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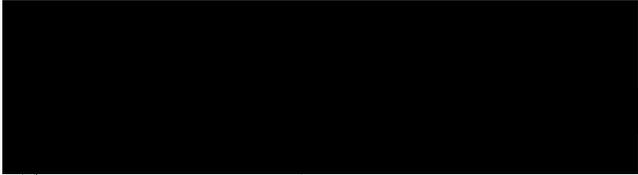
U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
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DM



APR 19 2004

FILE: EAC 02 033 53328 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



[Handwritten mark]

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, 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 claims to be engaged in the import and wholesale of garments. 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 relating to its financial status or that it has been doing business. The director also determined that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. On appeal, counsel disputes the director's findings and submits a brief in support of his assertions.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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 (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 U.S. petitioner states that it was established in 2000 and that it is a subsidiary of P.K. International, located in India. The initial petition was approved and was valid from October 30, 2000 to October 30, 2001, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$30,000.

The first issue in this proceeding is whether the petitioner has established that it has been doing business.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

*Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In support of the petition, the petitioner's submissions included a letter from the petitioner's bank stating that its account is in good standing, its income tax return for the year 2000 and quarterly tax return for the third quarter of 2001, as well as several of the beneficiary's tax documents. The petitioner also submitted business correspondence dated in 2001 indicating that the beneficiary was in the process of negotiating business deals with several clients. There is no evidence to indicate that any of these business deals had actually been finalized or that any merchandise was sold as a result of the beneficiary's efforts.

Upon reviewing the initially submitted evidence, CIS issued a request for additional evidence on December 31, 2001. The director noted that the petitioner did not submit sufficient evidence to establish that the beneficiary has been doing business and asked the petitioner to submit a lease to support its claim that it sublet two rooms for its office and storage space. The petitioner was also asked to submit bank statements indicating the level of activity in the petitioner's account.

Although the petitioner responded to CIS's request for additional evidence, it failed to provide the requested bank statements and copy of a lease. The only bank statements that were provided clearly pertained to the foreign entity. The petitioner also provided a number of shipping documents showing sales of the foreign entity's products to U.S. companies. However, none of the submitted documents indicate that the petitioner was involved in or earned money on any of the foreign entity's sales transactions.

On August 1, 2002 the director denied the petition noting the petitioner's failure to submit the requested bank statements and its inability to produce documentation to support its claim to having generated \$1.5 million during the 2001-2002 time period. The director concluded that the petitioner failed to submit sufficient documentation to establish that it has been doing business.

On appeal, counsel failed to acknowledge the director's conclusion on this issue and states that "based on the efforts and investments made, there is no doubt [the] petitioner is conducting business in the United States." Contrary to counsel's assertion, the beneficiary's efforts and the foreign entity's investment in the petitioning business do not demonstrate that the petitioner has engaged in the regular, systematic, and continuous provision of goods and/or services. See 8 C.F.R. § 214.2(l)(1)(ii)(H). While the petitioner may eventually solicit enough clientele to sell its merchandise, as claimed, the record suggests that the petitioner is at best a sales agent for the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. 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. In the instant matter, the petitioner has not reached the point that it is doing business or generating income. Although the petitioner has stated that phase II of its expansion will allow the petitioning entity to be "a direct source of goods," the record fails to establish that the petitioner has been and is currently doing business. For this reason, the petition cannot be approved.

The remaining issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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 support of the petition, the petitioner provided the following description of the beneficiary's job duties as president and CEO of the U.S. operation:

Direct the overall operations of the company with an emphasis on sales and marketing.

Develop, plan, and implement long term goals and plans, establish and oversee policies and strategies with respect to promotion, marketing and economic growth.

Coordinate, interview, train and supervise managerial and support staff in sales and marketing.

Assign duties and responsibilities to subordinate managers.

Review customer relations and establish business connections.

