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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



FILE: SRC 02 030 54787 Office: TEXAS SERVICE CENTER

Date: FEB 06 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

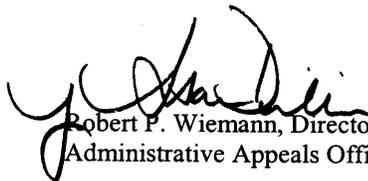
INSTRUCTIONS:

This is the decision 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 F. 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 claims to be a full service dry cleaning business. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner failed to establish that the beneficiary is employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, the petitioner disagrees with the director's determination and asserts that the evidence establishes that the beneficiary's duties are executive in nature.

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(l)(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(l)(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.

The regulation at 8 C.F.R. § 214.2(1)(14)(ii) states that a visa petition under section 101(a)(15)(L) of the Act, 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);
- 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 2000 and claims to be a full service dry cleaning business. The petitioner claims that the U.S. entity is a subsidiary of Rift Valley Stationers LTD, located in Nakuru, Kenya. The petitioner declares three employees and \$28,567 (4/1/01 to 7/1/01) in gross annual income. The petitioner seeks the continuation of the beneficiary's services as president of its organization for a period of two years, at an annual salary of \$30,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary is employed in a primarily executive capacity.

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 described the beneficiary's duties as president of the U.S. entity as: "responsible for purchasing and setting up of the business, hiring of suitable staff, formulating and implementing advertising and marketing campaigns, business development planning, and all financial aspects."

In a letter of support, dated October 12, 2001, the managing director of the foreign entity stated that the beneficiary's mandate remains to successfully set up a chain of dry cleaning stores. The director further stated that the beneficiary is currently working on development plans for the first store, to incorporate a wet laundry service and to set up a drop off store. The director also stated that once the first store and trainee manager are operating to the beneficiary's satisfaction, he will concentrate on the development of the corporation and the opening of further stores for the organization's chain.

The petitioner provided a list of the beneficiary's duties and responsibilities as president for the U.S. entity as follows:

- ✓ Overall guidance of the corporation
- ✓ Ensuring all Government, County and Health regulations and registrations are compiled with
- ✓ Negotiation and completion of all purchase details on first store
- ✓ Approving standard of store ready for opening under new management
- ✓ Establishing corporation's policies and procedures
- ✓ Advertising, interviewing and hiring of staff
- ✓ Training of new trainee Manager on company policies and standards
- ✓ Overseeing daily administration and guiding new Manager on them
- ✓ Monitoring new Manager's staff training program and advising on same
- ✓ Delegating responsibilities to new Manager for the daily store operation
- ✓ Holding regular meetings with the new Manager and advising on any problems she may be having with the daily store operation
- ✓ Reviewing equipment and ensuring operational satisfaction
- ✓ Reviewing and sourcing any new equipment required
- ✓ Investigating and visiting competition
- ✓ Reviewing current catchment area and establishing plans for growth
- ✓ Reviewing advertising campaigns and formulating new plans for increased sales
- ✓ Reviewing all advertising media-newspapers, local magazines, flyers, radio, TV and web site
- ✓ Establishing new advertising campaign with special promotion to the local business area
- ✓ Consideration of providing a pick up/drop off service to larger business and government offices and schools in the area, making the problem of dropping off and picking up dry cleaning etc. easier for working clients
- ✓ Joining local professional groups to promote new management and its services
- ✓ Investigating and sourcing suitable premises for Drop Off store in the Vero Beach area, following requests from established clientele
- ✓ Initiating wet laundry service following requests from established clientele

- ✓ Visiting, reviewing and gathering information on further areas considered as possibilities for further stores
- ✓ Establishing a budget for the first store and cash flow
- ✓ Monitoring of all financial aspects
- ✓ Reports only to the Board of Directors of the Kenyan parent company

In response to the director's request for additional evidence, the petitioner submitted the following descriptions as the beneficiary's executive duties:

As President [the beneficiary's] daily duties include, but are not limited to:

STAFFING (20%)

- Daily meetings with Trainee Manager, [REDACTED] to review overall operation and to train, discuss, and guide her as to what is required, or to give her advise on any problems she may be having with staff, work ethics and standards, the facilities, or customers.
- Delegating responsibilities and tasks to [REDACTED] with regard to the daily operation and supervision of staff work.
- Spot checking on staff, building and facilities to ensure high standard maintained.
- Reviewing staff training manual, and establishes guidelines for each new department to follow to ensure coordination between them.
- Advertising for further staff and interviewing applicants with [REDACTED] Once she is familiar with interviewing them it will be [REDACTED] responsibility to hire staff.

FINANCIAL (25%)

- Reviewing of financial affairs, including daily sales figures and cost control, and reviewing with Manager as part of her training.

- Comparison of actual weekly figure with budgeted figures.
- Financial forward planning.

FACILITY AND EQUIPMENT (10%)

- Walk through inspection of the facility to ensure staff work standards and cleanliness is to standard expected, checking on building and facilities, and to supervise overall operation. As his Trainee Manager develops confidence, problems found are delegated to her attention.
- Checking on security and advising Manager on same.
- Reviewing performances of equipment to ensure reliability and investigating further equipment as and when required.

