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U.S. Citizenship  
and Immigration  
Services

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JUN 08 2004



FILE: SRC 02 263 52663 Office: TEXAS 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:



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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Terry World International, Inc., endeavors to classify the beneficiary as a nonimmigrant manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims it is an affiliate of Faisal Fabrics, located in Pakistan. The petitioner is a distributor and seller of terrycloth towels. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's vice president of operations. The petitioner was incorporated in the State of Florida on August 21, 2001 and claims to have four employees.

On December 23, 2002, the director denied the petition and determined that the petitioner had not established that the beneficiary has been or will be primarily performing duties in an executive or managerial capacity.

On appeal, the petitioner's counsel refutes the director's findings and claims that "the [b]eneficiary is working in a managerial capacity." Counsel further asserts that the director based her decision, in part, on the petitioner's failure to provide evidence which was never requested. Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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 (l)(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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require 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 (l)(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.

The issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties for the United States entity.

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.

On September 6, 2002, the petitioner filed the Form I-129. The petitioner described the beneficiary's proposed duties in an August 15, 2002 letter as:

- Communicating Duties: Includes contacts with Vendors and Buyers (Retailers/Wholesalers), correspondence and consultations with home company [the foreign entity], fax/email/telephone contacts with [U.S.] freight carriers, transporter, clearing and forwarding agents, banks and service agencies initiate and complete transactions related to import, custom clearance, payment of freight and will include all day to day business transactions. [The beneficiary] spends approximately 15% of his time with these duties.
- General Administrative Duties: Include control and management of work load assigned to employees, contractors, service agencies, supervision of employee-work hours, payments of salaries/wages, payment of creditors, collection of debtors, payment of monthly bills, insurance lease payments, utilities, payroll taxes, advertising, accounting, and legal expenses cost of supplies. [The beneficiary] spends approximately 10% of his time with these duties.
- Operations Duties: Include all aspects of business transactions, control, implementation of policies, execution, target, thrust, from gathering information/ data related to market needs, preferences, designs and qualities to placement of orders, with monthly calculated figures, monitoring shipments and arrival of goods at U.S. ports, customs clearance, warehousing, and/or direct delivery to U.S. business organizations as well as transactions with one or more parties involved. [The beneficiary] spends approximately 20% of his time with these duties.
- Sales Duties: Including all direct and indirect marketing efforts leading to confirmation of sales of Terry Towel products within the U.S. market, preparing a delivery/supplies schedules, obtaining customer preferences, maintenance of average

sales target, to reduce sitting inventory load and enhance cash flow. [The beneficiary] spends approximately 20% of his time with these duties.

- Advertising Duties: Include promotion and target marketing of cotton terry textiles directed towards selected vendors, suppliers, wholesalers and customers to boost sale, marketing, promotions and to obtain market feedback. This is implemented through advertisement in newspapers, industries magazine yellow pages, telemarketing and other reliable efforts. [The beneficiary] 5% of his time with these duties.
- Public Relations Duties: Include maintenance of strong business relations with customers, vendors, wholesalers, retailers, consumers, similar product and services participation in fairs, events, exhibitions, promotional activities, working with consumer groups, media services to assist achievement of targeted sales. [The beneficiary] spends approximately 10% of his time with these duties.
- Controlling Duties: Include all aspects of control exercised in business including marketing, sales, promotions, collection of data, feedback, import, freight, placement of orders, follow-ups, after-sales service, payment of wages, salaries, taxes and other bona-fide expenses of the company. [The beneficiary] spends approximately 10% of his time with these duties.
- Staffing Duties: Include delegation of workload, shifts, staff duties, responsibilities, care taking, related to the workforce of the company. [The beneficiary] spends approximately 3% of his time with these duties.
- Coordinating Duties: Include all work that is intended to or helps to improve the efficiency of different departments of the company, streamlining workload, removal of administrative bottlenecks, assisting colleagues to perform better and to enhance productivity and remove areas of conflict within the internal departments of the company. [The beneficiary] spends approximately 2% of his time with these duties.
- Taxes Duties: Include accurate calculation and payment of various forms of taxes/charges as prescribed under legislation/regulations of the city government, and state government (income tax, sales tax, and other forms of taxes). [The beneficiary] spends approximately 5% of his time with these duties.

The petitioner also claimed that the U.S. employees included [REDACTED] the president; the beneficiary (vice-president); [REDACTED] the sales officer; and [REDACTED] the administrative officer.

On September 26, 2002, the director requested additional evidence. Specifically, the director requested: (1) a detailed description of the beneficiary's U.S. duties; (2) how the beneficiary qualifies as a manager

or executive; (3) the names of the employees that the beneficiary manages; and, (4) whom are the employees the officers oversee.

The petitioner responded to the request for additional evidence on December 4, 2002 and submitted a letter describing the job duties for each employee, a U.S. organizational chart, Forms W-4, and copies of employees' paychecks for November 1, 2002. The petitioner stated:

The Beneficiary endeavors to achieve the Company's goals, through performance of essential functions that include, but are not limited to:

- Managing the Department of Marketing & Sales
- Managing the business organization in general
- Supervision and control of the work of one Sales Manager
- Having the authority to make decisions concerning the day-to-day operations of the Department of Marketing/Sales, in particular and all other Departments, in the absence of the President
- Directing, as and when required, to manage a major part of the organization
- Setting goals and policies (in consultation with the President of the Company), having discretionary authority to make decisions

