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U.S. Citizenship
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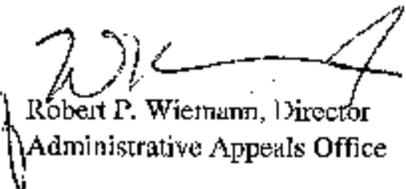
IN RE: Petitioner:
Beneficiary: "

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:

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 Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a new U.S. office established as a "holding company" for a U.S. grocery store, of which the petitioner owns half. The petitioner seeks to employ the beneficiary for one year as its executive, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary had not been employed abroad and would not be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel states that the director's denial of the petition was in error. Counsel contends that the "beneficiary's roles for both corporate entities have been clearly established to be that of a manager or executive within the 'L-1' definition." Counsel notes that a brief and evidence will be submitted to the AAO within thirty days of the appeal. To date, more than a year later, counsel has not made any subsequent submission of evidence.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. In addition, 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.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 (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 has at least one continuous year of full-time employment abroad with a qualifying organization within 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 services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) sufficient physical premises to house the new office have been secured;

(B) the beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

- (1) the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
- (2) the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
- (3) the organizational structure of the foreign entity.

The first issue in this proceeding is whether the beneficiary has been employed abroad 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 stated that the beneficiary has been an executive of the foreign company since its establishment in October 1993. The petitioner explained that as an executive and co-owner of the foreign business, the beneficiary, in conjunction with his brother, has been responsible for managing all aspects of the company, including establishing the overall goals and policies of the company, and directing the employees.

In a request for additional evidence, the director asked that the petitioner submit evidence to establish that the beneficiary's employment abroad meets the four criteria set forth in the statutory definition of executive capacity. The director noted that the evidence should be specific and should include dates of employment, job titles, types of employees supervised, the beneficiary's level of authority, and the title and level of authority of the alien's supervisor. The director also requested a detailed description of the day-to-day tasks performed by the beneficiary, including an estimate of the percentage of time spent on each duty, and asked that the petitioner submit an organizational chart of the beneficiary's foreign employer.

In response, the petitioner submitted the following statement from the co-owner of the foreign company explaining the beneficiary's job duties abroad:

[The beneficiary] first comes to the store to talk to the Manager to discuss any urgent matters (5% of time). If there are any urgent matters, he will focus on those matters. These matters may require 5 minutes of his time or the whole day depending on what is required. He then returns or places calls to our numerous vendors or customers (65% of time). At the end of his shift, he does the daily bookkeeping (25% of time). This involves reconciling cash with sales receipts and recording all sales transactions for that shift. He may print out weekly financial reports for the weekly meeting. Finally he and I meet on a weekly basis or more frequently as needed to evaluate how the company is meeting its goals and doing financially (5% of time). We also discuss employee performance, sales, expenditures. We may at such meeting discuss whether to hire, promote, demote, or terminate individual employees. If any such action is needed we may have [an] additional meeting with the employee concerned.

The petitioner also submitted an organizational chart of the foreign company, in which the beneficiary was identified as a co-owner of the company. Subordinate to the two owners are the following employees: a manager, a supervisor/cashier, three salespersons, and a stocker.

In his decision, the director determined that the majority of the beneficiary's time in the foreign company was spent on non-executive duties such as calling vendors and customers and performing bookkeeping duties. The director further noted that while the beneficiary may co-own the foreign entity, it does not appear that the

company is sufficiently complex to support an executive position. The director consequently determined that the beneficiary had not been employed abroad in a primarily executive capacity.

On appeal, counsel asserts that "documentation has been presented to establish daily tasks, duties and strategic planning which is commonly performed only by executives and managers." Counsel contends that the director's decision failed to take into account the reasonable needs of the organization, component or function, and that the number of employees supervised is not determinative of whether the beneficiary is an executive. Counsel further states that the director's decision violates Section 41.54 N.8.2 of the Foreign Affairs Manual, and that the decision is contrary to *National Hand Tool Corporation v. Pasquarell*, 889 F.2d 1472, N.5 (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988).

On review, the record does not establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity.

When examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (Emphasis in original).

