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

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

D7

FILE: SRC 03 055 51625 Office: TEXAS SERVICE CENTER Date: MAY 21 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, Famous, Inc. d/b/a Big D's, endeavors to classify the beneficiary as a manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims that it is an affiliate of Famous Dairy Farm, located in India, and is engaged in the retail business. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's president. The petitioner was incorporated on November 28, 2001 and claims to have four employees.

On September 20, 2003, the director determined that the petitioner failed to establish that the beneficiary will be employed in a primarily executive capacity. The director also determined that the petitioner failed to submit sufficient evidence that it has been doing business for the previous year.[1]

On appeal, the petitioner's counsel claims that the "beneficiary has to combine the roles of Executive and Manager" and that the petitioner has been doing business for the previous year.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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.

---

[1] The AAO notes that the director misstated several facts in his decision. The AAO concurs with counsel's findings that the petitioner claims that: 1) it operates a retail business rather than an import and export business; 2) it petitioned to extend the beneficiary's stay for three additional years rather than one year; and, 3) the beneficiary performs managerial and executive duties rather than exclusively executive duties.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act 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 petitioning organization has been doing business for the previous year. As previously noted, 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner demonstrate that it has been "doing business" for the previous year.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

> "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 a supporting letter submitted with Form I-129 on December 17, 2002, the petitioner claims that it terminated its original lease in June 2002 and signed a new lease. The petitioner stated that it "registered a new DBA as Dan's Food Mart and a new lease was signed with Ranger Fuels." However, the petitioner claimed that the petitioner withdrew from the lease agreement and continued its search for a new location, finalizing a new retail business as Big D's in June 2002. In addition, the petitioner submitted copies of several bills of sale, account statements, purchase invoices, and a copy of its Employer's Quarterly Report for 2002.

On June 19, 2003, the director requested a copy of the petitioner's U.S. Corporation Income Tax Return and Quarterly Wage Reports for 2002. In response, the petitioner submitted a copy of its 2002 Quarterly Wage Reports and IRS Form 1120, U.S. Corporation Income Tax Return, showing the petitioner's taxable income as $1,769.

On September 20, 2003, the director denied the petition because the petitioner failed to establish that the U.S. entity had been doing business for the previous year.

On appeal, counsel claims that the petitioner finalized a new retail business in June 2002 and that its "[t]ax record reflects that it was actively involved in business for a year."

On review, the petitioner submitted minimal documentation to establish that the petitioner was doing business for the previous year. At the time the petitioner seeks an extension of the new office petition, the regulation 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. The initial petition for the new office was approved and valid from December 17, 2001 until December 17, 2002. On December 17, 2002, the petitioner filed to extend the validity of the petition and the beneficiary's stay.

In support of the extension petition, the petitioner submitted copies of purchase invoices dated November 25, 2002 for gas purchases made between October 12, 2002 and November 22, 2002, and several other copies of invoices dated November 1, 2002. However, the petitioner must submit evidence to establish that it had been doing business for the full year prior to filing the extension petition, not a mere two months. Instead, the petitioner has represented that it spent the first six months of the previous year "conducting feasibility studies" instead of actively conducting business. There is insufficient documentation to establish that the U.S. entity has been actively engaged in the regular, systematic, and continuous provision of goods or services for the previous year pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(B). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, 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. 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. On appeal, the petitioner claims that the slow expansion of its business was due to extenuating circumstances. The petitioner claims it "registered a new DBA as Dan's Food Mart and a new lease was signed with Ranger Fuels." However, this transaction failed and on October 10, 2002, the petitioner signed a new property agreement with Eros Investment, Inc. and registered a new d/b/a as Big D's. However, the petitioner is not granted additional time beyond this one year period to investigate new business opportunities in an attempt to qualify for L-1 status. 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).

After careful consideration of the evidence, the AAO concludes that there is a lack of evidence to establish that the U.S. entity has been doing business as defined by 8 C.F.R. § 214.2(l)(1)(ii)(H) for the year prior to filing for the extension. The sporadic activity of the U.S. entity in the two months prior to filing the current petition is not sufficient evidence to establish that the petitioning entity has been doing business for the previous year. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity in the United States. 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 a letter of support filed with Form I-129 on December 17, 2002, the petitioner stated that the beneficiary "will continue to be responsible for managing the U.S. business." In addition, the petitioner described the beneficiary's duties as:

> [R]ecruitment and training; supervising employees; overseeing preparation of inventory reports; establishing and implementing policies to manage and achieve

> marketing goals; manage promotions and review financial reports; review revenue and expenses; manage the corporation and maintain good relationship with the customers in addition to the vendors. In the performance of his duties, the [b]eneficiary will exercise wide discretion and latitude.

On June 19, 2003, the director requested that the petitioner submit additional evidence. In particular, the director requested a list of the beneficiary's duties, percentages of time spent on each duty, organizational charts of the foreign and U.S. entities, a list of the number of subordinate managers, supervisors, or other employees who report directly to the beneficiary, and a brief description of their job titles, duties, and educational backgrounds.

