



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: EAC 02 267 54736 Office: VERMONT SERVICE CENTER Date:

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

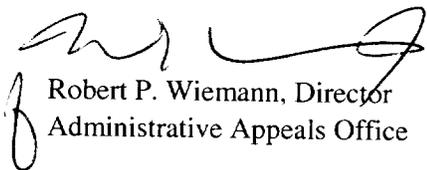
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 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 director of imports and exports as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is an import and export company in the District of Columbia. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Karachi, Pakistan. The petitioner now seeks to extend the beneficiary's stay for two years.

The director denied the petition concluding that the petitioner had failed to establish that under the extended petition the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel contends that the director based his denial of the petition on the incorrect belief that the petitioner had failed to submit evidence specifically requested by the director. Counsel claims that the petitioner had previously submitted the evidence in its December 2002 response to the director's request. Counsel further claims that the beneficiary's job duties are "quite specific and essential to the running of the business." Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. 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(I)(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 (I)(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(I)(14)(ii) 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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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 issue in the present proceeding is whether under the petition for an extension the beneficiary would be employed by the U.S. entity 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 an August 6, 2002 letter filed with the petition, counsel for the petitioner stated that the beneficiary was transferred to the United States to oversee the start-up of the U.S. operation, which he accomplished by hiring five employees. Counsel explained that, while employed in the United States, the beneficiary has directed and managed the import and export of goods to and from the parent company in Pakistan, negotiated contracts for the petitioner, and has overseen its operations. Counsel submitted payroll summaries and Form 941, Employer's Quarterly Federal Tax Return, for the quarter ending in June 2002 as evidence of its employees.

On August 21, 2002, the director issued a lengthy request for evidence. With regard to the instant issue, the director specifically requested that the petitioner provide the following: (1) an organizational chart of the petitioning corporation clearly identifying the beneficiary's position in relation to all other employees and departments in the company; (2) a list of the petitioner's employees including a brief description of their job titles, job duties, educational levels, immigrant status, and amount of wages; (3) a detailed description of the beneficiary's job duties in the U.S. company explaining how the petitioner functioned prior to employing the beneficiary and why the petitioner requires the beneficiary's services; (4) Form 941 for all employees for the first quarter of 2002; and (5) the petitioner's payroll summary and year 2001 Forms W-2 and W-3.

In a response dated December 26, 2002, counsel submitted an organizational chart for the petitioning corporation, in which the beneficiary was named as the petitioner's president and was identified as holding positions in administration, operations, and importing-international relations. Four employees subordinate to the beneficiary were identified as marketing and sales personnel. Counsel also submitted a separate list that identified the petitioner's employees - president, vice-president, sales manager, sales staff, marketing, administration and operations - and included a one-line job description for each. In an attached undated letter, the petitioner provided the following job description for the beneficiary:

The beneficiary manages two other officers (Vice Presidents) and the manager of sales. As president of the company [the beneficiary] is responsible for the importing of inventory, negotiation of process with vendors, inventory needs analysis and purchasing of new merchandise for sale. [The beneficiary] is responsible for reporting results of operations [and] sales to the Board of Directors.

[The petitioner] has recently found a location for a second store, which will need to be stocked with inventory and properly staffed. [The beneficiary] will also manage the new store and all its operations. [The beneficiary] is responsible for managing sales personnel, approval of all new heirs and setting schedules to insure [sic] the stores are properly staffed. [The beneficiary] also sets policies and procedures for employees and store operations.

Counsel also submitted the petitioner's quarterly tax returns for 2001 and 2002, payroll summary for 2002, and copies of the petitioner's record of payroll payments.

In a decision dated February 7, 2003, the director concluded that the petitioner had failed to demonstrate that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director stated that, although the beneficiary's title of director implies a position of managerial or executive authority, the petitioner has not demonstrated that the beneficiary would function at a senior level within the organization. The director also stated that the petitioner did not establish that the beneficiary would supervise and control the work of other supervisory, professional, or managerial employees who would relieve him from performing the operations of the business. The director noted that the petitioner failed to submit the requested current Form 941 and a complete job description for each of the petitioner's employees, including an allocation of time spent by the beneficiary and his employees on particular job duties. The director stated that it was therefore unclear who was actually providing the services of the U.S. company. Accordingly, the director denied the petition.