While the petitioner provided a description of the beneficiary's job duties abroad, and assigned a percentage of time spent on each, the job responsibilities are not primarily executive in nature. Specifically, in his position in the foreign company, the beneficiary prepared the company's financial records, performed the bookkeeping, and spent the majority of his time contacting vendors and customers. According to the petitioner, only a small percentage of the beneficiary's time, 5%, was spent "direct[ing] the management of the organization." 8 C.F.R. § 214.2(l)(1)(ii)(C). Furthermore, the beneficiary spent only an additional 5% of his time evaluating the company's finances and goals. Although the beneficiary may be spending a small percentage of time performing executive duties, the record clearly establishes that the majority of the beneficiary's time was spent functioning in a non-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 or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Additionally, although the petitioner identified the beneficiary as an executive of the foreign company, counsel, on appeal, appears to use the terms manager and executive interchangeably. Counsel states that the beneficiary's job duties are "commonly performed only by executives or managers," and that his role in the foreign entity has been "clearly established to be that of a manager or executive within the 'L-1' definition." Counsel fails to distinguish the beneficiary's job responsibilities as either managerial or executive. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. Moreover, the assertions of counsel do not constitute evidence. *Matter of Obuigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The second issue in this proceeding is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year of approval of the petition.

In a letter submitted with the petition, the petitioner stated that the beneficiary would serve in an executive capacity as president of the U.S. entity. The petitioner explained that the petitioning organization purchased half of a U.S. retail business, through which it will operate as a grocery store. The petitioner further noted that the beneficiary would work in conjunction with the present owner of the grocery store, who will serve as the vice-president.

The petitioner described the beneficiary's job responsibilities as "managing all aspects of the company including establishing the overall goals and policies of the entire company and directing how all other employees will operate." The petitioner also outlined the following job duties of the beneficiary: (1) incorporate the petitioning organization; (2) open a business account and facilitate the transfer of initial funds from Pakistan; (3) locate and rent office space; (4) hire and train staff; and, (5) establish the U.S. entity as a self-sustaining and profitable enterprise.

In a request for evidence, the director asked that the petitioner submit evidence to establish that the beneficiary's employment in the United States would meet the four criteria set forth in the statutory definition of executive capacity within one year of approval of the petition. The director requested that the petitioner provide a statement from an authorized official of the prospective employer describing the beneficiary's intended employment in the U.S., including job titles, types of employees supervised, the beneficiary's level of authority, and the title and level of authority of the alien's supervisor. The director also requested a detailed description of the day-to-day tasks to be performed by the beneficiary, including an estimate of the percentage of time the beneficiary will spend on each duty, and asked that the petitioner submit an organizational chart of the U.S. company.

In response, the petitioner submitted a letter from the co-owner of the U.S. grocery store, in which he explained that he and the beneficiary would "split the day" and share responsibilities for managing the store. The co-owner further stated in the letter that the beneficiary's daily job duties would be:

He will first discuss with the sales person any urgent matters (5% of time). If there are any urgent matters, he will focus on those matters. These matters may require 5 minutes of his time or the whole day depending on what is required. He will then returns [sic] or places calls to our numerous vendors or customers (65% of time). At the end of his shift, he will do daily bookkeeping (25% of time). This will involve reconciling cash with sales receipts and recording all sales transactions for that shift. He may print our weekly financial reports for the weekly meeting. Finally, he and I will meet on a weekly basis or more frequently as needed to evaluate how the company is meeting its goals and doing financially (5% of time). We may also discuss employee performance, sales, expenditures. We may at such meeting discuss whether to hire, promote, demote, or terminate individual employees. If any such action is needed we may have [an] additional meeting with the employee concerned.

An organizational chart was also provided, which identified the beneficiary as president, the business' co-owner as vice-president, and two subordinate salespersons that the company anticipated hiring.

In his decision, the director concluded that the beneficiary would not be employed in a primarily executive capacity within one year of approval of the petition. The director stated that Citizenship and Immigration Services (CIS) must distinguish between an individual who operates a business and one who manages, directs, or oversees an organization. As noted in the previous issue, the director determined that the majority of the beneficiary's time would be spent on non-executive duties, rather than fulfilling an executive role in the U.S. entity.

