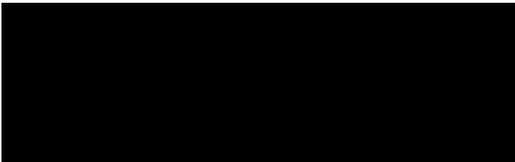


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

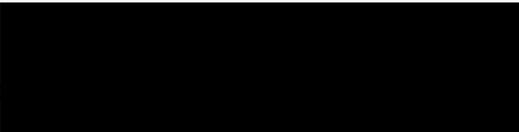


U.S. Citizenship
and Immigration
Services



FILE: SRC 02 217 51407 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



AUG 10 2004

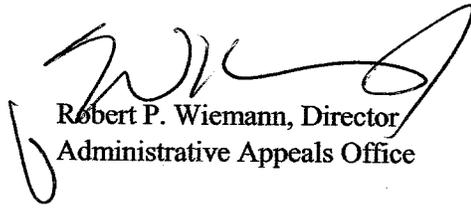
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

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prevented clearly unwarranted
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DISCUSSION: The Director, Texas 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 a subsidiary of M/s Ecco International, located in Pakistan, and states that it is an importer, exporter, broker, and investor. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for a period of three years at a salary of \$30,000 per year. The director denied the petition based on the determination that the beneficiary would not be employed in a managerial or executive capacity under the extended petition. 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed in a 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 a statement submitted in support of the petition, the petitioner indicated that the beneficiary's duties during the start-up phase have included proposal development, contract negotiation, and market analysis. The petitioner stated that the beneficiary is still in the process of negotiating investment deals and provided the following description of the beneficiary's job duties:

Once the investment is finalized, [the beneficiary's] duties will include supervision of all financial and administrative operations for the company, over which he will exercise complete discretionary authority. In addition, he will continue to have responsibility for obtaining contracts and entering contractual obligations for and on behalf of [the petitioner]. . . . Ultimately, it will be his responsibility to market the operations of these investments and to help put [the petitioner] on a sound financial footing. He will recruit and train the staff and have hiring and firing authority over them. Additionally, he will use his marketing skills to develop and execute the company's marketing strategies, including advertising campaigns and company promotions. [The beneficiary] will continue to manage

all financial and developmental aspects of our company, from public relations and marketing to the development of company policy, financial management and the implementation of procedures for the efficient running of the company.

On September 4, 2002, the director instructed the petitioner to submit additional evidence. Specifically, he requested that the petitioner submit a copy of its organizational chart naming all of its employees and their position titles, as well as the duration of their employment.

Although the petitioner acknowledged the director's general request for additional evidence, it failed to provide the specific documentation enumerated in the request. Instead, the petitioner submitted a statement indicating that it plans to hire a sales representative, a receptionist, an office manager/accountant, and five additional regional managers to oversee marketing and distribution. The petitioner also provided the following additional description of the beneficiary's duties:

- Has total managerial and executive authority over the company; all of its activities and employees including accounting and financial management decisions; possesses all right to execute all the managerial decisions of the [c]ompany . . . ; act in the name of the [c]ompany in all kinds of business contacts and relations, i.e. decisions on [sic] choosing merchandise distributors an [sic] meetings with marketing heads of distribution companies, etc. The store and assistant managers will report directly to Mr. Nasiruddin. Will be responsible for [the] entire operation. Oversees management functions of US Corporation.
- Management decisions: possesses all rights to execute all the managerial decisions of the [c]ompany, including purchasing goods and equipment and hiring, firing and promotion of employees; assess store mangers [sic] performance and assist with management issues;
- Company Representation: acts in the name of the [c]ompany in all kinds of business contacts and relations; coordinate with state government office to ensure compliance with EPA regulations;