The petitioner also reiterated some of the beneficiary's U.S. duties and claimed that the beneficiary managed the company through the direct supervision and control of five employees. The petitioner also stated that by March 2002, "the company's situation had improved" and that it had "appointed one full time manager and one full time officer." However, the petitioner claimed it could not file a payroll tax return for these employees in the first quarter ending on March 31, 2002 other than for the president and vice president. In addition, the petitioner claimed that it filed payroll tax returns for the president, vice-president, and two employees at the end of the second quarter ending on June 30, 2002; however, the employees listed on the payroll tax return are no longer with the company. The petitioner then claimed that the company hired five new employees who will be listed on the payroll tax return ending on December 31, 2002. These employees are [REDACTED] the sales and administrative manager; [REDACTED] the assistant manager; [REDACTED] the office assistant; [REDACTED] the part-time office assistant; and [REDACTED] the part-time office assistant. Finally, the petitioner claimed that when the president is away, "The Beneficiary shares the additional burden of the President's duties and responsibilities." The petitioner described these additional duties and the duties of its five new employees in its October 31, 2002 letter.

On December 23, 2002, the director denied the petition and determined that the petitioner had not established that the beneficiary has been or will be primarily performing duties in an executive or managerial capacity. The director found that there were discrepancies concerning the employees who worked for the petitioner. The director noted that the dates were changed on the Forms W-4 and found that the petitioner had not established that it had employees other than the beneficiary and the company president at the time the petition was filed. The director concluded that the beneficiary is performing most of the day-to-day work of running the company.

On appeal, the petitioner's counsel submits a January 16, 2003 letter responding to the director's findings. Counsel claims that "the [b]eneficiary is working in a managerial capacity." Counsel explains that the Forms W-4 were obtained from an accountant and were computer generated with preprinted dates. Counsel states that the petitioner crossed out the preprinted dates and hand wrote the actual dates the employees were hired. The petitioner submits a letter from A&K Bookkeeping & Tax Consultants. The petitioner also submits copies of the checks issued in November 2002 indicating that the employees were paid. Counsel asserts the company had employees starting from the second quarter. Finally, counsel claims that as soon as the petitioner was receiving goods from Pakistan, they hired employees and that prior to that time "operations for the business were on temporary hold."

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the description of the beneficiary's U.S. job duties. *See* 8 C.F.R. § 214.2(I)(3)(ii). On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary's proposed U.S. duties included "control[ing] implementation of policies," "control[ing] and management of work load assigned to employees," and "[s]etting goals and policies." The petitioner did not, however, define or clarify these duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, the petitioner describes the beneficiary as being involved in communication duties (15 percent), general administrative duties (10 percent), operations duties (20 percent), sales duties (20 percent), advertising duties (5 percent), public relations duties (10 percent), controlling duties (10 percent), staffing duties (3 percent), coordinating duties (2 percent), and tax duties (5 percent). This description indicates that the beneficiary spends the majority of his time performing the daily tasks of the company; therefore, the beneficiary is not employed in a primarily managerial or executive capacity. 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 capacity. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO notes that the petitioner indicated that the five employees were listed on the payroll tax return ending on December 31, 2002. The petitioner also stated that by March 2002, "the company's situation had improved" and that it had "appointed one full time manager and one full time officer." However, the petitioner claimed it could not file a payroll tax return for these employees in the first quarter ending on March 31, 2002 other than for the president and vice president. In addition, the petitioner claimed that it filed payroll tax returns for the president, vice-president, and two employees at the end of the second quarter ending on June 30, 2002; however, the employees listed on the payroll tax return are no longer with the company. The petitioner claims that it subsequently hired a Sales and Administrative Manager on August 10, 2002. However, the petitioner has failed to explain why this individual was not included in the list of employees submitted with the initial petition on September 6, 2002, or why this list of employees included two individuals who were no longer employed at the date of filing. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the

remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Based on the conflicting and confusing evidence submitted, the AAO cannot conclude that the beneficiary had any subordinates at the time of filing.

It appears the petitioner subsequently hired additional employees. 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. 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 matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Further, the description of the beneficiary's duties does not persuasively demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision, or component of the company. 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).

The petitioner stated in the response to the director's request for additional evidence that the beneficiary "endeavors to achieve the Company's goals, through performance of essential functions." However, 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.

First, as pointed out earlier, the petitioner failed to provide a sufficiently comprehensive and detailed description of the beneficiary's proposed responsibilities. Thus, the petitioner did not provide evidence sufficient to meet the burden of proof. *Matter of Soffici*, 22 I&N Dec. at 165. Second, as demonstrated above, the beneficiary will be largely performing tasks necessary to produce a product or provide services; thus, the beneficiary is not employed in a managerial capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 593, 604. In sum, the petitioner has not provided evidence that the beneficiary manages an essential function.

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO is not persuaded that at the time the petitioner filed its petition on September 6, 2002, it had established that it had been doing business for the previous year as required by the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B). 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. The term “doing business” is defined in the regulations as “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.” 8 C.F.R. § 214.2(I)(1)(ii).

In the October 31, 2002 response to the director’s request for additional evidence, the petitioner claimed that it “is a Corporation that has been doing business in the State of Florida since January 2002.” The petitioner explained that due to the events of 9/11, that it could not start business earlier and that the situation improved by March 2002. The petitioner also claimed that it had commenced shipments of goods to the United States in April 2002. In addition, the petitioner claimed it could not file a payroll tax return for its employees in the first quarter ending on March 31, 2002 other than for the president and vice president. On appeal, the petitioner specifically states “it was not possible on the part of the Petitioners to start operations of any sort, earlier than April 2002. Therefore, it does not appear that the company was doing business from September 2001 through April 2002. For this additional reason, the petition may not be approved.

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 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). For this additional reason, the AAO concludes 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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.