Puja Gupta: Full-time employee:

Responsible for producing and mailing marketing brochures and documents accounting transactions.

The petitioner further stated that the compensation given to Kuehne & Nagel and Roshan Ajanee was based on actual work performed on an as needed basis. The petitioner also stated that the sales executives received compensation for actual performance and criteria based on sales targets met; and that Mrs. Gupta was currently the only full-time employee, and that eventually additional personnel will be hired.

The petitioner submitted as evidence in support of the petition copies of the initial L-1A Approval Notice dated December 4, 2001, U.S. entity's Customs Power of Attorney, company invoices, Corporate Income Tax Return for the year 2001, Employer's Quarterly Tax Statements through September 30, 2002, Notice of Company Registration Identification Number issued by the U.S. Federal Trade Commission, Bank One bank statements, emails, wire transfers, and a Certificate of Ownership issued by the state.

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary would be employed primarily in a managerial or executive capacity. The director further stated that the beneficiary would have to engage in the day-to-day operations of the business since the evidence did not demonstrate that he had the necessary employees to carry out the functions of the organization.

On appeal, the petitioner disagrees with the director's decision, and resubmits company business documents as evidence.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive position. The record reveals that the petitioner is filing for a new office extension and therefore has been doing business for one year prior to the filing of the petition. Therefore, it is not to be considered a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F) for purposes of evaluating the beneficiary's proposed position. The petitioner, by continuously referring to the U.S. entity as a business still in the developmental stages, infers that the director's basis of analysis should have been based upon the "new office" standard. However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended 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 an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. Furthermore, the director's basis of analysis was appropriate in the instant case and has not been refuted by the petitioner on appeal. The fact that the petitioner is still in the developmental stages is considered, but does not relieve it from meeting statutory and regulatory requirements as an established business entity.

In evaluating whether the beneficiary is a managerial or executive employee, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner has not provided a comprehensive description of the beneficiary's purported job duties. The beneficiary's position description is too general and broad to establish that the preponderance of his duties will be managerial or executive in nature. The following duties are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive: manage all aspects of company's operation, identifying potential markets for consumer goods and textiles, create sales for imported goods, and setup purchase and sales channels. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Specifics are clearly 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 actual duties themselves reveal the true nature of the employment. *Id. at 1108*. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff who can relieve him from performing non-qualifying duties. The petitioner claims that there is one full-time employee and three part-time employees who are employed by the U.S. entity. However, the record does not reflect that either of the employees relieve the beneficiary from performing the non-qualifying operational tasks of the petitioner or that they take direction from the beneficiary in performing their duties. In addition, the petitioner admits, "The salary or compensation . . . are based on actual work performed on need [sic] basis."

Furthermore, although the petitioner claims a part-time and full-time subordinate staff, the petitioner has not submitted evidence of the wages paid to the staff in the previous year, as required at 8 C.F.R. § 214.2(l)(14)(ii)(C). 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). The petitioner's tax return reflects no salaries or wages paid to employees and no payments made to contract workers. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record does not establish that a majority of the beneficiary's duties will be primarily directing the management of the organization. The record indicates that primarily the beneficiary's duties have and will consist of maintaining the business operations rather than managing the same. 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 by the beneficiary on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Although the petitioner stated that the beneficiary will be primarily responsible for managing the short-term and long-term organizational planning of the business and will also establish general guidelines, the record reflects that the majority of the beneficiary's time has been spent performing the day-to-day functions of the business. Evidence submitted by the petitioner demonstrates that the beneficiary's signature appears on the majority of the U.S. entities sales and business records thereby indicating that the beneficiary has been and will likely continue to act more as a sales representative. The petitioner has failed to provide sufficient documentary evidence to show how the beneficiary manages the overall operation of the business or whom he manages or supervises.

Based upon evidence submitted on the record, it appears that the beneficiary will be performing the functions of the U.S. entity rather than managing a function of the organization. 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). The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the lack of evidence regarding the claimed parent company's ownership of the petitioning enterprise raises the issue of whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(A). Although the petitioner claims to be the wholly-owned subsidiary of a company located in Delhi, India, the petitioner's 2001 IRS Form 1120, at Schedule K, indicates that the company is not owned directly or indirectly by any foreign person. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho, supra*. In addition, the petitioner has failed to establish that the U.S. entity has been doing business in a regular, systematic, and continuous manner for the previous year, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The record contains evidence of one import transaction and the entity's 2001 tax return reflects no gross receipts or sales. Additionally, although the petitioner was required to possess sufficient physical premises at the time the initial petition was filed in June 2001, the record indicates that the petitioner did not acquire its premises at the Dallas Market Center until August 15, 2002, less than two months prior to filing the current petition. Again, this fact raises questions whether the petitioner was doing business for the previous year. Finally, the record does not establish that the beneficiary's services are to be used for a temporary period and that he will be transferred to an assignment abroad upon the completion of the temporary services in the United States pursuant to 8 C.F.R. § 214.2(l)(3)(vii). For these additional reasons, the petition may not be approved and the appeal must be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.