In an appeal filed on March 6, 2003, counsel challenges the director's claim that the petitioner failed to submit requested evidence, stating that the evidence was either previously submitted with the petition or provided in the petitioner's response to the director's request. Specifically, counsel states that the petitioner previously submitted Form 941 for the year 2001 and contends that Form 941 for the year 2002 was not requested and was not previously available. Counsel submits it on appeal.

Counsel also claims that the petitioner provided a description of the positions held by the beneficiary and the petitioner's employees. With regard to the requested time allocation, counsel states that the employees are employed in full-time positions, and therefore "the duties of the individuals are mixed during the work days depending on the job needs." Counsel provides the following explanation as to the beneficiary's position in the U.S. company:

The beneficiary[']s duties, contrary to the decisions [sic] assertion, are quite specific. He was responsible for the staffing of the company, he had full authority to contractually bind the company and make all final company decision[s]. He also established policy goals for the company in the U.S. and uses his latitude in making decisions for the company. [Citizenship and Immigration Services (CIS)] is trying to impose a standard on this company regarding the beneficiary's duties that is unfair in review of its growing size. [CIS] regulations describing managerial responsibilities are guidelines to be followed and are considered an example of acceptable duties. It seems inconsistent to say that when one has duties echoing the regulations that they (the duties) are vague. As evidenced above the duties for [the beneficiary] are quite specific and essential to the running of the business.

The organization in question has completed it[s] second year of operation. At present the two main functions for the organization are marketing and sales [redacted] (Marketing) and [redacted] (Sales) are responsible for performance. The beneficiary supervises and controls these manager[s] and their departments as evidence[d] by their duty descriptions. While their departments are small they are growing.

On review, the record does not demonstrate that under the extension of the petition the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. When a new business

is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. 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 support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in Citizenship and Immigration Services (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.

The director correctly notes that the petitioner's vague and nonspecific description of the beneficiary's job duties fails to demonstrate what the beneficiary does on a daily basis. For example, the petitioner stated in its response to the director's request for evidence that as president the beneficiary would be responsible for all the petitioner's issues and would approve the actions of the petitioner's employees. On appeal, counsel states that the beneficiary is responsible for hiring the petitioner's staff, binding the U.S. company in contractual agreements, establishing policy goals, and making decisions for the petitioning organization. Contrary to counsel's assertions on appeal, the limited job descriptions do not explain the beneficiary's specific job duties, define the petitioner's goals, or provide examples of the types of managerial or executive decisions the beneficiary would make. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, the brief description provided by the petitioner indicates that the beneficiary would likely be performing some of the petitioner's non-qualifying job duties. Specifically, the petitioner notes in its December 2002 response that the beneficiary "is responsible for the importing of inventory, negotiation of prices with vendors, inventory needs analysis and purchasing of new merchandise for sale." The beneficiary's job duties are not typical of those performed by a manager or executive. See sections 101 (a)(44)(A) and (B) of the Act. Moreover, the petitioner notes on its organizational chart that the beneficiary would also be responsible for administration, operations, and importing-international relations. The petitioner describes these positions as including the responsibilities of developing internal policy and control procedures and handling day-to-day operations and logistics. As the petitioner does not identify any subordinate employees who would relieve the beneficiary from performing these non-qualifying functions, it is reasonable to assume that the beneficiary is also functioning in these non-qualifying capacities. 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).

Furthermore, neither counsel nor the petitioner provides an explanation as to the inconsistencies in the beneficiary's position title. The petitioner notes on the nonimmigrant petition that the beneficiary would be employed as the director of imports and exports, yet provides in its December 2002 response that the beneficiary would be employed as the company's president and would occupy additional positions in

administration, operations and importing-international relations. This clarification is necessary in order to determine the true nature of the beneficiary's employment. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not satisfied this crucial element.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed abroad by the foreign corporation in a qualifying capacity. The petitioner indicated on the foreign company's organizational chart that the beneficiary was employed as the export-marketing manager. The petitioner, however, did not identify any subordinate supervisory, professional, or managerial employees who the beneficiary managed or supervised. *See* section 101(a)(44)(A) of the Act. The record also lacks evidence that the beneficiary managed the essential marketing function of the organization. *Id.* 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). Absent additional documentation, the AAO cannot conclude that the petitioner established the beneficiary's previous employment abroad in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

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).

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.