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U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 042 56378 Office: TEXAS SERVICE CENTER Date: MAR 03 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Oliver Services Corporation, incorporated on June 12, 2000, claims to be a subsidiary of a Brazilian company Fast Services Ltda. In November 2000, the U.S. entity petitioned to classify the beneficiary as a nonimmigrant intracompany transferee (L-1). The director approved the initial petition as valid from November 20, 2000 until November 19, 2001. During this time, the petitioner had initially planned to purchase and operate a gas station and retail convenience store in the United States. Although the petitioner claims that these businesses are still planned, the petitioner decided to open and operate a shoe store franchise. However, the shoe store franchise did not materialize and the petitioner decided to engage in the restaurant business. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for one year. The petitioner seeks to employ the beneficiary's services as the U.S. entity's president at an annual salary of $40,000.

On May 28, 2002, the director denied the petition and determined that the petitioner failed to establish that the U.S. and foreign entities are doing business. The director also found that sufficient premises for the new business had not been secured and that the beneficiary has not been acting primarily in a managerial or an executive capacity for the United States entity.

On appeal, the petitioner's counsel asserts that the United States and foreign entities are engaged in business and that the beneficiary has been acting in an executive or managerial capacity.

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 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.

Pursuant to 8 C.F.R. § 214.2(l)(3), 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.
>
> (iii) 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.

Further, if the petitioner is filing a petition extension for L-1 classification, 8 C.F.R. § 214.2(l)(14)(ii) provides that:

(ii) *New offices.* 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 first issue in this proceeding is whether the United States and foreign entities are doing business. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F), (G), and (H) states:

(F) *New office* means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(H) 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 pertinent part, the regulations at 8 C.F.R. § 214.2 (l)(1)(ii) define "parent," "branch," "subsidiary," and "affiliate" as:

(I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.

(J) "Branch" means an operating division or office of the same organization housed in a different location.

(K) "Subsidiary" means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) "Affiliate" means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity[.]

On February 8, 2002, the director requested additional evidence to establish that the U.S. entity is doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). At the time of this request, the director assumed the petitioner was engaged in the shoe business. The director requested copies of sales contracts, invoices, bills of lading, orders, and tax returns.

In addition, the director requested that the petitioner submit evidence that the foreign entity was doing business. The director requested that the petitioner submit a copy of the incorporation papers, cash register receipts or sales receipts, purchase orders including invoices for restaurant supplies, and evidence of the person currently running the business.

On May 3, 2002, the petitioner responded to the request for evidence by claiming that the petitioner had a slow start-up because the petitioner decided not to open a shoe store and "[s]ince the foreign parent company, Fast Servicio Ltda. is in the food business, it was decided to go in

that direction and open a restaurant operation. . . ." The petitioner, in the letter, claims that documentation has been submitted that includes:

- a business plan for 2002 to 2004
- evidence of the hiring of an operation supervisor
- the leasing of the facility for the restaurant operation
- contract with an architectural firm
- general contractor for construction
- certificate of registration, bank statement showing the company maintains $100,000 on account
- evidence of purchase of more than $60,000 of equipment for the operation of the business

In relation to the foreign entity, the petitioner also claimed that:

> [D]ocumentation is submitted to show that the [foreign entity] continues to operate as a business and currently has a management team of four individuals who are responsible to manage the company's 40+ employees, to administer production, to oversee the administrative and financial sectors of the company from purchases of materials required by the production sector to administration, marketing, reception, the deposit of monies, and the sale of the final product.

On May 28, 2002, the director determined that the petitioner did not submit evidence to establish that the United States and foreign entities have been doing business during the past year. The director found that since the petitioner claimed that the United States entity was involved in establishing a delicatessan in a shopping center, it had not been doing business for the past year.

The director also found that: (1) the petitioner submitted invoice receivables, dated February 2, 2002, but no sales receipts for the foreign entity; (2) a number of invoices were for McDonalds' groceries; (3) an occupational certificate indicated that the foreign entity was doing business as McDonald's; (4) the relationship between the foreign entity and McDonald's was not explained or documented; and (5) the foreign entity was reported on the payroll records as the managing partner with what appeared to be a business named Guimaraes MN Stores Industria Comercio Representacao E Importacao Ltda.

On appeal, the petitioner asserts that documentation is included to establish the relationship between McDonald's and the foreign entity. The petitioner initially submitted the following information:

- Payroll records from January 2001 through September 2001.

- Lease agreement indicating the number of installments and amounts.

- Certification that the foreign entity has a management team composed of four executives.

- Extract translation of supplier invoices issued to the foreign entity indicating an invoice number, dates ranging from January 2002 through February 2002, a supplier/description, and a total amount for various suppliers. A number of the suppliers indicate descriptions such as "BRAPELCO/ Groceries for McDonald's." These invoices pertain to "[a]ddressee FAST SERVICOS LTDA. Avenida Colares Moreira 222A Renascenca . . . 65075-440

- A receipt from a supplier, Brapelco, indicating an address for the foreign entity listed as Av. Colares Moreira, 222A, Renascenca 65075-440.

