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U.S. Department of Homeland Security

Citizenship and Immigration Services

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DM
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Meads, 3/F
251 Street, N.W.
Washington, D.C. 20536

FEB 06 2004

FILE: WAC 02 033 53303 Office: CALIFORNIA 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:

[REDACTED]

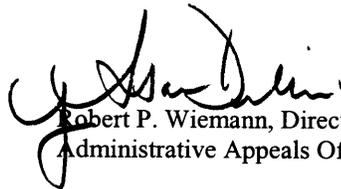
INSTRUCTIONS:

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 P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as an automobile and parts exporting, repair and restoration business. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager for the service department. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been and would continue to be employed primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or 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(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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1996 as an automobile and parts exporting, repair and restoration business. The petitioner states that the U.S. entity is a subsidiary of Apex Corporation, located in Tokyo, Japan. The petitioner declares two employees. The petitioner seeks a continuation of the beneficiary's services as its general manager at a yearly salary of \$25,000.

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

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose

and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In the petition, the petitioner lists the beneficiary's current and proposed job duties as follows:

While at TPA, Inc. [the beneficiary maintains] supervision and control of the service operation including hiring, firing, promoting employees and exercises direction over the day-to-day operations of this department; makes determinations at a senior level for the dept including determinations relating to basic operations (hours of operation, nature of service provided, interaction with other aspects of TPA), decisions on the possibility and manner of outsourcing work, the use of and selection of themes for advertising and promotions for service, review of service department procedures and preparation of reports for use of parent corporation, [and] liaison with parent corporation relating to information requests on U.S. procedures.

The director requested that the petitioner submit additional evidence to establish that the beneficiary has been or would be functioning primarily in a managerial or executive capacity. The director requested the petitioner submit an organizational chart for the U.S. entity; a more detailed description of the beneficiary's job duties; and a description of how the proposed duties meet the petitioner's requirements for a manager or executive. The director also requested complete position descriptions, educational levels, annual salaries and immigration status for all of the employees under the beneficiary's supervision in the United States; and a breakdown of the number of hours devoted to the employees' job duties.

In response to the director's request for additional evidence, the petitioner submitted a copy of the U.S. organizational chart and copies of invoices of outsourced contractors. Counsel stated in a letter of response, dated March 13, 2002, that the beneficiary was currently employed by the petitioner as the general manager to manage and direct the company's service department. He continued by listing duties performed by the beneficiary:

1. Planning and developing policies and objectives for the Service Department;
2. Directing legal affairs of the Service Department;
3. Directing and supervising marketing operations of the Service Department;
4. Pricing of the services to be provided;
5. Evaluating the distribution base to ensure thorough coverage throughout its markets;
6. Supervising the Service Department's financial matters;
7. Initiating contracts with manufacturers of U.S. automobiles and automotive parts and accessories in the Southern California area; and
8. Serving as a liaison with APEX Headquarters in Japan.

Counsel further stated that the beneficiary has discretionary decision-making power over the service department's business operations, including making recommendations for hiring and firing. Counsel listed 13 past service department employees and explains that the organization has shifted to outsourcing its labor. He further maintained that the beneficiary, in light of the change in staffing, is still ultimately responsible for the quality and nature of the service and must maintain strict controls and supervision over the entire service process. The petitioner submitted copies of recent invoices of outsourced contractors as evidence. Counsel also stated that under the outsourcing policy, the beneficiary investigates outside providers for specific areas of expertise, enters into negotiations for service rates and terms of the service, and enters into agreements with the service providers on the pertinent factors. There has been no evidence submitted to substantiate counsel's claims, however. Counsel adds that on a weekly basis, 60 percent of the beneficiary's time is related to establishing job requirements, selecting appropriate contractors, negotiating requirements, costs, manner and timing of delivery, and supervising and reviewing the work performed until delivery. On a weekly basis 10 percent of the beneficiary's time is spent creating and implementing ongoing advertising schedules for trade publications and tracking their effectiveness. And, another 5 percent-10 percent of the beneficiary's time will be spent in liaison activities with the foreign entity. Counsel also noted that the remainder of the beneficiary's time is spent in administrative deliberations relating to planning and reviewing policies and objectives for their short term and long term effects, evaluating pricing of services; and supervising the service department's financial matters.

The U.S. organizational chart depicts a president and the beneficiary as general manager. There are no subordinates, supervisors, independent contractors, leased employees, office clerks or administrative assistants listed on the organizational chart. The chart reiterates the beneficiary's job duty descriptions provided by counsel. The petitioner also lists six primary service contractors.