In response, the petitioner submitted organizational charts for the foreign and U.S. entities, a list of the beneficiary's subordinate employees, and a brief description of their job titles, duties, and educational backgrounds. The petitioner also submitted the percentages of time that the beneficiary will spend on each of the U.S. duties:

- 25% Hiring and firing managers and training when necessary

- 25% Overseeing preparation of sales and inventory reports and reviewing and analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; reviewing financial reports, and reviewing budgets and expense reports prepared by subordinate employees;

- 50% Managing the company and overseeing marketing campaign developed by subordinate managers, locating vendors, supervising subordinate employees who prepare inventory and expense reports; resolving issues related to defective or unacceptable goods with vendors; supervising purchase activities; maintain/order inventory; supervise subordinate employees

In addition, the petitioner claims, "The beneficiary will continue to supervise five employees including the store manager, assistant managers, and the stokers."

On September 20, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary will be employed in a primarily executive capacity.

On appeal, the petitioner claims that the "beneficiary has to combine the roles of Executive and Manager as the petitioner is a small business wanting to expand its operations." In addition, the petitioner states that the beneficiary will perform the following functions:

<u>Executive Duties</u>

- Directs the management of the organization, where he supervises and controls the Store Manager and Assistant Managers

- Establishes goals and policies of the organization

- Exercises wide latitude in discretionary decision making
- He is at the top of the organizational chart as Executive manager

Managerial Duties

- Manages the organization
- Supervises other managerial level workers, as reflected on the organizational chart
- Has the authority to hire [and] fire personnel
- Exercises wide latitude and discretion in the performance of his duties

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the description of the beneficiary's U.S. job duties to determine whether the beneficiary is employed in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fail to establish what the beneficiary will do on a day-to-day basis. For example, the petitioner stated that the beneficiary's duties will include "establishing and implementing policies" and "manag[ing] the corporation." However, these duties are generalities that fail to enumerate any concrete policies that the beneficiary will establish or implement, or how the beneficiary will manage the corporation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, the petitioner generally paraphrased the statutory definition of managerial and executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "[e]xercis[ing] wide latitude in discretionary decision making" and "[d]irect[ing] the management of the organization." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner claims that the beneficiary's U.S. duties will include spending 50 percent of his time on tasks such as "[m]anaging the company and overseeing marketing campaign developed by subordinate managers" and 25 percent of his time "establishing and implementing policies to manage and achieve marketing goals." However, the record does not indicate who will actually formulate the marketing goals and develop the marketing. Although the petitioner submitted a description of the beneficiary's subordinates' duties, none of the employees' duties include performing marketing tasks. Therefore, it appears that 75 percent of the beneficiary's time will be spent on marketing tasks. 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).

Moreover, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. In the response to the request for additional evidence, the petitioner claimed, "The beneficiary will continue to supervise five employees including the store manager, assistant managers, and the stokers." In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employees. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant matter, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, for the assistant managers who will prepare the employees' work schedules, operate cash registers, and maintain inventory.

The petitioner has also not established that the beneficiary will manage a subordinate staff of managerial or supervisory personnel. Although three of the five claimed subordinate employees have managerial titles, their duties entail primarily performing non-managerial tasks. For example, the store manager prepares the employees work schedules and daily sales reports, and performs virtually identical duties as the two assistant managers. Therefore, the subordinate employees will be performing daily non-managerial operational tasks of the business. Upon review, it appears that the beneficiary is at most the first-line supervisor of the gas station's nonprofessional employees.

The AAO notes that there is a discrepancy in the record concerning the number of employees the petitioner employs. The U.S. organizational chart shows that the petitioner employed six individuals. However, at the time of filing on December 17, 2002 and in the Employer's Quarterly Report ending March 31, 2003, the petitioner claimed that it employed four individuals. In addition, the petitioner submitted a copy of several Employer's Quarterly Federal Tax Returns and its Employer's Quarterly Report for the quarter ending March 31, 2002. One of the Employer's Quarterly Federal Tax Return indicates that the quarter ended September 30, 2002 and indicates that there were four employees in the pay period during March 12th. 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).

Finally, 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. At the time of filing, the petitioner had not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. After careful consideration of the evidence, the AAO must conclude that the beneficiary will not be employed in a primarily managerial or executive capacity. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the minimal documentation of the parent's and the petitioner's business operations raises the issue of whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner's 2002 Internal Revenue Service (IRS) Form 1120 Corporate Tax Return reveals that it is not a subsidiary and is not affiliated with any other entity. The tax return further indicates that the petitioner is wholly owned by the beneficiary, thus it is not a subsidiary of the foreign entity. Consequently, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States and at least one foreign country, or that it has a qualifying relationship with a foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). Furthermore, willful misrepresentation in these proceedings may render the beneficiary inadmissible to the United States. Section 212(a)(6)(C) of the Act. In addition, 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 this matter, 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. For these additional reasons, 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 appeal will be dismissed.

ORDER: The appeal is dismissed.