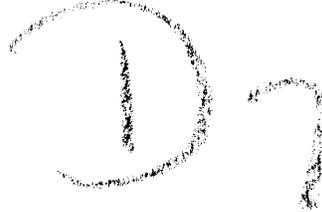


**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



File: LIN 03 070 53707

Office: NEBRASKA SERVICE CENTER

Date: **APR 04 2005**

IN RE: Petitioner:

Beneficiary:



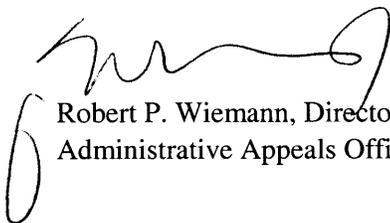
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Nebraska 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 chief executive officer 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 limited liability company formed in the State of Washington that operates a gas station and convenience store with a fast food deli. The petitioner claims that it is the subsidiary of Hussain Groceries, Inc., located in Guyana. 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 employment for three years.

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

The petitioner filed a motion to reconsider on July 7, 2003. The director granted the motion and affirmed his previous decision on December 10, 2003. On January 9, 2003, the petitioner filed the instant appeal, which the director forwarded to appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision is in error because it (1) contains an eligibility requirement which is not found in the Immigration and Nationality Act or regulations; (2) mistakenly states that the beneficiary does not function at a senior level within an organizational hierarchy; (3) is contrary to the legislative history of L-1 visa law; and (4) is contrary to public policy interests. In support of these assertions, 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 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 a December 23, 2002 letter submitted with the initial petition, the petitioner stated that the beneficiary's responsibilities include the following:

He is responsible for managing all aspects of the several businesses at our . . . location. He has been responsible for the overall management of the business, including all purchases and sales, day to day operations and all fiscal matters. The new property contains several businesses. Currently this business (the Airport Depot) employs (4) people, including a manager and 3 clerks. [The beneficiary] has successfully been developing customer base relations with suppliers as well as distributors for import and export products.

In addition, the petitioner submitted a separate document summarizing the beneficiary's role as follows:

The President is responsible for overall solvency of the company. To supervise all operations ensuring compliance with all State and Federal regulations in order to achieve strategic plans. The President has direct responsibility to set goals and objectives directed by the Board of Directors and to implement strategies to achieve such goals. The President is charged with all fiduciary responsibility of the company and to ensure compliance with all governmental regulations. The President is responsible to manage the overall company activities to achieve long-term beneficial relationships with suppliers, customers, bankers, governmental agencies and all strategic alliances.

This document contained the following list of duties and responsibilities:

- Develops strategic plans that foster growth and financial solvency for the company.
- Develop and implement growth through acquisition and alliances whenever possible.
- Develop and foster relationships with suppliers and vendors.
- Develop and foster relationships with Bankers and financial institutions.
- Develop and foster relationships with various constituents in governmental agencies, strategic company alliances and customers.
- Manage the daily operations for Airport Depot.
- Oversee the daily shifts for the store.
- Manage all accounting and financial activities including receivables and payables as well as payroll.

On the Form I-129 Petition, the petitioner indicated that it employed four workers, while in its supporting letter, the petitioner claimed that it employed a store manager and three sales clerks in addition to the beneficiary. The petitioner submitted job descriptions for the sales clerk and store manager positions, as well as an accountant position, although the petitioner did not claim to employ an accountant. The AAO notes that, according to the position description, the accountant reports to a “comptroller” and is located in Nandy Park, which is the town in Guyana where the petitioner’s parent company operates.

On January 27, 2003, the director requested additional evidence, including a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition. In response, the petitioner submitted a letter dated April 7, 2003 which described the beneficiary’s duties as follows:

The President is responsible for overall solvency of the company. Therefore monitoring of cashflow [sic] including preparation of daily deposit journals, as well as monthly reports. Our business is responsible for many different types of tax reporting (local, state and federal) which the president prepares and submits on a regular basis (see attached reports). The president meets regularly with bankers to discuss ongoing financial needs including financing for planned projects.

The President develops and maintains relationships with key suppliers and customers by attending local and regional meetings which enhance business development. For example, our company is now in the planning stage of a new business: we plan to add a car wash to our complex. We are now working with contractors to obtain construction bids.

The President is responsible for setting company policy including personnel policy. He must oversee the work of the other employees and monitor their performance. He will work to develop and train employees in their jobs. In addition he will hire and terminate employees as necessary.

The President is on the premises of the store on a regular basis. He develops relationships with customers and will occasionally resolve problems between a customer and an employee

of the store. Other duties while on premises including monitoring the security system, and maintaining records regarding ordering, inventory, negotiating with vendors and suppliers, etc.