MARKETING AND DEVELOPMENT (35%)

- Analyzes market trends
- Reviews further business opportunities and developments for company
- Reviewing and visiting competitors establishments to be better conversant and informed on competition.
- Researches advertising media and options and establishes the company's marketing strategies
- Investigating and planning new drop off store for Vero Beach, exploring possible areas, looking at suitability of various locations, obtaining demographics for various areas, scrutinizing competitors in each area, and assessing business opportunity.

GENERAL (10%)

- Performs general daily administration
- Ultimate problem solving for the company and his Manager when she is unable to resolve a problem

The petitioner also submitted an organizational chart of the U.S. entity that depicts the beneficiary as president, and includes a trainee manager and a machine operator presser. It also depicts proposed positions, which had not been filled at the time the petition was filed.

The petitioner also stated in response to the director's request for additional evidence that the subcontractor, Jen's Alterations, provides the service of repairing of garments for customers, and that Camelot Dry Cleaners is a subcontractor who provides shirt pressing services to the U.S. entity. The petitioner provided copies of subcontractor invoices to substantiate its claim.

The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary is employed primarily in a managerial or executive capacity. The director stated that even with the contracted services of garment repair and shirt pressing, it is apparent that with so few employees, at the time the petition was filed, the beneficiary's actual time devoted to day-to-day functions would exceed that which is spent in purely managerial or executive duties for the company.

On appeal, the petitioner reiterates the beneficiary's duties as president of the U.S. entity. The petitioner also asserts that the beneficiary established policies and procedures, investigated competitors, reviewed prices, set marketing strategies, planned advertising, set budgets based on seller information, set sales goals, produced cash flows, trained staff in all aspects of the dry cleaning process, reviewed services and made changes for efficiency and better service. The petitioner also states that the beneficiary spent time each day training the manager trainee. The petitioner included as evidence on appeal a letter from the parent company confirming the beneficiary's executive responsibilities; affidavits from the foreign entity's representatives confirming the beneficiary's executive duties and responsibilities; affidavits from the beneficiary and employees describing the beneficiary's executive duties; a revised organizational chart of the U.S. entity; employment tax records; employment staff tables; and invoices depicting subcontracting work (alterations and shirt pressing) completed.

On review of the complete record, it cannot be found that the beneficiary is employed primarily in an executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he is primarily

directing the management of the organization or a major component or function of the organization, that he is establishing goals and policies, that he is exercising a wide latitude in discretionary decision-making, or that he receives only general supervision or direction from higher level individuals. The record does not contain any evidence of a subordinate staff that relieves the beneficiary from performing the day-to-day non-executive duties of the business.

Although the petitioner claims that the U.S. entity is adequately staffed with other employees who perform the everyday services of the business, the evidence shows that when the petition was filed, only two additional employees were employed by the U.S. company. The evidence shows that of the two full-time employees, one is a machine operator/presser who is being trained by the beneficiary for a managerial position, and the other is a machine operator/presser with no specified additional duties. The evidence also shows that the U.S. entity out sources its alterations and shirt pressing jobs. The evidence further demonstrates that the laundry machine operator had left the company and the beneficiary was in the process of recruiting a replacement at the time the petition for extension of status was filed. With the beneficiary's added responsibilities, the loss of an essential employee, and the alleged growth of the business, it is unlikely that he primarily performs executive duties on a day-to-day basis. While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these facts can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role.

Furthermore, the record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed executive staff position. There were a number of positions indicated in the U.S. entity's organizational chart that had yet to be filled at the time the petition for extension of status was filed. The petitioner states on appeal that the business employs five employees. However, the evidence shows that when the petition was filed, the U.S. entity employed only the beneficiary and two other employees. The U.S. entity's 2001 Corporate Employer's Quarterly Federal Tax Return shows that \$15,410.00 was issued by the organization for salaries and wages, and that the only three employees were listed on the accompanying Employer's

Quarterly Report statement for the quarter ending December 31, 2001. In addition, the U.S. entity's Employee Staffing Table and Payroll Roster demonstrates that during the months of October and November 2001, only three employees were on the company's payroll. It is noted for the record that the petition for a new office extension in the instant case was filed on November 2, 2001. The regulation at 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended United States operation (new office) one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (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 case, the beneficiary, at best, primarily supervises non-professional employees and provides the day-to-day services of the U.S. organization, and performs some executive duties. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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 evidence fails to demonstrate that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Moreover, the petitioner has not shown that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. There is no evidence to show that the U.S. entity has the organizational structure or the financial ability to remunerate the beneficiary for his services. It appears from the evidence that the beneficiary is and will continue to primarily perform the day-to-day duties of the organization, including supervising non-professional subordinate staff. Although the record demonstrates that the beneficiary is performing executive functions; with the nature of the business and the number of employees, it appears necessary for the beneficiary to perform multiple non-executive duties in order to assure continued viability of the business. The AAO recognizes that the U.S. entity has added employees since the filing of this petition; however, such progress cannot be taken into consideration in determining this beneficiary's eligibility for an extension of status as the company's president. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts, *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into

being only subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary is employed in an executive capacity. While it is apparent that the beneficiary's experience is a tremendous asset to furthering the petitioner's business objectives, it does not appear at this time that the petitioner is prepared to sustain the beneficiary in a strictly executive capacity.

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.