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U.S. Citizenship  
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Services

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[Redacted]

File: EAC 03 080 52216 Office: VERMONT SERVICE CENTER Date:

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

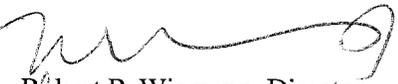
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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 general manager marketing 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 New York that is engaged in real estate development. The petitioner claims that it is the subsidiary of [REDACTED] located in Islamabad, 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 beneficiary will not be employed in a primarily managerial or executive capacity with the United States entity. The director also noted that the petitioner did not establish that it had acquired sufficient office space for the U.S. entity.

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 disputes the director's findings and asserts that the beneficiary's job duties will be primarily managerial in nature. Counsel also contends that the petitioner's office space, while located in the same building as the beneficiary's residence, is separate and sufficient to meet the current needs of the company. 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 primary 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 January 6, 2003 letter submitted with the initial petition, the petitioner stated that the beneficiary "has a key role in the marketing plans in the United States and his continuing presence is essential to bring the expansion effort to a successful conclusion." The petitioner indicated on Form I-129 that it employed four individuals.

On April 16, 2003, the director requested additional evidence to establish that the beneficiary would be employed in a managerial capacity in the United States entity. Specifically, the director requested: (1) a comprehensive description of the beneficiary's proposed duties and an explanation as to how the duties will be managerial or executive in nature; (2) a list of the petitioner's employees that identifies each employee by name and position title, as well as a position description describing the number of hours devoted to each of the employees' job duties on a weekly basis; and (3) a description of the type of business conducted by the United States entity, including the type and location of established and prospective customers/clients, the services to be rendered and the products and/or commodities to be sold.

In response, the petitioner submitted a letter dated July 8, 2003, which stated that the beneficiary "has been designated with full powers of bank operations, allocating and maintaining business budget, lease contracts, major business deals and hiring [and] firing of essential staff." The petitioner also indicated that the United States entity employs a "Manager operations" responsible for "telemarketing, follow up, recovery, allotment letters," and an "Office manager" responsible for "computer programming, date [sic] base, correspondence, dispatch and filing."

In addition, the petitioner included an attachment labeled "Duties of [the beneficiary]." The attachment indicates that [REDACTED] the general manager of the USA entity and lists the following duties:<sup>1</sup>

- a. Formulating the company's long and short-term business goals (8 hours).
- b. Researching the international market in order to develop marketing and sale strategies on a long and short-term basis (12 hours).
- c. Negotiating contracts and conducting follow-up with client through the marketing/sales representatives who serve as liaison between CEO and clients (5 hours).
- d. Determine customer's requirements as per feedback from marketing/sales representatives (5 hours).
- e. Interfacing with marketing/sales representatives (3 hours).
- f. Communicating with suppliers/distributors to negotiate contract arrangement and communicating with bank regarding necessary transfer of money (2 hours).
- g. Supervising and participating in trade shows of Housing Development Industry (3 hours).
- h. Interviewing, hiring, supervising and termination of employees (2 hours)[.]

In response to the director's questions regarding the primary purpose of the petitioner's business, the petitioner explained that its parent company develops new towns in suburban areas of large cities in Pakistan and sells plots and homes to residential and commercial customers. The petitioner further explained that the U.S. entity is responsible for selling plots and homes located in Islamabad and Lahore, Pakistan to Pakistanis residing in the United States. Finally, the petitioner stated that the beneficiary continued to serve as director of marketing for the parent company during his assignment to the United States and provided an organizational chart for the foreign entity indicating six individuals under the beneficiary's supervision.

On August 29, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary would be employed in an executive or managerial position under the extended petition. The director specifically noted that the petitioner provided a very vague description of the beneficiary's duties, only has three employees, and, based on the lease agreement submitted, appeared to still be operating from a home office. Finally, the director concluded that, given the size and nature of the organization, the beneficiary will be primarily engaged in the non-managerial, day-to-day operations involved in providing a service.

On appeal, counsel for the petitioner asserts that the beneficiary performs managerial duties and is not involved in the day-to-day functioning office, but rather that he "exercises managerial control over the office employees who assist and aid him in performance of his functions." Counsel further states that the director failed to recognize the beneficiary came to the United States to open a new office and the office "over a period of time will grow to include more employees." In addition, counsel states that the beneficiary's responsibilities with the United States entity include the following duties:

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<sup>1</sup> On appeal, counsel for the petitioner asserts that the name [REDACTED] was erroneously indicated as the general manager of the company due to a typographical error, and that the petitioner never employed a person by this name in any capacity. Counsel states that, factually, the beneficiary performs all of the listed duties.

[F]ormulate and lay out polices for marketing and sales operations, including establishment of sales goals; establish personnel and financial policies for the newly established branch; negotiate with customers regarding price discounts, location of plots, etc.; hire and fire employees; financial control and banking, preparation of periodic (Quarterly, Half-Yearly and Annual) financial reports; supervise and provide directions and policy to independent contractors and consultants including CPA, etc. Confer with board of directors in Pakistan.

Counsel concludes that the petitioner submitted sufficient evidence to establish that the beneficiary's duties are "primarily those of a senior executive or general manger [sic] as enumerated by the regulations on the subject."

