**U.S. Department of Homeland Security**
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 01 198 53304 Office: VERMONT SERVICE CENTER Date: OCT 2 2 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:

SELF-REPRESENTED

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

identifying data deleted to prevent unwarranted invasion of personal privacy

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**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2001 and claims to be in the jewelry trade business. The petitioner claims that the U.S. entity is a subsidiary of M.F. Corporation Pvt. Ltd., located in Pakistan. It seeks to employ the beneficiary temporarily in the United States as the president of its new office for one year, at an annual salary of $30,000.00.

The director determined that the petitioner submitted insufficient evidence to establish that; (1) the beneficiary has been and will be employed in a primarily managerial or executive capacity; and that the U.S. entity will be able to support such a position within one year of operation; and (2) the petitioner had secured sufficient physical premises to house the new office.

On appeal, the petitioner disagrees with the director's determination and submits a brief and evidence in support of its contentions. The petitioner contends that the evidence is sufficient to establish that the beneficiary has been and will be employed primarily in a managerial or executive capacity; that the U.S. entity will be able to support such a position within one year of operation; and that evidence has been submitted to demonstrate that the petitioner has secured sufficient physical premises to house the new office.

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)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary 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.

(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(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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; and

(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 (l)(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 petitioner has established that the beneficiary has been and will be employed in a primarily managerial or executive capacity; and whether the U.S. entity will be able to support such a position within one year of operation.

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 dated April 20, 2001, the petitioner stated that the beneficiary had been employed by the foreign entity since 1997 as the general manager of marketing of precious stones. The petitioner described the beneficiary's past duties as managing the marketing division of the foreign entity. The petitioner stated that the beneficiary hired and supervised marketing and sales agents, monitored independent contractors, and developed and devised marketing strategies and implementation mechanisms. The petitioner also stated that the beneficiary was highly skilled in evaluating rough stones and that he possesses valuable managerial skills. The petitioner further stated that the beneficiary makes all sales and marketing decisions.

The petitioner further described the beneficiary's past duties as: managing the organization; supervising marketing, sales, and other personnel; finalizing contracts; monitoring shipments; and attending numerous gem and jewelry trade shows in the United States. The petitioner submitted a copy of the foreign entity's organizational chart, which portrayed the beneficiary as general manager of precious stones. The petitioner submitted copies of pay stubs for December of 1999, January through December of 2000, and January through September of 2001 that showed the beneficiary's base salary and company title of "general manager exports." In a letter dated March 20, 2001, the foreign entity's accountant firm stated that the beneficiary has been working for the entity since August of 1997 as a "general manager marketing precious stones."

In response to the director's request for additional evidence, the petitioner lists the beneficiary's title, job duties, and qualifications abroad as follows:

> **Position:** General Manager (Precious Stones)
> **Duties:** [The beneficiary] takes full responsibility to manage and operate the day-to-day business activities of precious stones (gems)on daily basis by managing the office through the subordinate staff; defines the sales goal[s] and develop[s] marketing strategy for improvement of the business. [The beneficiary] will increase the staff, whenever necessary.
> **Qualifications:** Bachelor's degree with several years experience in the gemstone industry.

In a letter of support dated May 10, 2001, the petitioner described the beneficiary's proposed duties as:

> [The beneficiary] will take full responsibility to manage and operate the day-to-day activities of [the U.S. entity] on daily basis by managing the office through help of subordinate staff and independent marketing sales agents. [sic] (70%)
>
> [The beneficiary] will define the goals and develop marketing strategy for improvement of the business in the precious stone trade i.e. to create a niche in the industry, make the long term and short-term goals as to how to reach a certain level of business. [sic] (10%)
>
> [The beneficiary] will follow the market trend in precious stone industry by attending the various exhibitions, reading the manuals and survey reports of the industry so as to be one up on our competitors. [sic] 10%)
>
> [The beneficiary] will also coordinate with the principal in Pakistan and assess them of our business in the United States, the amount of business turnover on monthly basis, the orders that had been procured, the amount of risk involved, the profit margin in a particular transactions etc. [sic] (5%)
>
> [The beneficiary] will increase the staff of the United States by bringing in a general manager and independent sales agents, so that he can increasing his business in a further manner and cover all the states in United States, through his agents. [sic] (5%)

The petitioner also stated that as president of the U.S. entity, the beneficiary will be responsible for the company's inventory, managing the marketing and import operations, directing the purchasing and marketing activities, formulating long and short-term corporate marketing goals and strategies, and implementing decisions based upon market research and forecasts of consumer trends. The petitioner submitted a copy of the U.S. entity's organization chart that depicts the beneficiary as president, and a general manager, marketing and sales agent, secretary, assorter and grader, accountant, and independent contractors and commission agents as his subordinates.

