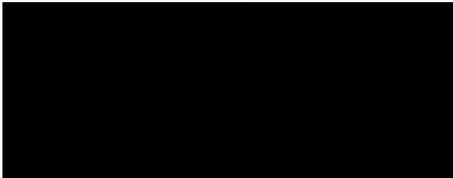


D-7

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

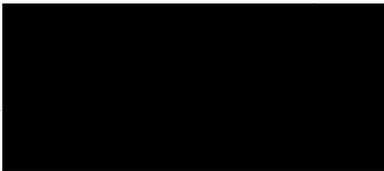


FILE: SRC 02 038 53982 Office: TEXAS SERVICE CENTER Date: **MAR 23 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

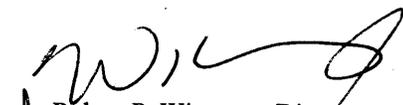
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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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 is described as a retail store established to market and distribute electronics, food, household, and automotive products under the business name "Asif Sunmart #147." It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and director. The director determined that the petitioner failed to establish that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel submits a brief in opposition to the director's decision.

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.

According to the record, the petitioner was incorporated in 2000. The petition claims that the U.S. entity is a subsidiary of Asif Electronics LTD, located in Waltham Stow, England. The petitioner declares one to two employees and an estimate of \$300,000 in gross annual income. The petitioner seeks to extend the beneficiary's stay for three years at an annual salary of \$30,000.

The issue presented in this proceeding is whether the petitioner has established that the beneficiary has been or 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.

In the petition, the petitioner described the beneficiary’s past duties as: “[d]irector and chief executive offer. Has total authority over hiring, training, ABD supervising of managerial level personnel.” The petitioner continued by describing the beneficiary’s proposed duties as: “[h]ire, train, and supervise managerial

personnel. Will establish a marketing plan, company policies and set goals. Will report directly to the board of directors.”

In response to the director’s request for additional evidence, counsel described the beneficiary’s current duties as follows:

On a daily basis, Mr. [REDACTED] devotes most of his time to the supervision of employees and in planning the expansion of our company. Plans for the expansion of our company are foremost in his activities. He reports to the parent company on his evaluation of business opportunities and proposed ventures in the United States. He plans, develops and establishes policies with the objective to maximize the profitability of the business organization in accordance with board directives and corporation charter. He reviews the activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions.

The director determined that the information provided by the petitioner was insufficient to show that the beneficiary’s actual daily activities were or would be primarily managerial or executive in nature. The director also concluded that the business had not grown to a point where it needed or could support a full-time, bona fide president/director.

On appeal, counsel asserts that the petitioner has provided sufficient evidence that the beneficiary has been employed and will continue to be employed in the United States in a managerial or executive capacity. Counsel also provides as evidence, an organizational chart of the U.S. entity, employee position descriptions, a copy of the U.S. Corporate Income Tax Return for 2001, and a copy of the U.S. entity’s 2002 Employer’s Quarterly Federal Tax Return (Form 941) for the first quarter. Counsel describes the beneficiary’s proposed job duties as:

As a President and Director . . . [the beneficiary] will be the key U.S. contact for the shareholders and directors of the parent company. Mr. [REDACTED] will be employed at the highest position within the U.S. Company, and will supervise other managers who run day-to-day operations of retail stores. In sum, Mr. [REDACTED] will have the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, determining which retail outlets to purchase, placing a management team to run the outlets, supervise all financial aspects of the company and set policies and objectives for the company.

Counsel continues by describing the beneficiary’s past duties as:

Since . . . November 2000, [beneficiary] has served as the president and director of our U.S. entity. Asif Electronics USA. In this capacity, [beneficiary] directs and oversees all executive functions of the company.

As president and director, [beneficiary] a) has the overall managerial and executive responsibility for developing, organizing, and establishing the operations of Asif Electronics USA and all its acquisitions in the U.S. domestic market; b) has total managerial and

executive authority over the company and all of its activities and ultimately over employees without limitation; c)planning and steering the expansion of U.S. entity, their respective store managers perform the day-to-day functions at ASIF Electronics USA and its acquisitions; d) possess all rights to execute all managerial decisions of the company, including decision over types of business investments, products, goods, contracts, pricing, and hiring sales staff and other personnel; f) directs and formulates financial and marketing strategy to provide funding in developing and continuing the operations to maximize profitability; and g)supervises the company’s day-to-day operations.