The director denied the petition stating that upon review, the evidence as provided was deficient in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The director went on to state that the record contains only unsubstantiated accounts of the alleged executive or managerial responsibilities necessary to oversee and manage the business. The director concluded by noting there was no indication from the record that the beneficiary would exercise significant authority over generalized policy or that the beneficiary's duties would be primarily managerial or executive in nature.

On appeal, counsel disagrees with the director's decision and asserts that the documentation previously submitted supports a determination that the beneficiary's position is managerial or executive in nature. Counsel further submits profit and loss statements for the years 2001 and 2002, a list of current and past service providers, and copies of service invoices for the petitioner. Counsel asserts that the role of general manager for TPA in discovering new parts providers and repair service contractors, in evaluating new providers, and monitoring current providers, negotiating terms of service, ensuring compliance with agreements, and terminating agreements, is predictable and within the scope of the regulation.

Counsel's assertions are not persuasive. After the director requested additional documentation on this issue the petitioner failed to submit sufficient evidence. On appeal, counsel relies on evidence that was not in existence at the time the petition was filed, or at the time the initial decision to deny the petition was made by the director. 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 Corp.*, 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). Therefore, a petitioner may not make material changes

to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998).

Pursuant to 8 C.F.R. § 103.2(B)(12): "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner's new evidence will not be considered and the record as presently constituted does not demonstrate that the beneficiary has been or will be functioning primarily in a managerial or executive capacity.

On review of the record, it cannot be found that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The vague position description is insufficient to establish that the beneficiary's current or proposed job duties are managerial or executive in nature. The petitioner has not provided persuasive evidence to establish that the beneficiary has been and will be managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organization hierarchy. Counsel contends that the petitioner has outsourced its labor and that the beneficiary supervises and manages the outsourced labor in his capacity as general manager of the organization's service department. The record demonstrates that the petitioner out-sources service and repair jobs to auto repair, auto service, and auto parts shops. The petitioner has failed to submit any documentation to attest to the existence of formal agreements or contracts dealing with the organization's decision to outsource its labor. There is no evidence in the record to show that any form of agreement has been made between the petitioner and the service contractors for management or supervision by the beneficiary over the contractors' employees who are located off-site. In fact, the invoices reflect that the petitioner is doing business with the service contractors, rather than maintaining any element of management or supervision over the outsourced employees. There is no evidence in the record that demonstrates the petitioner is responsible for paying the wages or salaries of the outsourced employees. There is no evidence of record to substantiate that

the petitioner's management maintains tight control over the STAT contract labors' job performance, or over how the services are to be provided. The petitioner has not established how the beneficiary is managing or supervising services and repairs that take place at the petitioner's company daily (see invoices), and in the same instance is managing outsourced employees who work in a multitude of off-site locations (Gardena, Torrance, Lawndale, California) for multiple service providers (JCK Auto Repair Service, Fernando's Auto Repair, Kim's Smog & Auto Service, Discount Tire Centers, M&B Auto Parts, and New Wave Sound). The record does not demonstrate that the U.S. entity contains the organizational complexity to support a managerial or executive position. There are only two employees listed by the petitioner in the petition and in the organizational chart - president and general manager (beneficiary). The record does not support a finding that the beneficiary will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. There are no subordinates listed as being under the beneficiary's direction within the U.S. entity. The record reflects that the beneficiary will continue to perform the day-to-day services of the organization. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Position title alone is insufficient to establish that the beneficiary will be functioning primarily in a managerial or executive capacity.

Furthermore, the record does not establish that the beneficiary has been and will be primarily managing a function of the organization. The beneficiary's job descriptions depict an individual in charge of the day-to-day services of the organization, not a functional manager. When managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must demonstrate that the executive or manager does not directly perform the function. Although counsel argues that the beneficiary will be managing an essential function of the U.S. entity by overseeing the service department for the organization, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The petitioner has failed to provide a detailed position description specifying exactly what the management of the service department will entail. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from

performing non-qualifying duties. In the instant matter, the petitioner submitted documentation that lists former employees and current service contractors who work off-site. The petitioner also provided numerous copies of invoices prepared for the U.S. entity by the service providers. This evidence is insufficient to establish that there are qualified employees to relieve the beneficiary from performing the function. Absent details concerning the employees' position descriptions, daily activities, and percentages of time spent performing each duty, the record is insufficient to establish that the beneficiary will be managing rather than performing the function.

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.