The director determined that the evidence submitted was insufficient to establish that the beneficiary had been or would be employed primarily in a managerial or executive capacity. The director stated that the first ground for denial of the petition was based on the fact that the petitioner failed to comply with his request for additional evidence. The director noted that the statements made by the petitioner in support of the beneficiary's qualifications where not substantiated by any evidence, although such evidence had been requested. The director further stated that the record was devoid of evidence pertaining to how the beneficiary performed his duties abroad; or how many subordinates he had, their titles and salaries. The director noted the claims made by the petitioner suggested that the beneficiary performed the day-to-day operations of the business abroad, rather than performing managerial or executive duties. The director determined that the evidence submitted was insufficient to demonstrate that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity, or that the entity would be able to support such a position within one year of operation. Again the director noted that the statements made by the petitioner and counsel were not supported by any substantive documentary evidence, although specifically requested in the director's notice. The director stated that the petitioner submitted evidence late. The director also stated that the evidence that was submitted portrayed the beneficiary as performing mixed duties, at a very low salary, using a number of different conflicting titles.

On appeal, the petitioner disagrees with the director's decision and states in part "...it was a bad decision to hire a very unprofessional counsel as I provided him with tons of documents as and when requested but sorry to say my case was not professionally compiled and presented." The petitioner submits copies of the companies organizational charts, export statistics, corporate income tax returns, export trade control certificate, auditors report, bank statements, invoices, photographs of business premises, lease agreement, and other business documents as evidence on appeal.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. On appeal, the petitioner relies on evidence that was requested but not produced until after the initial decision to deny the petition was made by the director. The petitioner submitted copies of various business documents as listed in the record. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.,* 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm. 1998).

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing

eligibility at the time the application or petition was filed." Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant matter, the director specifically requested the petitioner submit payroll documents, business plans, organizational charts, photographs of the business entity, a lease agreement, and evidence of doing business. The petitioner's new evidence will not be considered and the record as presently constituted does not demonstrate that the beneficiary has been or will be performing primarily in a managerial or executive capacity, or that the U.S. entity will be able to support such a position within one year of operation.

The petitioner contends that due to attorney error documents requested by the director in his notice were not submitted until the appeal. The petitioner's contention is not persuasive. Furthermore, there has been no independent documentary evidence submitted to substantiate such claim. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In the instant matter, the petitioner has not submitted proof to show that any action has been taken against the attorney in compliance with regulatory requirements.

Upon review, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity by the foreign entity. The petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; or receiving only general supervision or direction from higher level executives. *See* Section 101(a)(44)(B) of the Act. Furthermore, the following duties are without any context in which to reach a determination as to whether they are qualifying: responsible for overall control and management of the company, sets sales goals, develops marketing strategies, finalizes contracts, and monitors shipments. The use of position title alone is not sufficient to establish that the beneficiary is employed by the foreign entity in a managerial or executive capacity. Further, the general descriptions of the beneficiary's job duties paraphrase the elements of the regulatory definitions. Paraphrasing the regulation as a substitute for a day-to-day description of the beneficiary's job duties is insufficient to demonstrate the beneficiary is acting in an executive capacity. 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.). The petitioner has not shown that the beneficiary has been functioning at a senior level within an organizational hierarchy.

Likewise, the petitioner has failed to submit sufficient evidence to establish that the beneficiary has been employed by the foreign entity in a managerial capacity. There has been no evidence submitted to establish that the beneficiary has been employed by a qualifying organization for one continuous year within the three

years preceding the filing of the petition. The petitioner stated that the beneficiary manages the overall operation and day-to-day business of the foreign entity. However, there has been no independent documentary evidence submitted to substantiate this claim. There has been no evidence submitted to show that the beneficiary manages subordinates who can relieve him from performing non-qualifying duties.