Counsel also submits a table depicting the beneficiary’s duties and the percentage of time spent performing each as:

DESCRIPTION OF DUTIES	TIME SPENT %
Management Decisions/Team Building	40%
Business Negotiations	15%
Financial Decisions	10%
Supervision of management staff and Company functions	15%
Organizational Development of Company	20%

The U.S. entity’s organizational chart shows that there is a vice president/general manager, a sales manager, and two sales reps/cashiers that are managed and/or supervised by the beneficiary. Counsel also submits a description of job duties for all subordinates.

Counsel’s assertions are not persuasive. On review, the record as presently constituted does not demonstrate that the beneficiary has been employed in a primarily executive or managerial capacity. The information provided by the petitioner describes the beneficiary’s current duties only in broad and general terms. Duties described as: has overall managerial and executive responsibility for developing, organizing, and establishing the operations; planning and steering the expansion of U.S. entity; possess all rights to execute all managerial decisions of the company; directs and formulates financial and marketing strategy; and supervises the company’s day-to-day operations are without any context in which to reach a determination as to whether they would be qualifying as executive or managerial in nature. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. The beneficiary’s position title cannot be used to substitute for a concrete description of the beneficiary’s actual duties. The limited information contained in the record regarding the beneficiary’s actual duties indicates that the beneficiary is performing the necessary day-to-day activities of the U.S. entity. 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).

Further, there has been no evidence presented to show that any of the beneficiary’s time has been spent managing the organization, or managing a department, subdivision, function, or component of the company. Based upon the evidence contained in the record, it appears that the beneficiary was the sole employee at the time the current petition was filed, and has been primarily responsible for establishing the new entity and

carrying out the daily activities of the organization. The record does not establish that within the first year of operation, the beneficiary functioned at a senior level within the organization. Furthermore, the petitioner's evidence is not persuasive in establishing that the beneficiary has been managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The U.S. entity's 2001 Corporate Income Tax Return shows that there was no salary or wage payments made to any employees during 2001. The record also shows that the U.S. entity did not demonstrate the existence of the four additional employees until 2002, when the quarterly tax returns, for the first quarter of 2002, depicted a total of five employees.

The petitioner's evidence is not sufficient to establish that the beneficiary will be directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher-level executives. Counsel states on appeal, that the beneficiary will be employed at the highest position within the U.S. entity, and will supervise other managers who will run the day-to-day operations of the retail stores. This position description is not sufficient to demonstrate that the beneficiary will be employed in a managerial or executive capacity. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title.

Furthermore, the record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed managerial or executive staff position. Counsel states on appeal that the business employs five employees and anticipates expansion of the U.S. partnership in the near future. However, the evidence shows that at the time the petition was filed, the U.S. entity employed only the beneficiary. The U.S. entity's 2001 Corporate Income Tax return shows that \$31,000 was issued by the organization for compensation of officers, and that no money was issued for salaries and wages during that same year. In addition, the company's corporate quarterly tax records for the beginning of 2002 reveal that the additional four employees were not employed until 2002. The regulation at 8 C.F.R. § 214.2(l)(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 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, will be supervising non-professional employees, and will continue to provide the day-to-day services of the U.S. entity. 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. It is noted that the petition in the instant matter was filed November 9, 2001.

On review of the record of this proceeding, the petitioner has not established that the beneficiary has been or will be primarily employed in a managerial or executive capacity. There is insufficient evidence to establish that the beneficiary will be managing a professional staff or a function of the U.S. entity. There is no evidence to show that the U.S. entity will be able to support a managerial or executive position.

Beyond the decision of the director, the record indicates that the beneficiary is the owner of the petitioning and foreign companies. There is no evidence to establish that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad on completion of the temporary assignment in the United States pursuant to 8 C.F.R. § 214.2(l)(3)(vii). In addition, the minimal documentation of the parent's and the petitioner's business operations raises the issue of whether there is a qualifying relationship between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). Neither has the petitioner persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. As the appeal will be dismissed, 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.