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



U.S. Citizenship
and Immigration
Services



File: EAC 02 141 55036 Office: VERMONT SERVICE CENTER Date: 10/27/02

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

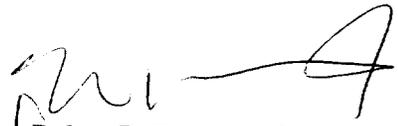
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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, Vermont 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 filed this nonimmigrant petition seeking to extend the employment of its vice president as an L-1A nonimmigrant intracompany transferee 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 is a corporation organized in the State of Pennsylvania that is engaged in the business of software development. The petitioner claims that it is the subsidiary of Lahore Lyceum (Pvt.) Ltd., located in Lahore, Pakistan. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred in failing to take note of the evidence presented in support of the petition, which counsel claims specifically provided detailed information regarding the nature of the U.S. entity and the nature of the work to be performed by the beneficiary in a managerial capacity. In support of this assertion, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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) 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)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 initial petition, the petitioner described the beneficiary's job duties as follows:

In the capacity of Vice-President, [the beneficiary] will continue to organize, direct and provide the goods and services that we need to accomplish our business goals of providing our products and services that are to be solicited throughout the United States.

[The petitioner] seeks to have [the beneficiary] continue to be our client's developmental partner in the United States. Our client . . . is continuing the process of a complete computerization of all of its operations pertaining to their Sales and Stocks operations, as well as their accounts department creating a staff database, inventory control and other modules. [The beneficiary] and [the petitioner], in the past year, have worked in 4 Phases to update [our client's] computer systems equipment and functionality. Phase One (3 months) consisted the [sic] business' System Analysis and Design, the supply of the necessary computer equipment and accessories and the hardware installation. Phase Two (2 months) [the beneficiary] provided the education for the networking of their computers systems, hardware and networking testing and the development of various modules for effective and flawless operations. Phase Three (two months) consisted of the initial deployment and testing of the software modules and the interaction with the administration for any changes in design or structure of the system. Phase Four (5 months) consisted of the integration,

installation of the completed system and the training of the staff. To date, [the petitioner] is contracted for the troubleshooting and upgrade of the system.

Due to the complexity of our approach to client's services and products, and the lack of knowledgeable individuals implementing and managing our criteria and products, [the beneficiary] will continue to direct and coordinate the activities of our Philadelphia office, formulating and administering company policies and continue the development of the company's long range goals and objectives.

On April 16, 2002, the director requested additional evidence. Specifically, the director requested evidence establishing that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. Additionally, the director requested an organizational chart for the U.S. entity indicating where the beneficiary will assume his role in a managerial capacity, a comprehensive description of the beneficiary's proposed duties, a complete position description for all employees of the U.S. entity accompanied by an overview of their educational backgrounds, and a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

In response, the petitioner submitted a cover letter and additional evidence on July 11, 2002. In the response, counsel for the petitioner stated that the specific documentation requested, including an organizational chart and description of the subordinate employees' duties and backgrounds, could not be provided as the U.S. entity currently employed only two persons, including the beneficiary. Alternatively, counsel provided statements from the alleged owner of the U.S. entity and from its director, both of which attested to the general nature of the beneficiary's managerial duties. Also included were copies of contracts executed by the U.S. entity for future projects.

On November 13, 2002, the director denied the petition. The director determined that the evidence provided did not establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director concluded that the evidence suggested that the beneficiary's duties primarily consisted of the day-to-day operations involved in fabricating a product or providing a service, thus rendering his position non-managerial.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and that he failed to consider the statements provided by the U.S. entity's director and alleged owner. More specifically, counsel asserts that the beneficiary's position will be managerial in the future, and that the lack of subordinate staff members at the time of the petition was caused by a downturn in market economics. Alleging that a prosperous economy will now permit the U.S. entity to implement its original business plan, counsel concludes that the U.S. entity's need for the beneficiary's employment in a managerial or executive capacity is warranted, and therefore the petition should be granted.

Upon review, counsel's assertions are not persuasive. 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). The petitioner's description of the job duties 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions.

In this case, counsel initially provided a description of the beneficiary’s duties that identified non-managerial tasks. Specifically, the description included with the initial petition alleged that the beneficiary “worked in 4 Phases to update [the client’s] computer systems equipment and functionality” and “provided the education for the networking of their computer systems, hardware, and networking testing and the development of various modules for effective and flawless operations.” In response to the director’s request for additional evidence and again on appeal, counsel for the petitioner responded by acknowledging that the U.S. entity employed no subordinate employees to the beneficiary. Additionally, the statement provided by the director of the U.S. entity stressed that the beneficiary’s position with the U.S. entity was primarily managerial in nature, but simultaneously acknowledged that the beneficiary was responsible for the day-to-day operations of the U.S. entity, including client contact and initial product design and prototyping.

The descriptions provided of the beneficiary’s duties clearly identify non-managerial tasks. 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). In addition, 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). As confirmed by counsel’s letter dated July 10, 2002, the beneficiary: (1) is responsible for the day-to-day operations of the business; (2) reports to and is supervised by the director of the U.S. entity; and (3) has no subordinate employees to manage or supervise. Consequently, there is no evidence to suggest that the director’s findings were erroneous, because it is clear that the beneficiary is performing a multitude of tasks not normally required of a manager or executive.

Furthermore, the AAO notes that the U.S. entity’s Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, identifies on Schedule A that payments were made to a “sales rep.” in the amount of \$28,000. Upon review of the documentation contained in the file, the AAO notes that the beneficiary was the only person to be paid compensation (as an independent contractor) by the U.S. entity in 2001. Specifically, a Form 1099 for miscellaneous income was issued to the beneficiary in the amount of \$28,000.00. Clearly, the U.S. entity is identifying the beneficiary as a sales representative and not as a manager or executive. A sales representative and the duties that normally accompany such a position are not consistent with a managerial or executive position as contemplated by the regulations.

Finally, the petitioner indicates that it plans to hire additional managers and employees in the future, and that its small staff and lack of prosperity for the preceding year is the result of the economic

downturn manifested after the tragedy of September 11, 2001. However, 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). 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 the regulations that allows for an extension of this one-year period, regardless of economic conditions or unforeseen circumstances. 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.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO notes some additional issues not addressed prior to adjudication of this appeal. First, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the Pakistani entity. The U.S. petitioner claims that it is a subsidiary of the foreign entity.¹ The petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. Accordingly, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved.

Secondly, 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 for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted a

¹ The AAO notes an additional discrepancy with this claim. The U.S. petitioner states that [REDACTED] owns 95% of the stock options of the foreign entity and 95% of the stock options of the U.S. entity. By definition, this would make the U.S. and foreign entity *affiliates*. In addition, the stock certificates in the record show that [REDACTED] owns only 80% of the outstanding shares of stock issued by the U.S. entity. 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, the record contains insufficient evidence to corroborate the claim that Mr. Aziz owns 95% of the stock options of the foreign entity. 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).

copy of its Form 1120S for 2001, which evidences gross sales of \$38,980.00 and an ordinary income of \$507.00. The petitioner, however, failed to submit any documentation evidencing that it regularly and systematically engaged in business on a regular basis. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from March 2001 through March 2002. 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.