The petitioner also submitted a document describing the beneficiary's subordinate staff, stating that it "has five employees in different areas of the company such as Management, Sales and Marketing and Food Preparation." The employees were identified as a manager, two sales clerks and an accountant. The manager's duties were described as follows:

Assist the CEO with overall strategic planning and execution of strategies to accomplish set goals. Supervise all purchases and sales staff. Coordinate inventory with sales and purchases on a daily basis. Promote store with local business owners and local chamber of commerce. Supervise the food preparation for the restaurant. Coordinate daily sales with accounting. Coordinate all purchase orders with accounting. Prepare monthly reports for sales, purchases and inventory on hand. Meet with suppliers and distributors for all items carried in the store and maintain good relationships with them. Make weekly schedules for employees for the various shifts and coordinate hours with accounting. Hire and train all staff for the store and restaurant. Coordinate all security for the store and vendor representatives. Responsible to hire and train sales staff. Build relationships with suppliers negotiate prices in accordance company strategies.

The petitioner provided the following job description for its two sales clerks:

Responsible for opening store in the morning and start coffee. Open the safe and count cash from the night shift. Turn all equipment on and open doors. Verify the store is clean and ready for business. Meet and greet customers in store and run cash register. Assist in stocking all merchandise in store. Keep store clean and tidy. Monitor all customers entering the store and assist with security. Assist in incoming merchandise and stocking shelves with displays. At the end of the shift, count the cash in the register and reconcile sales.

Finally, the petitioner described the following responsibilities performed by the claimed accountant:

Conduct daily reconciliation of sales, account receivables, and cash. Deposit cash from sales to the bank and reconcile account. Keep all invoices reconciled with purchases. Pay all bills monthly. Prepare payroll and associated taxes. Prepare monthly invoices for sales to store owners and send bills. Post all account receivables and payables to appropriate ledgers. Prepare daily, monthly and weekly reports for sales, purchases and inventory on hand. Conduct inventory and reconcile with warehouse staff and marketing sales supervisors. Prepare all monthly report for management. Prepare all financial statements, general journals and balance sheets.

The AAO notes that the petitioner also submitted a "Yearly Earnings Report" for the year ended on December 31, 2002. The report confirms that the petitioner employed the claimed store manager and one of the sales

clerks at the time the petition was filed. Based on the report submitted by the petitioner, the other sales clerk identified by the petitioner worked for the company from May through July 2002 but was not an employee at the time the petition was filed. The individual identified as the petitioner's accountant does not appear on any of the submitted payroll records.

On June 4, 2003, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Specifically, the director noted that the petitioner did not demonstrate that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. The director further noted that it did not appear that he has been or will be managing or directing the management of a department, subdivision, function or component of the organization. Finally, the director stated that the petitioner did not establish that the company's four employees are professional, managerial or supervisory personnel who relieve the beneficiary from performing the services of the company.

On July 7, 2003, the petitioner submitted a motion requesting that the director reconsider the June 4, 2003 decision. On motion, counsel for the petitioner asserted that the director "did not understand that the beneficiary's duties are executive in nature." Much of the documentation submitted by the petitioner on motion, including another description of the beneficiary's position and the petitioner's staffing, is re-submitted on appeal and will be discussed below. The director granted the motion and, upon reconsideration, affirmed the previous decision. In the December 10, 2003 decision, the director cited the same grounds for denial noted in the previous decision, and also noted "the petitioner does not contain the organizational complexity to support a managerial/executive position."

On appeal, counsel for the petitioner asserts that the director erroneously concluded that the beneficiary would not be employed in a qualifying executive capacity. Counsel asserts that the director placed undue emphasis on the small size and "organizational complexity" of the petitioning company. Specifically, counsel states that "the [director] appears to have a strong preconceived notion that a small business because of its size, simply does not need (or does not deserve to have) an executive or manager." Counsel further states that the director's view is mistaken, and asserts that (1) it is not supported in current or previous law or regulations; (2) it ignores the fact that even in small businesses, executive-level decisions must be made daily; and (3) it erroneously states that the beneficiary does not function at a senior level, when in fact there is no person in the organization senior to him; and (4) it "utterly ignores strong public policy interests supporting small businesses in the U.S. as essential economic engines. . . ." In support of these assertions, counsel submits copies of two unpublished AAO decisions in which employees of small corporations were found to qualify as functional managers or executives. The petitioner also submits two expert opinions letters to support its assertion that the beneficiary performs primarily qualifying executive duties.

In addition, the petitioner submits a July 1, 2003 letter, previously submitted on motion, and a new organizational chart for the U.S. entity. The letter states that the petitioner employs the beneficiary, a store manager, an accountant and four cashiers and identifies all employees by name. The AAO notes that the employee previously identified as the store manager is depicted as a cashier on the updated organizational chart. The letter expands upon the beneficiary's recent job duties, which include market expansion activities, namely, sub-leasing part of its property to a restaurant and planning for the addition of a car wash. The