- A receipt from a supplier indicating an address for McDonald's listed as AV CEL COLARES MOREIRA 00000 0, RENASCENCA

- An occupancy and operating license for fiscal year 2001 stating "Name: FAST SERVICES LTDA., d.b.a. McDONALD'S.

- An extract of the foreign entity's articles of incorporation indicating that the foreign entity's designated purpose "is to operate a retail food business (restaurant) and engage in the marketing of food products in general and the importing and exporting of related goods and products."

The regulations require that the foreign entity is a qualifying organization that is doing business. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Specifically, doing business is defined as "the regular, systematic, and continuous provision of goods. . . ." *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). After carefully examining the payroll records, lease agreement, certification, invoices, receipts from suppliers, occupancy and operating license, and articles of incorporation, the AAO has determined that the foreign entity has been doing business during the past year. Specifically, the occupancy and operating license for fiscal year 2001 indicate that the foreign entity has been doing business as a McDonald's franchise. Therefore, the director incorrectly concluded that the foreign entity had not been doing business during the past year and the AAO withdraws this portion of the director's decision. Accordingly, there is sufficient evidence in the record to persuade the AAO that the foreign entity has been doing business and that the foreign entity is a qualifying organization.

The AAO observes that the director incorrectly concluded that the foreign entity was reported as what appears to be the managing partner with Guimaraes MN Stores Industria Comercio Representacao E Importacao Ltda. The employment and welfare record booklet indicates that these entities are two separate employers and that the foreign entity is not a managing partner.

Further, on appeal, the petitioner asserts that:

> [T]he petitioner has enclosed the architectural plans for the construction of the restaurant which has been underway since the lease was signed April 9, 2002. During this time, the petitioner engaged U.S. workers to construct the restaurant.

Upon review, the evidence does not establish that the United States entity has been doing business. The regulation at 8 C.F.R. § 214.2(l)(14)(ii) requires that the petitioner submit evidence that the United States entity has been doing business for the previous year. *Id.* The petitioner must submit evidence that it has been doing business by showing the regular, systematic, and continuous provision of goods and/or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H).

On appeal, the petitioner asserted that "the construction of the restaurant . . . has been underway since the lease was signed April 9, 2002." Since the petitioner had filed for an extension for the beneficiary on November 16, 2001, the petitioner already had from November 19, 2000 until November 20, 2001 to show that the United States entity was an operating business. At the time of filing for an extension, the deli had not been in operation during the previous year. Therefore, the petitioner has not been doing business as required and defined by the regulations for the previous year. *See* 8 C.F.R. § 214.2(l)(14)(ii); *See also* 8 C.F.R. § 214.2(l)(ii)(H). Accordingly, there is insufficient evidence in the record to persuade the AAO that the U.S. entity has been doing business.

The second issue is whether the petitioner has established that it secured sufficient physical premises to operate the new business.

The regulations state that if the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States then the petitioner must submit evidence that sufficient physical premises to house the new office have been secured. 8 C.F.R. § 214.2(l)(3)(v). The director determined that as of the date of filing, the petitioner had not yet secured a place to do business.

On November 14, 2001, the petitioner filed Form I-129 to extend the beneficiary's stay. Since construction on the Deli commenced in April 2002, this indicates that at the time of filing for the extension, the petitioner had not secured a sufficient physical premise to operate the business. Although the director determined that the U.S. entity has not secured sufficient physical premises to operate its business, this issue should have been adjudicated in the initial petition. As the appeal will be dismissed, this issue need not be examined further.

The third issue in this proceeding is whether the beneficiary has been 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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

On February 8, 2002, the director requested additional evidence including the beneficiary's position title, beneficiary's duties and percentage of time spent on those duties, qualifications for the beneficiary's position, level of authority and organizational hierarchy held by the beneficiary, number of subordinate employees with a description of their job titles, duties, and educational background.

On May 2, 2002, counsel submitted a letter stating that:

> The beneficiary will function as a Manager responsible to oversee the activities of the Operation Supervisor who will direct subordinate staff in carrying out the day-to-day responsibilities not of managerial nature. Since [the beneficiary] has more than 12 years experience in restaurant management, he is well qualified to direct the operations of Doral Deli.

On May 3, 2002, counsel submitted a second letter stating that:

> In your request for additional information, you advised the petitioner as to its burden of proof in documenting how the beneficiary would function in a managerial or executive capacity under the extension following the opening of a new office. As indicated in the petitioner's response of May 2, 2002, the petitioner had a slow start-up, as it initially planned to own and operate a gasoline station and retail convenience store and then explored the feasibility of opening a retail outlet of a Brazilian-based retail shoe store, City Shoes. Since the foreign parent company, . . . is in the food business, it was decided to go in that direction and open a restaurant operation. . . .