The petitioner also provided the following hourly breakdown of the proposed job descriptions:

Formulating the company's long- and short-term business goals (5 hours);

Researching the US garments market in order to develop marketing and sales strategies on a short and long-term basis (10 hours);

Meeting with marketing staff in order to communicate the findings of market research and instruct Representative [sic] regarding preferred course of action (5 hours);

Setting and controlling budgets and related fiscal matters, including meeting with the company's CPA to discuss financial planning for the company (5 hours);

Exercising discretion over the daily operations of the company (2 hours);

Organizing and establishing office systems and procedures (1 hour);

Negotiating contracts and conducting follow-up with clients through Manager who serves as liaison between CEO and clients (4 hours); [sic]

Hiring, firing, and determining compensation levels and leave of employees (as needed);

Determining customer requirements as per feedback from marketing (1 hour);

Interfacing with marketing staff regarding sales consulting services related issues (1 hour);

Communicating with clients to negotiate contract arrangements and communicating with banks regarding necessary transfers of money (2 hours);

Engaging in customer and public relations (2 hours);

Supervising and participating in Trade Shows and garments Exhibition (1 hour);

Communicating with parent company with regard to current status of market, supply & demand issues, financial status of the subsidiary, and implementation of short/long term goals (2 hours);

Preparing periodic reports concerning the quantity and value of the Inventory (1 hour);

Supervising Administrative Assistant in the collection of all accounts receivable from our customers and assisting CPA in the preparation of taxes and related financial matters (1 hour);

Interviewing, hiring, supervising and terminating staff members (1 hour and as needed).

Liaisoning [sic] with the Parent Company (1 hour and as needed).

The petitioner also discussed plans to hire additional employees and provided an hourly breakdown for each employee's proposed job duties.

In CIS's request for additional evidence the petitioner was notified that the record fails to establish that the beneficiary has been and will be primarily performing managerial or executive duties, despite the beneficiary's past and proposed list of duties. The petitioner was asked to provide evidence of the actual duties performed by the beneficiary.

The response included a statement from counsel in which he repeated the job descriptions initially provided. Counsel also stressed the discretionary authority with which the beneficiary has been vested and explained that even though the petitioner does not currently sell goods to customers, it plans to do so in the next phase of its expansion. Although the petitioner provided several other brief lists of the beneficiary's proposed job duties, each description was based on an organizational structure that the petitioner has not yet attained. The petitioner failed to list any of the beneficiary's actual duties based on the petitioner's current organizational structure.

In the subsequent denial the director concluded that the petitioner failed to submit sufficient evidence to establish that the petitioning entity will support a managerial or executive position.

On appeal, counsel asserts that upon approval of the petition to extend the beneficiary's status the petitioner plans to hire additional staff and start directly supplying the goods to its customers. However, 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 instant case, the initial petition was approved in October 2000. Nearly two years since that time the petitioner is still anticipating the potential hire of employees and the commencement of doing business.

Counsel also asserts that the beneficiary manages an essential function and that he is "the highest-ranking business manager" of the petitioning organization. However, the record as currently constituted indicates that the beneficiary is one of a total of two employees. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C.

§ 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors the absence of employees who would perform the non-managerial or non-executive operations of the company, or a company that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp.2d 7, 15 (D.D.C. 2001). In the instant case, the AAO agrees with the director's determination that the petitioner has failed to establish that it has been and is currently doing business. The petitioner's lack of a support staff to perform daily operational tasks suggests that the beneficiary is not primarily performing managerial or executive tasks.

Counsel asserts that the petitioner is a start-up company that needs the beneficiary to perform many of its operational duties. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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. Although the petitioner's reasonable needs must be considered when taking into account its staffing levels, the reasonable needs of the petitioning organization do not override the petitioner's evidentiary burden of establishing that the beneficiary performs primarily managerial duties. In the instant matter, the petitioner indicates that its reasonable needs are best met with the beneficiary continuing to perform the daily operational tasks. The petitioner is unable to employ the beneficiary in a predominantly managerial or executive position.

Furthermore, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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). In this matter, the petitioner claims that the beneficiary's essential function is "development and management" of the petitioning entity. In using such general terminology it cannot be concluded that the petitioner has identified the essential function with specificity. Nor has the petitioner provided evidence that the beneficiary manages an essential function. The AAO notes that 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Although the petitioner provided an hourly breakdown of the beneficiary's proposed job duties, that list is not supported by the evidence in the record. That evidence indicates that the petitioner does not employ a sufficient support staff to relieve the beneficiary from having to primarily perform non-qualifying duties. Simply going on record with the beneficiary's detailed job description without providing supporting evidence does not conclusively establish what the beneficiary actually does on a daily basis. *See id.*

The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's

duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that he will be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that she operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. 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. Here, that burden has not been met.

**ORDER:**           The appeal is dismissed.