In the instant case, the evidence demonstrates that the foreign entity employs a number of persons, in addition to the beneficiary. The petitioner contends that the beneficiary is responsible for the overall executive control and management of the company. However, there has been no evidence submitted by the petitioner to show how the beneficiary manages and controls the entity's operation and personnel. Evidence submitted by the petitioner fails to demonstrate that there are any employees at the foreign entity who are professional, managerial, or supervisory and whose functions are directly or indirectly managed by the beneficiary. The entity's organizational chart shows that there are no other employees under the direction of the beneficiary. Neither has the petitioner submitted sufficient evidence to establish that the beneficiary manages a function of the organization. Furthermore, there is a lack of documentation to show how much time the beneficiary spends performing managerial versus non-managerial duties. *Ikea US, Inc. v. U.S. Department of Justice,* 48 F. Supp. 2d, 22, 24 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation).

The record does not support a finding that the beneficiary will be employed by the U.S entity in a managerial or executive capacity. The information provided by the petitioner describes the beneficiary's job duties only in broad and general terms. The following duties described are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive in nature: manage and operate the day-to-day activities of the organization, define goals and develop marketing strategies, follow market trends, coordinate with foreign entity, and increase staff. The petitioner has not demonstrated that the beneficiary will manage or direct the management of a department, subdivision, function, or component of the organization. Neither has the petitioner established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing the services of the corporation. The record reflects a management structure for the U.S. entity that includes the beneficiary as president and a general manager. The record also reflects a personnel structure for the U.S. entity that includes a marketing and sales agent, secretary, assorter and grader, accountant, and independent contractors. There has been no evidence submitted to show that any of the positions were actually filled at the time the petition was filed. Based upon the evidence of record, it appears that the beneficiary will be primarily performing the services of the organization, rather than managing a function or the overall day-to-day activities of the organization.

The evidence submitted also fails to establish that the U.S. entity will be able to support a managerial or executive position within one year of approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). The business plan submitted by the petitioner fails to detail accurate, realistic projections to establish that the U.S. entity will realize growth within one year sufficient to support a managerial or executive position. Although the petitioner infers that it intends to hire additional employees within one year of operation, there has been no evidence submitted to show that they will be employed in anything other than non-professional positions. Furthermore, there is no evidence to show how much of the beneficiary's time will be allotted to managerial or executive duties, and how much to other non-qualifying duties. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Rather than the beneficiary functioning at a senior level, it appears from the

record that he will continue to perform the functions of the organization in carrying out the day-to-day services of the business.

On review of the record, the petitioner has failed to establish that the beneficiary has been employed primarily in a managerial or executive position abroad; that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive position; and that the petitioner will be able to support a managerial or executive position within one year of approval of the petition.

A second issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office.

The petitioner initially submitted a copy of a lease agreement dated, April 19, 2001, entered into by the beneficiary as lessor, and the U.S. entity as lessee. The location of the property was Pensacola, Florida. The petitioner also submitted photos of the leased premises.

The director determined that although the agreement was titled "commercial lease" the evidence failed to establish such. The director noted that the photos submitted were confusing in that they showed two distinct resident-like locations and two different offices that appeared to be for one occupant.

On appeal, the petitioner submits a lease agreement titled "commercial sub-lease," dated November 1, 2001, but scheduled to take effect January 1, 2002. The lease agreement was entered into by Disha Corporation as the lessor and the U.S. entity as the lessee for the sublease of showroom space. The location of the property is Dallas, Texas. The petitioner also submitted a copy of a lease agreement entered into by the U.S. entity as lessor and Tahzeen ABID as lessee entered into on September 5, 2001. The property is located in Dallas, Texas. The petitioner submitted photos depicting the location of the show room.

In review of the evidence, it cannot be concluded that sufficient physical premises have been secured to house the new office. Again, after the director requested additional documentation on this issue the petitioner failed to submit evidence in a timely manner. The petitioner submits evidence on appeal that was not submitted to the director when requested and which was not in existence at the time the petition was filed. It is noted that the petition in the instant case was filed June 9, 2001. 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano, supra.* The petitioner's new evidence will not be considered.

The regulations require the petitioner to submit evidence that establishes that sufficient physical premises to house the new office have been secured at the time the new office petition is filed. *See* 8 C.F.R. § 214.2(1)(3)(v)(A). In the instant case, the petitioner has not submitted documentary evidence to show that the initial lease entered into by the petitioner was a commercial lease. Nor has the petitioner submitted evidence to show that the premises leased were adequate to house the new office. The petitioner must establish eligibility when the nonimmigrant visa petition is filed. CIS may not approve a visa petition at

a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp., supra.*

The evidence of record fails to establish that the petitioner had secured sufficient physical premises to house the new office at the time the petition was filed. Accordingly, the appeal will be dismissed.

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.