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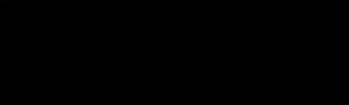
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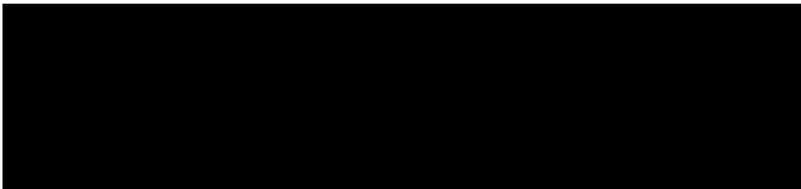
File: SRC 02 069 50464 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



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.

Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is in the business of retailing food, gasoline and petroleum products and operates a retail outlet named the Sunrise Food Mart. It seeks to continue to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary would continue to be employed in the United States in a managerial or executive capacity.

On appeal, counsel states that the petitioner was not given sufficient time to commence operation of the business. Counsel further states that since April 2002, the petitioner has consistently employed at least five persons and is performing the full range of responsibilities normally performed by an executive. Counsel emphasizes that the petitioner had only been in operation for four months when the tragedy of September 11th occurred. Counsel indicates that the petitioner's goals for the business are greatly devastated by this event as it relies on the daily traffic of the tourists and workers of the Kennedy Space Center and the "Space Coast" area of Florida. Counsel submits the petitioner's income statement for the period ending June 30, 2002 to show that the gross sales of the business are almost the same for the first six months of 2002 as they were for 2001 in its entirety. Counsel requests that the visa petition be approved.

The petitioner is a corporation that originated in the State of Florida on October 2, 2000. The petitioner was initially granted a one year period of stay in order to open the new office. The petitioner now seeks to extend the validity of that petition pursuant to 8 C.F.R. § 214.2(l)(14)(ii).

The regulations at 8 C.F.R. § 214.2(l)(14)(ii) state that 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.

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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in the United States 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.

The petitioner described the beneficiary's job duties as president as follows:

This position involves all of the functions that one would typically associate with the position of the highest ranking corporate officer in any business corporation, including the following functions:

Developing and establishing all corporate policies and objectives; planning business objectives and developing all corporate policies, functions and operations; and establishing responsibilities and procedures among employees in order to attain the highest profitability and efficiency, and also to attain corporate revenue goals, which revenue goals are determined and established by Mr. Shah in his capacity as Corporate President. Furthermore, the duties of Corporate President include the direction of the financial programs of the company, not only to ensure that there are sufficient funds on hand at all times to attain desired revenue objectives, but that revenue planning is ongoing in terms of acquisition of other similar types of businesses in the Space Coast area of Florida.

In this case, the fact that a certain phase of the petitioner's business is in an early stage of development and that the corporation has or might be able to sustain additional staffing in the future does not strengthen the petitioner's presentation. The petitioner must establish eligibility at the time of filing; See 8 C.F.R. § 103.2(b)(12); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

On the date the visa petition was filed, the petitioning corporation had a staff of three persons including the beneficiary as president. The petitioner's U.S. Corporation Income Tax Return for the firm's 2001 tax year shows that the company had gross receipts or sales of \$98,338 and total income of \$45,177. The firm paid only \$5,070 in officer compensation and \$2,880 in salary and wages for the entire year and showed taxable income of \$4,286 for the period. The petitioner's tax returns and other documentation directly contradict the petitioner's claim that it consistently employs at least five employees. Furthermore, the petitioner has submitted evidence of invoices and sales receipts that have been signed by the beneficiary. Accordingly it appears the beneficiary is engaged in the day-to-day operation of the retail gas station, contrary to the claimed duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Additionally, if CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner's assertions concerning the managerial and executive nature of the beneficiary's future duties are not persuasive. It appears that the beneficiary would be performing the necessary operations of the petitioner. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has provided no in-depth description of

the beneficiary's duties that would demonstrate that the beneficiary will be managing or directing the management of a function, department, subdivision or component of the company. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy. For this reason, the petition may not be approved.

The regulation at 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 establish the new office. Furthermore, 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. 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 matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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.

ORDER: The appeal is dismissed.