* * *

- Directs and formulate[s] financial strategy to provide funding in developing and continuing the operations to maximize returns on investments; set[s] sales and product cost targets for managers and monitor[s] progress;
- Supervision of the company's day-to-day operations; [sic] oversee store standards regarding food quality and customer satisfaction policy; provide support to plant manager and support staff;
- Organizational Development: projects the [c]ompany's future development and executes steps to accomplish the desired growth; prepare publicity and promotional campaigns; plan business strategy and target new business investments

On January 15, 2003, the director denied the petition noting the petitioner's failure to comply with the director's request for additional evidence. The director concluded that the petitioner failed to establish that

the beneficiary would be employed in a managerial or executive capacity. It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, counsel states that the beneficiary's services are essential to the success of the petitioning entity. Counsel also submits a brief disclosing the names and position titles of the employees the petitioner plans to hire in the near future. However, in the request for additional evidence the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. Although counsel asserts that the petitioner "inadvertently failed to attach" the requested evidence, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Consequently, the appeal will be adjudicated based on the record of proceeding before the director.

Upon review of the record, the AAO concludes that the petitioner has failed to progress beyond the start-up stage of development within its first year of operation. There is no evidence that as of the date of the filing of the petition the petitioner had hired or contracted a support staff to relieve the beneficiary from having to engage in non-qualifying duties. Although the petitioner has suggested its intent to hire regional managers and office personnel, eligibility must be established 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).

Further, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In the instant case, the record is replete with statements describing the beneficiary's duties in terms that are entirely too vague to convey an understanding of what specifically the beneficiary would be doing on a daily basis. 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). Stating that the beneficiary will manage, oversee, or direct various functions within the petitioning entity does not specify what exactly the beneficiary would be doing, particularly since the petitioner has not hired any staff to manage or to perform the duties that the beneficiary would be overseeing or directing. 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). Although the petitioner states that the store assistant managers will report directly to Mr. Nasiruddin, the petitioner fails to explain what job duty this person performs, nor is there any evidence that this individual is, in fact, employed by the petitioner.

Additionally, the initial description of the beneficiary's proposed job duties indicates that the beneficiary will develop marketing campaigns in an attempt to solicit clientele for the petitioner's products. It is noted, however, that 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). As the record lacks any clear indication as to what portion of the petitioner's overall job would consist of performing marketing duties, the AAO is unable to determine that the beneficiary will primarily perform managerial or executive duties. Based on the

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

Beyond the decision of the director, the record lacks sufficient evidence to determine whether the petitioner has established a qualifying relationship with the foreign entity as mandated by 8 C.F.R. § 214.2(l)(14)(ii)(A). According to section one of the supplement to Form I-129, the petitioner and the foreign entity are both equally owned by the beneficiary and one other individual. However, the record contains only one stock certificate indicating the beneficiary's ownership of one thousand shares of the petitioner's stock. In the Consent of the Directors of Ecco International, Inc. to the Adoption of Certain Actions and Resolutions in Lieu of First Annual Meeting the beneficiary was also named as the sole shareholder. Thus, instead of supporting the claims made in the petition, the submitted documents point to discrepancies in the petitioner's claim. 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 contain any evidence to resolve the inconsistency between the petitioner's claim and the documents submitted to support that claim. As such, the petitioner has failed to establish that it has a qualifying relationship with a foreign entity.

Also beyond the director's decision, the record lacks sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States as mandated by 8 C.F.R. § 214.2(l)(14)(ii)(B). See 8 C.F.R. § 214.2(l)(1)(ii)(H). In support of the petition, the petitioner submitted three contracts, all dated August 2001, reflecting the purchase of the petitioner's goods by various companies. However, all three orders were canceled in September of 2001. While the record contains one letter, dated August 19, 2001, where the petitioner confirms a sales order, there are no shipping documents to indicate that the contract terms were actually carried out. A number of letters and emails written and received by the beneficiary clearly indicate his eagerness to commence doing business. However, the beneficiary's attempts to solicit clientele and forge business contacts does not equate to "doing business" on a continuous basis for the year prior to filing this petition. See *id.* It is noted that 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). As such, due to the additional grounds discussed in the above paragraphs, this petition cannot 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.