

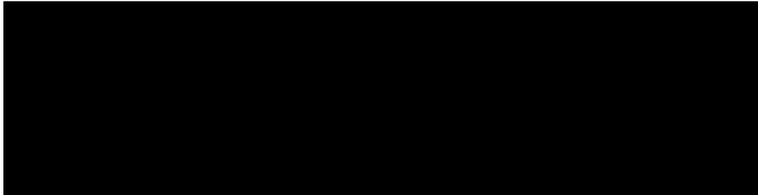
is being deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

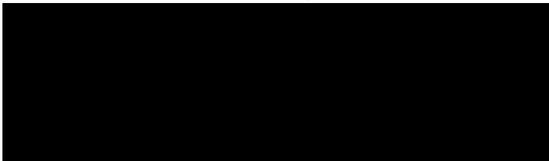
MAY 18 2004

FILE: WAC 02 053 54894 Office: CALIFORNIA 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California 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 an importer of spices, foodstuffs, jewelry, and dinner plates from Sri Lanka. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its managing director. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel states that the director's denial of the petition was erroneous and submits additional evidence to support his assertions.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) 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 U.S. petitioner states that it was incorporated in the state of California in June of 2000 and claims that it is a subsidiary of Princess Enterprise (Pvt), Ltd., located in Sri Lanka. The initial petition was approved and was valid from December 1, 2000 to November 30, 2001, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years at a salary of \$3,000 per month.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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 support of the petition, the petitioner provided the following description of the beneficiary's proposed job duties under the extended petition:

[The beneficiary] will continue to be in overall control of the business. He will be the individual responsible for establishing, organizing and promoting the business. He will be responsible for executing all corporate decisions, strategy and policy. He will further be the individual responsible to [sic] plan and developing [sic] the overall business policy and its strategy and he will be responsible for hiring and training managers and supervisors to attend

upon [sic] the workers in the business and control their actions. The aforementioned managers will report to [the beneficiary] on all their actions pertaining to their duties regarding the policy and strategy. [He] will have the sole authority to hire and fire all personnel of the business. He will also institute training programs for staff and have the appropriate manager supervise such instruction.

[The beneficiary] will also negotiate and arrange and sign all contracts on behalf of the business both in the USA and on the international front. [He] will report to the Board of Directors from time to time on the progress of the business.

In his executive capacity with our business [the beneficiary] will have full control of the direction of the corporation and will be responsible for decisions with regards [sic] to the coming US business expansion including the extent and scope thereof.

On January 10, 2002, CIS issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart naming all of its employees and pointing out those employees that are directly under the beneficiary's supervision. The petitioner was also asked to provide a more specific description of the beneficiary's proposed job duties, including a percentage breakdown of time spent performing each of the listed duties.

The petitioner's response included an organizational chart listing eight positions within the petitioner's personnel hierarchy. However, the only positions filled at the time the petition was filed were the position of president and the beneficiary's position of managing director. The petitioner also provided the following description of the beneficiary's proposed duties under the extended petition:

[The beneficiary] as temporary Managing Director and C.E.O. of the US operations will be responsible for the advancement and structure of the entire business and will oversee all operations. Reporting only to the President and the foreign Board of Directors when necessary, [the beneficiary] is being transferred with the hopes that he will be able to advance the petitioner to a level where it will be self sustained [sic].

The petitioner also provided the following percentage breakdown of the beneficiary's proposed duties:

1. Dealer Inquiry & Store Location Visits comprises 40% of [the beneficiary's] time
2. Checking invoices, Maintaining records/credit files, working with CPA on all tax issues, dealing with appropriate government regulatory offices in regards [sic] to the petitioners [sic] type of business. . . 15%
3. Dealing with foreign suppliers and addressing marketing strategy pertaining to each product in the United States. Estimated 15%
4. Reporting on all progress to the foreign board of directors including the securing of new dealers and further marketing ideas. 10% of a work week.

5. New product inquiry and sourcing available [sic] supplies for possible marketing in the US. 10%
6. Survey local market for needs and any possible marketing strong points and drawbacks to confirm to a feasibility schedule. 10% of time.

Although the petitioner asserts that this list of duties is subject to change upon the future hiring of a local sales coordinator, the record indicates that at the time the petition was filed such a person had not yet been hired.

On May 1, 2002, the director denied the petition, noting that the petitioner failed to provide the position titles for its proposed positions. On appeal, counsel disputes this finding and resubmits the petitioner's previously submitted organizational charts listing the position titles for its current employees and its future hires. Therefore, the director's comment was inaccurate and is hereby withdrawn.

The director properly concluded, however, that the petitioner has failed to establish that the beneficiary's duties will be primarily managerial or executive. Counsel addresses this issue, stating that the petitioner suffered a number of setbacks, which prevented the petitioner from advancing beyond the initial stage of development. Counsel further states that the petitioner has grown despite the delays and needs the beneficiary's services to handle incoming shipments of merchandise and to meet with purchasing retailers. Although the petitioner submits evidence indicating that it hired additional personnel, the record shows that the hiring took place in April of 2002, over four months after the petition to extend the beneficiary's authorized stay had been filed. 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). Therefore, the hiring of additional personnel that took place after the petition was filed cannot be considered in determining the petitioner's eligibility for the benefit sought here. Furthermore, 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. At the time of filing of this petition, the petitioner had not reached the point that it could employ the beneficiary in a predominantly managerial or executive position.

When examining the executive or managerial 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). In the instant case, the record shows that at the time the petition was filed the beneficiary was one of the petitioner's two employees. While the number of the petitioner's employees cannot be the sole consideration in determining eligibility for managerial or executive status, the AAO can and should take this factor into consideration for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties. In the instant case, the petitioner states that at the time the petition was filed 40% of the beneficiary's time was spent meeting with retailers, 15% was spent dealing with foreign suppliers and deciding on how to market their products, and 10% of his time was spent surveying local markets. This list of duties indicates that at least 65% of the beneficiary's time was spent carrying out the operational tasks of the petitioning 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*, 19 I&N Dec. 593, 604 (Comm. 1988). Regardless of the beneficiary's authority

and control over the petitioning organization, the AAO cannot overlook the fact that a majority of the beneficiary's time has been spent performing non-qualifying tasks. While this may change as the petitioner moves beyond the initial stage of development, the evidence of record suggests that such change had not occurred at the time the petition was filed. Thus, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive. For this reason the petition cannot be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States and abroad pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). The petitioner submitted email correspondence indicating that it would eventually start selling merchandise. Such emails were sent in June and July of 2001. Thus, six months after the initial petition had been approved, the petitioner had not actually sold any merchandise, which is the essence of its business. As such, the record lacks evidence to establish that the petitioner had been doing business for the year prior to filing the petition to extend the beneficiary's authorized stay. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B). For this additional reason, this 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.

ORDER: The appeal is dismissed.