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.* A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

Although the petitioner has provided a description of the beneficiary's duties and the number of hours per week he spends on them, the description provided fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary devotes 20 percent of his time to "formulating the company's long and short-term business goals" but does not explain what specific tasks are involved within this broad responsibility. The petitioner also states that the beneficiary will spend an additional 20 percent of his time interfacing with marketing and sales representatives and determining customer requirements based on their feedback, but the petitioner does not employ any marketing and sales representatives. 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). 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).

In addition, the petitioner describes the beneficiary as performing market research and negotiating sales terms with customers. Moreover, although the petitioner describes the beneficiary as overseeing sales and marketing functions through subordinate personnel, the petitioner has not established that it employs any sales and marketing personnel to relieve the beneficiary from directly performing operational tasks associated with these functions. If the beneficiary actually performs the sales and marketing work, he is performing tasks necessary to provide a service or product and these duties will not be considered managerial or executive in nature. 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).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. 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 the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's duties, including sales and marketing duties, banking and routine finance activities, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, counsel asserts that the director erroneously relied on the size of the petitioning company in making his determination that the beneficiary would not be engaged in primarily managerial or executive duties. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position.

As noted above, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) requires the petitioner to submit 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. In this case, the petitioner indicated on the Form I-129 that it employs four people, but provided no additional evidence of wages paid or the required description of its staffing. The director specifically requested that the petitioner provide detailed job descriptions for all of the beneficiary's subordinates. In its response the petitioner only provided the names, position titles, and brief, vague job descriptions for the employees. 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. at 190.

Furthermore, a review of the petitioner's financial statements for the year ended on December 31, 2002 reveals that the company paid no salaries in 2002, other than \$15,960 in officers compensation. On appeal, the petitioner submitted quarterly wage reports for the fourth quarter of 2003, evidencing wages paid to the beneficiary and the two employees identified as the operations manager and office manager. 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). Based on the petitioner's financial statement and the petitioner's failure to comply with the regulation requiring submission of evidence of wages paid, the AAO cannot conclude that the petitioner actually employed the claimed staff at the time the petition was filed. Furthermore, even if the petitioner did employ the claimed staff, the job descriptions provided for these individuals do not establish that these employees will relieve the beneficiary from performing most or all of the company's sales and marketing, contract negotiation and routine financial tasks. Regardless, the

reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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 duties and the staff 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, 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. For this reason, the petition may not be approved.

Another issue addressed by the director is whether the petitioner has acquired sufficient office space for the United States entity. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). In support of the petition, the petitioner submitted a lease agreement for an apartment that states that the property "must be used only as a private Apartment to live in and for no other reason." The lease was valid from July 15, 2001 until June 15, 2002 and already expired at the time the petition was filed. Accordingly, the director requested a current lease for the United States entity and photographs of the interior and exterior of the office. The director noted that the expired lease was for a residential property.

In response, the petitioner explained that the leased property has two portions, one of which is being used for the beneficiary's residence and the other portion which is used for business purposes. The petitioner further explained that the beneficiary is often required to be in the office late at night to communicate with the Pakistani company, and that the leasing arrangement is functional for this purpose. The petitioner also submitted a lease agreement for the period July 15, 2003 to July 15, 2004. This agreement states "the Apartment must be used only as a private apartment to live in as the primary residence of the Tenant and for no other reason." The lease agreement appears to be for the entire second floor of the building.

In his August 29, 2003 decision, the director noted that Citizenship and Immigration Services was not persuaded that the petitioner has acquired sufficient office space for the United States entity. The director observed that "considering the beneficiary was transferred to the United States to open and set up a new office, the fact that he is still working out of his residence does not sound like the beneficiary completed the initial tasks required of him in the initial approval of L-1A status."

On appeal, counsel again explains that the beneficiary is frequently required to work unusual hours in order to communicate with the parent company in Pakistan, and therefore must reside very near to the petitioner's office. Counsel states that the residence and the office are distinct and separate from each other, and that the landlord is paid two distinct rent payments. Counsel also claims that the office space is over 1000 square feet in area, which is "more than sufficient" to meet the needs of the U.S. entity. In support of these assertions, the petitioner submits an affidavit from the owner of the building stating that there are two portions on the second floor of his house, and that one portion is being utilized as the petitioner's office. The affidavit is accompanied by a diagram showing the division of the second floor of the house between the beneficiary's residence and the petitioner's office space.

Upon review of the record, the AAO concurs that there is insufficient evidence to establish that the petitioner occupies a physical premises separate from the beneficiary's residence. Although counsel's statement that the residence and office are in the same building for the sake of convenience is reasonable, there is no evidence in the record to substantiate the petitioner's statement that the company pays a separate rental payment or that the petitioner signed a separate lease agreement for the commercial use of a portion of the second floor of the house. Both lease agreements submitted indicate that the second floor of the building is an apartment to be used as a residence only. Again, 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 regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises.

Finally, it is noted that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's authorized period of stay expired on January 13, 2004. However, the petition for an extension of the beneficiary's L-1A status was filed on January 14, 2003, one day after the beneficiary's status expired. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

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.