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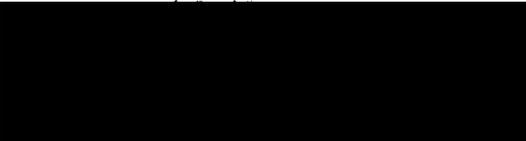
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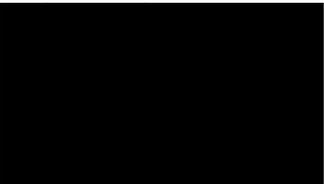


FILE: SRC 03 138 53291 Office: TEXAS SERVICE CENTER Date: **SEP 02 2004**

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:



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.

According to the documentary evidence contained in the record, the petitioner was established in 2001 and claims to be in the specialty food market business. The petitioner claims to be an affiliate of Dinafer, SRL, located in Buenos Aires, Argentina. It declares one employee and \$203,510.00 in gross annual income. The petitioner seeks to extend its authorization to employ the beneficiary in the United States as its president for a period of two years, at a yearly salary of \$45,165.00.

The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be primarily employed in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision.

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 (1)(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 with 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 serves 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) 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 (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- 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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

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 memorandum dated April 14, 2003, counsel describes the beneficiary's duties as:

The beneficiary . . . will continue to serve [the U.S. entity] as president. In this capacity, he is responsible for overseeing the operations of [the U.S. entity]. As manager and executive he will continue to run the company. He will continue to produce business through sales and marketing initiatives. He will also oversee the day-to-day management of all operations and manage the financial aspects and administrative organization of the company. [The beneficiary] will be responsible for hiring knowledgeable staff to run and operate the market and café.

In an affidavit written by the beneficiary, he describes his duties in part as:

I oversee the operations, budget, purchasing and promotion of the business. I am responsible for running the company. I produce business through sales and marketing initiatives, I oversee the day-to-day management of all operations, and I manage the financial aspects and administrative organization of the company.

My position with Shine's is also in an executive and or managerial capacity. The position of president meets the L-1A criteria for the following reasons:

1. I manage and develop business for the corporation, exercising total control over the company and all decisions made to further its growth and success;
2. I will hire, manage and exercise complete control over personnel actions and decisions affecting all employees of the company;
3. I will exercise discretion over the day-to-day operations of all functions of the company; and

4. I establish the goals and objectives for all functions of the business and manage steps to ensure that those goals are achieved.

In response to the director's request for additional evidence on this subject, the petitioner described the beneficiary's duties in part as:

[The beneficiary] is a manager and an executive of this corporation. Because the business is newly established in the marketplace, many of his duties thus far have been managerial. He manages the market, oversees the ordering and purchasing of the foods, oversees the marketing and promotional initiatives, and oversees all financial reporting and forecasting.

...

[The beneficiary] is the president of the company and is responsible for the development of the newly-established Shine's Mediterranean market. In this capacity, he manages and oversees all financial, marketing and sales functions for the company. Currently, such management activities are focused on establishing and maintaining the day-to-day operation of the market, making sure that it becomes an established boutique market and continues to grow.

The petitioner further stated that the U.S. entity also employed the beneficiary's wife as head chef and was responsible for preparing fresh food on a daily basis. The petitioner stated that the company had hired two new employees subsequent to filing the petition, and noted the company's intent to hire additional employees in the future.

The director denied the petition after determining that the evidence failed to establish that the beneficiary would be employed by the U.S. entity primarily in an executive capacity. The director stated that the evidence demonstrated that the majority of the beneficiary's duties would include the non-managerial, day-to-day operations of the business. The director noted the absence of subordinate staff who could relieve the beneficiary from performing non-qualifying duties. The director also noted that the Citizenship and Immigration Services (CIS) had to rely on the facts in existence at the time the petition was filed and could not adjudicate the case based upon events that took place after the petition was filed.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary will be performing managerial, not executive, duties. Counsel notes that the U.S. entity has since hired additional employees and invested in another company. Counsel contends that the petitioner and beneficiary are continuing to expand the business. The petitioner submits as evidence on appeal an affidavit by the beneficiary; U.S. company pay stubs, IRS Form I-9 and W-4; and written consent by the board of directors of Armen Oriental Rug Cleaning Company, Inc. for the purchase of stock in the company by the petitioner.

The record reveals that the petitioner was established in 2001 and has been doing business for the past year. It is implied throughout the record that the U.S. entity is still in its developmental stage. It is stated on appeal that the beneficiary's L-1A status needs to be extended to allow for him to get his business off the ground and to pursue alternate investment opportunities. It is also indicated that the petitioner intends to hire new employees in the future. The record shows that the U.S. entity has been doing business for more than one year. Therefore, the petitioner does not qualify as a "new office" pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C) which allows the petitioning business one year to become sufficiently operational. The assertion that the

petitioner is still in a developmental stage does not relieve it from meeting statutory requirements. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 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. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In an affidavit dated April 2, 2003, the beneficiary stated that the business was established in 2001 and opened for business in 2002. The beneficiary stated that the business opened as a specialty market and café, that caters to the local community consisting of approximately 175,000 residents. The beneficiary further stated that the market offers imported groceries and freshly prepared take-out, and that the café serves lunch and dinner seven days a week. Although the petitioner notes that the beneficiary's wife works for the U.S. entity in the capacity of head chef, there was no independent documentary evidence submitted to substantiate this claim. 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). The petitioner has stated that the beneficiary was the only employee employed by the U.S. entity at the time the petition was filed. There is insufficient evidence to show that the beneficiary will primarily perform qualifying managerial or executive duties rather than spending the majority of his time preparing freshly prepared take-out cuisine, maintaining the establishment's inventory, and servicing its customers.

While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these factors can be used as indicators that help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role. The record demonstrates that the business establishment is open seven days a week and that the majority of the beneficiary's job duties will entail preparing specialty dishes and servicing the local community.

The record contains a description of the beneficiary's job duties that essentially paraphrase the essential elements of the statutory definitions of manager or executive. In the affidavit prepared by the beneficiary he states that he will exercise total control over the company and over personnel actions; that he will exercise discretion over the day-to-day operations of all functions; and that he will establish goals and objectives. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to demonstrate

eligibility in this matter. 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 record does not contain a comprehensive description of the beneficiary's day-to-day activities. The petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists managerial or executive duties for the beneficiary, but fails to quantify the time the beneficiary will spend performing them. This failure of documentation is important because several of the beneficiary's daily tasks, such as sales and marketing, do not fall directly under traditional managerial duties as defined in the statute. The petitioner has not, therefore, established that the beneficiary is primarily performing managerial or non-managerial duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Based upon evidence in the record it appears that the U.S. entity has not yet established itself to the extent that it can support a managerial or executive position. Furthermore, the evidence demonstrates that the beneficiary will continue to perform all of the day-to-day functions of the organization. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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.