As previously noted above, counsel asserts on appeal that "documentation has been presented to establish daily tasks, duties and strategic planning which is commonly performed only by executives and managers." Counsel contends that the director's decision failed to 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. Counsel further asserts that the number of employees is not determinative of whether the beneficiary is an executive, and therefore, the director's decision violates Section 41.54 N.8.2 of the Foreign Affairs Manual. Counsel also argues that the decision is contrary to *National Hand Tool Corporation v. Pasquarell, supra* and *Mars Jewelers, Inc. v. INS, supra*.

On review, the record does not demonstrate that the beneficiary will be employed in a primarily executive position within one year of approval of the petition.

As addressed above, when examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(i)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS, supra*.

While the petitioning organization, as a new U.S. office, has one year within the approval of the petition to support a primarily executive position, the record does not demonstrate that following the first year, the beneficiary will be performing primarily executive job duties. The petitioner, stating that the beneficiary would prepare the company's financial records, perform the bookkeeping, and contact vendors and customers, has provided the same job responsibilities for the beneficiary in the United States as those duties performed abroad. Even if the petitioner were to hire the two anticipated salespersons within the year after approval of the petition, the beneficiary would still only be spending a small percentage of time directing the management of the organization, and evaluating the company's finances and goals. The beneficiary will clearly be performing primarily non-executive duties in the U.S. organization. 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 or executive capacity. *Matter of Church Scientology International, supra*.

Again, on appeal, counsel fails to distinguish the beneficiary's job responsibilities as either managerial or executive. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaighena, supra; Matter of Ramirez-Sanchez, supra*.

Additionally, counsel's assertions on appeal that the director's decision is contrary to 9 FAM 41.54 N.8.2, and *National Hand Tool Corporation v. Pasquarell*, and *Mars Jewelers, Inc. v. INS* are not persuasive. First, counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the two above-cited matters. Secondly, counsel fails to indicate how the director's decision "violates 9 FAM 41.54 N.8.2." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, counsel fails to consider the guidelines in the Foreign Affairs Manual pertaining to determining executive capacity. Specifically, 9 FAM 41.54 N.8.2 states that neither the title of a position nor ownership of a small or medium-sized business are, by themselves, indicators of executive capacity. The sole employee of a company may qualify as an executive "provided his or her primary function is to plan, organize, direct and control an organization's major functions through other people." 9 FAM 41.54 N.8.2. The record does not establish that the foreign or U.S. entities employ a workforce sufficient to perform the non-qualifying duties of the organization, while the beneficiary primarily plans, organizes, directs and controls the organization or its major functions.

For the foregoing reasons, the petition cannot be granted.

Beyond the decision of the director, a related issue is whether the beneficiary is eligible for a change of status to an intracompany transferee. The regulation at 8 C.F.R. § 248.1(b) states, in pertinent part:

[A] change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expires before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service, and without separate application, where it is demonstrated at the time of filing that:

- a. The failure to file a timely application was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds commensurate with the circumstances;
- b. The alien has not otherwise violated his or her nonimmigrant status;
- c. The alien remains a bona fide nonimmigrant; and
- d. The alien is not the subject of removal proceedings under 8 CFR part 240.

At the time of filing the petition, April 3, 2002, the beneficiary was in the United States on a nonimmigrant visitor for pleasure. His nonimmigrant status, however, expired on March 29, 2002. The record does not demonstrate that the petitioner's failure to file within the beneficiary's period of authorized status may be excused. In fact, counsel acknowledges the late filing on appeal, yet includes only a note requesting that CIS assign the petition a receipt date of March 26, 2002, "[o]therwise [the beneficiary] will not be eligible for a change of status."¹ It does not appear from the record that the beneficiary is eligible for a change of status to a nonimmigrant intracompany transferee. As the appeal will be dismissed on other grounds, this issue need not be further addressed.

¹ The petitioner's first petition for a change of status, received by CIS on March 26, 2002, could not be accepted, as it did not contain the proper filing fee.

An additional issue not considered by the director is whether the beneficiary, identified by the petitioner as a co-owner of the foreign corporation, will be employed in the United States for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states 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. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For this additional reason, 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.