On May 28, 2002, the director determined that the petitioner had submitted no evidence to establish that the beneficiary had been acting in an executive or managerial capacity. The director found that none of the business plans had been implemented as of November 16, 2001, the date of filing, and that the beneficiary had no opportunity to act as a manager or an executive.

On appeal, counsel asserts that "the nature of this operation is that the beneficiary will function in an executive-managerial capacity since such a business cannot operate without subordinate supervisory staff." Counsel stated that:

> Given the nature of such an operation, the beneficiary will direct the overall management of the operation and establish its goals and policies. He will not be engaged in routine, day-to day responsibilities that are not of a managerial nature. . . . The beneficiary has been acting in an executive or managerial capacity as he has been overseeing the construction of the business facility since April 2002. Prior to that time, the beneficiary conducted the necessary market research and feasibility planning required to develop a restaurant operation.

Counsel also asserts that the petitioner hired the operation supervisor April 1, 2002, a manager who started June 1, 2002, with a sales coordinator and cookie coordinator starting July 1, 2002, two cashiers beginning on July 20, 2002, and three delivery persons to start August 1, 2002.

Upon review, the petitioner did not submit sufficient evidence to establish that the United States entity will support an executive or managerial position. The regulation at 8 C.F.R. § 214.2(1)(3)(v)(C) requires that "the intended United States operation, within one year of the approval of the petition . . . support an executive or managerial position." *Id.* (Emphasis added.)

Since the petitioner stated that "the beneficiary *will* function in an executive-managerial capacity" then at the time of filing, the beneficiary had not yet served in an executive or managerial capacity. *See id.* Therefore, since the United States entity was not operational at the time of filing for an extension, the United States entity had not supported an executive or managerial position within one year of the approval of the petition. *See id.*

In the addendum submitted with the appeal, the petitioner stated that "[t]he beneficiary has been acting in an executive or managerial capacity as he has been overseeing the construction of the business facility since April 2002." Although the petitioner may have been "overseeing" the construction of the business facility, this is not considered acting in an executive or managerial capacity. Overseeing a group of U.S. construction workers does not equate to acting in a managerial or executive capacity. These workers do not operate the business and are not professional employees who are part of an organizational hierarchy. The beneficiary who is "overseeing the construction" is also not managing the organization, or a department, subdivision, function, or component of the business. *See* § 101(a)(44)(A) of the Act.

Further, the petitioner described the beneficiary as an individual who will "direct the overall management of the operation and establish its goals and policies. . . ." These duties are generalities that fail to enumerate any concrete "goals" or "policies" that the beneficiary will plan, develop, or establish. Although the petitioner asserts that the beneficiary is a "president," the AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner also stated that "the beneficiary will function in an executive-managerial capacity. . . ." The petitioner did not clearly describe the duties to be performed by the beneficiary and did not indicate whether such duties are either in an executive or managerial capacity. The regulation at 8 C.F.R. § 214.2(1)(3)(ii) requires that the petitioner submit evidence that the beneficiary will be employed in an executive, managerial, or specialized knowledge capacity, not in an "executive-managerial capacity" as stated by the petitioner.

In addition, the petitioner also failed to submit, as requested by the director, a description of the duties and educational levels for the U.S. entity's subordinate staff. The organizational chart does not indicate last names, only first names, a start date, and the positions held which include a president, supervisor, manager, sales coordinator, cookery coordinator, two cashiers, and three delivery employees. The petitioner claims that "such a business cannot operate without subordinate supervisory staff." However, since these employees' duties were not described, then it appears from the chart that the president, supervisor, and manager will be performing day-to-day operations such as food preparation. Also, although the petitioner stated that some of these employees have been hired, the petitioner has provided no evidence of the wages paid to these employees as required by 8 C.F.R. § 214.2(l)(14)(ii). Accordingly, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional personnel who relieve the beneficiary from performing nonqualifying duties. As stated in the Act, "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)(A)(iv) of the Act. After careful consideration of the evidence, the AAO must conclude that the beneficiary has not been and will not 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, another issue in this proceeding, not raised by the director, is whether the employment offered to the beneficiary is temporary in nature. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) provides that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. *Id.* While the petitioner for an L classification is required to submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily, where the beneficiary is claimed to be the owner or majority stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovic*, 18 I&N Dec. 361 (Comm. 1982).

The beneficiary's stay in the United States does not appear to be temporary. The record indicates that the beneficiary and his spouse own the foreign and petitioning entities. The beneficiary is the majority stockholder/owner of the petitioning and foreign entities. The beneficiary's wife is the minority owner. As indicated in the record, the foreign entity has a management team composed of four employees. This team is "empowered to manage 40 or more employees, as well as administer the production, administrative and financial sectors. . . ." Since the foreign entity has a management team capable of operating the foreign entity and both owners appear to be residing in the United States, this raises the question of whether the beneficiary will remain only temporary in the United States. Accordingly, the AAO concludes that the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

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