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FILE: SRC 02 111 52806 Office: TEXAS SERVICE CENTER Date **MAY 25 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:

[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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.¹

The petitioner is described as retail jewelry store. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner had not established that the beneficiary's duties in this position would be primarily those of an executive.

On appeal, counsel asserts that the beneficiary meets every single element of the criteria for executive capacity and submits additional evidence.

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)(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 (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.

Furthermore, 8 C.F.R. § 214.2(l)(14)(ii) states 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;

¹ It is noted that CIS has approved a Form I-140, Petition for an Alien Worker, that was filed on behalf of the beneficiary as a manager or executive under section 203(b)(1)(C) of the Act. The receipt number is SRC 02 252 50766. If the immigrant visa petition was approved based on the same or similar evidence that is contained in the current record of proceeding, the approval would constitute a serious and gross error. The director is urged to review the approved petition for possible revocation pursuant to 8 C.F.R. § 205.2.

(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 United States petitioner was incorporated in 2001 and states that it is an affiliate of Smart Shoes, located in Hyderabad, India. The petitioner states both companies are 100 percent owned by the beneficiary. The petitioner did not indicate the number of employees on the Form I-129 or the gross revenue. The initial petition was approved and was valid from March 1, 2001 to March 5, 2002, 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 an annual salary of \$35,000.

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

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 attached to the petition, the petitioner stated the beneficiary will direct the management of the petitioner in its entirety by overseeing operations of the company. The petitioner stated "all the goals and policies of the organization will be established solely by [the beneficiary]. Furthermore, [the beneficiary] will be exercising wide latitude in discretionary decision-making of [the petitioner]."

On August 15, 2002, the director issued a request for additional evidence. The director requested a list of employees of the petitioner and their job titles. The director also requested evidence that the employees were paid, such as the latest quarterly tax return. Additionally, the director requested the amount of sales and gross income of the beneficiary for the past twelve months.

On October 10, 2002, the petitioner provided a list of two employees which consisted of the beneficiary as president and [REDACTED] as a sales associate. The petitioner provided that latest quarterly tax return. Counsel for the petitioner stated that the total gross sales for the petitioner from January 2002 to September 2002 were \$145,339 and the gross profit was \$100,051 for the same time period. Counsel for the petitioner stated the tax returns for 2001 were previously provided. The AAO notes the copy of this tax return was not signed and

stated that no salaries or wages were paid for that tax year. The tax return did indicate compensation for officers. Counsel also attached the most recent Oklahoma Sales Tax Report.

Based on the record, the director determined the petitioner is a jewelry store that employs only two people, the beneficiary and a sales associate. The director found the petitioner had not established the beneficiary will be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the business. The director determined that the business has not expanded to the point where the services of a full-time chief executive officer would be required. The director concluded the majority of the beneficiary's work time would be spent in non-executive, day-to-day operations of the retail store business.

On appeal, counsel asserts that the beneficiary meets every single element of the criteria for executive capacity. Additionally, counsel asserts there are "numerous cases that directly refute the decision of [CIS] and state otherwise." In support of her argument, counsel cites several unpublished AAO decisions that address the issue of manager and executive responsibilities. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to these decisions. Simply 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, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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(I)(3)(ii). A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In the instant case, the petitioner claims the beneficiary meets every criteria of executive.

On appeal, counsel simply restates the regulations in describing the beneficiary's job duties. Counsel states:

The beneficiary does direct the management of the whole organization by hiring and developing staff, developing marketing strategies, overseeing all of the financial goals and budget requirements, being responsible for the overall performance and profitability of the company, overseeing the development and expansion of the company and negotiating contracts and leases. The beneficiary does establish goals and policies for the business and determines what direction the business should move. The beneficiary does exercise wide latitude in discretionary decision making and makes all of the decisions for the company."

The petitioner has not provided any specific description of the beneficiary's job duties. The actual duties themselves reveal the true nature of the employment. *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). The petitioner has not demonstrated how the beneficiary directs "the management of the whole organization by hiring and developing staff" when the petitioner employs one sales associate. The petitioner has not described how the beneficiary establishes the "goals and policies" for the business. Counsel and the petitioner have used broad, general terms that do not describe the day-to-day or weekly responsibilities of the beneficiary that would demonstrate that these duties are primarily executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of

reiterating the regulations. *Id.* The petitioner has not submitted a sufficiently detailed position description to allow CIS to determine whether the beneficiary is primarily employed in an executive position.

The petitioner is a jewelry store with two employees which include the beneficiary and a sales associate. The petitioner has not sufficiently described how the sales associate relieves the beneficiary from actually providing the service or producing the product or described how the beneficiary manages the employment of the non-professional staff. An executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Additionally, counsel explains that the petitioner "is presently searching for an additional employee." However, a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. It is noted in the record that there are only two employees working at the retail store and that the beneficiary maintains a full-time position. Other than the one sales associate, there is no mention in the record of any clerks, sales personnel, jewelry repair staff, or any other subordinate employees working for the petitioning enterprise. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to executive duties as one of two employees in a retail jewelry store. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the vague position description, and the implausible proposition that the beneficiary is not performing any non-executive duties in operating the retail store, the record does not demonstrate that the beneficiary will function primarily as an executive.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily executive capacity. The fact that an individual operates a business does not necessarily establish eligibility for classification in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly performing the operations of the organization, that is, operating the jewelry store. The other single employee is a sales assistant. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff that would relieve him from performing the non-qualifying duties of operating a retail store. The provided descriptions of the beneficiary's primary duties are insufficient to demonstrate that the beneficiary is primarily acting in a qualifying executive capacity. For this reason, the petition may not be approved.

In addition, the petitioner indicates that the beneficiary is the sole owner of both companies. If this fact is established, it remains to be determined that the beneficiary's services are 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 must be denied.

Furthermore, beyond the decision of the director, the petitioner has not submitted evidence to establish that a qualifying relationship exists between the U.S. company and the beneficiary's overseas employer. See 8 C.F.R. 214.2 (I)(14)(ii)(A). Although the petitioner claims that both the U.S. company and the Indian company are owned by the beneficiary, the petitioner did not submit any evidence to establish the ownership of the two companies. Instead, the petitioner submitted an affidavit in which the beneficiary declares: "I own 100% shares [sic] in both Smart Shoes and Ash Inc." The petitioner did not submit any corporate stock certificates, stock certificate registry, corporate bylaws, or the minutes of relevant annual shareholder meetings that would allow CIS to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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). For this additional reason, the petition must be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

It is noted that the current petition is a request for an extension of a previously approved petition. If the previous nonimmigrant petition was approved based on the same vague, unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001)

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.