

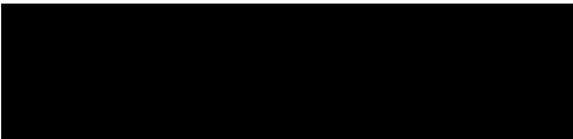
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: SRC 03 035 52819 Office: TEXAS SERVICE CENTER Date: AUG 01 2005

IN RE: Petitioner:
Beneficiary:



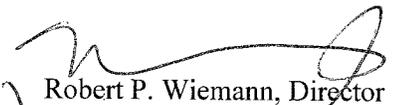
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 retail store business. The petitioner claims to be an affiliate of Step In Shoes, located in Karachi, Pakistan. The petitioner declares eight employees and gross annual income in excess of \$395,000.00 for 2002. The petitioner was originally granted a period of one year for the beneficiary to open the enterprise's new office in the United States. It now seeks to extend its authorization to employ the beneficiary as its president for an additional period of three years, at an annual salary of \$18,000.00. The director determined that the evidence submitted was insufficient to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to be managerial or executive in nature.

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 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) 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 in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity will be primarily managerial or executive in nature.

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.

The petitioner initially described the beneficiary's U.S. job duties in a letter of support as:

The beneficiary will continue to be the president of the petitioner, and he will continue [to] be responsible for hiring and firing managers; supervising subordinate employees, overseeing preparation of sales and inventory reports; reviewing and analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaign developed by subordinate managers.

In the performance of his duties, the beneficiary will receive minimum supervision from the other members of the Board of Directors, and the beneficiary will exercise wide discretion and latitude in the performance of his duties.

In response to the director's request for additional evidence, the petitioner stated that the U.S. entity employed six full-time employees and two part-time employees. The petitioner also stated that the entity anticipates operating two additional retail locations and hiring four additional employees. The petitioner listed job titles of the retail store's employees to include: president, vice president, operations manager, manager, assistant manager, and three cashiers. The petitioner submitted descriptions of the subordinate's job duties. The petitioner described the beneficiary's duties and percentage of time spent performing each duty as:

- i. 20% Hiring and firing managers, and supervising subordinate employees;
- ii. 15% Overseeing preparation of sales and inventory reports, and reviewing and analyzing sales data;

- iii. 25% Establishing and implementing policies to manage and achieve marketing goals;
- iv. 15% Reviewing financial reports, and reviewing budgets and expense reports prepared by subordinate employees;
- v. 25% Managing the company, and overseeing marketing campaign developed by subordinate managers.

The petitioner submitted as evidence a copy of the U.S. entity's IRS Form 941, Employer's Quarterly Federal Tax Return for the quarter ending December 31, 2002.

The director, in denying the petition, determined that the evidence of record demonstrated that the petitioner's business had not expanded to a point where the services of a full-time executive would be required. The director noted that the evidence established that the majority of the beneficiary's time would therefore likely be spent performing non-qualifying, day-to-day operational duties of the company. The director also noted that it was outside the corporate norm to have 62 percent of a company's workforce employed in managerial or executive positions.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary, as president, has been performing and will continue to perform primarily managerial or executive duties for the U.S. entity. Counsel contends that the beneficiary is responsible not only for overseeing the management of the U.S. entity, but is also responsible for reviewing additional retail locations. Counsel further asserts that the beneficiary will not be engaged in the day-to-day operations of the business, which counsel claims is evident from the fact that the petitioner has added two additional stores to its business. Counsel implies that the majority of establishments equal in size to that of the petitioner must logically employ a manager to manage the activities of their subordinates. Counsel restates the beneficiary's proposed duties and the percentage of time to be spent performing such duties. Counsel notes that the beneficiary will be spending more than 40 percent of his time managing the marketing department; and will primarily supervise and control other supervisory, professional or managerial employees. Counsel notes that the beneficiary will be responsible for reviewing and seeking additional retail locations; that the responsibility will not be delegated to subordinates; and that therefore, the beneficiary will manage an essential function of the organization.

Contrary to counsel's assertions, the petition and evidence of record fail to establish that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. 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(1)(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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. In the instant matter, the petitioner is claiming that the beneficiary will perform managerial as well as executive duties in that he will supervise professional, supervisory, or managerial personnel and will manage the marketing function of the business; while on the other hand, the petitioner states that the beneficiary will "continue to receive minimum supervision from the Board of Directors, . . . and will exercise wide discretion and latitude in the performance of his duties."

The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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).

Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision making authority. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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.).

Although the petitioner asserts that the beneficiary will be managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. In the instant matter, the beneficiary's proposed duties overlap with those of the vice president and managers. Although the petitioner admits to employing six full-time employees and two part-time employees, there has been no evidence submitted to demonstrate who the two part-time employees are, or who performs the duties of the part-time employees in their absence from the company. Five of the remaining six employees all have managerial or executive titles, thereby raising the question of who performs the non-managerial and non-executive functions of the retail operation. In addition, the subordinate's duty descriptions do not specifically connote professional, managerial, or supervisory expertise. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. It appears from the record that the beneficiary will be primarily supervising a staff of non-professional employees, thus the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the duties of the managers or cashiers, who are among the beneficiary's subordinates.

The nature of the beneficiary's claimed duties are further confused as counsel claims the beneficiary serves as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If

a petitioner claims that the beneficiary is managing an essential function, the petitioner the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the "function" with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function.

In this matter, the petitioner has not provided sufficient evidence to establish that the beneficiary will be responsible for managing an essential function of the organization. First, the petitioner has not identified the "marketing function" with any specificity or articulated the essential nature of the function. Although counsel contends that over 40 percent of the beneficiary's time will be spent managing the marketing function of the U.S. entity, the petitioner has not shown that the beneficiary will be managing the marketing function rather than performing the function. Critically, it is noted that none of the subordinate employees are described as engaged in marketing activities, leaving the AAO to conclude that the beneficiary actually conducts the primary marketing activities of the retail convenience store. 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).

On appeal, counsel asserts that the U.S. entity has acquired a total of three retail locations and submits, as evidence of these transactions, copies of three lease agreements. However, in response to the director's request for additional evidence, the petitioner admits to operating only one retail store at the time the petition was filed. Furthermore, this evidence was not submitted to the director prior to the decision and/or was not in existence at the time the petition was filed. It is noted that the petition in the instant case was filed on November 18, 2002. 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." 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). 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). Furthermore, 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 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. The petitioner stated in its response to the director's request for additional evidence that the entity anticipates operating two additional retail locations and hiring four additional employees. 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 fact that the petitioner is still in a developmental stage of organizational development is considered, but 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 petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, *supra*; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In review, the evidence of record fails to establish that the beneficiary will be employed primarily in a managerial or executive capacity or that the U.S. entity has developed to a point where it can support a managerial or executive position. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the minimal documentation of the parent company's and the petitioner's business operations raises the issue of whether there is a qualifying relationship between the U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In addition, there is insufficient evidence contained in the record to demonstrate that the foreign entity will continue doing business pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H). In this matter, the petitioner submitted copies of tax notices demanding tax payments from the foreign entity. The record fails to show that the foreign entity will be engaged in the regular, systematic, and continuous provision of goods and/or services during the beneficiary's temporary stay in the United States. In addition, the petitioner indicates that the beneficiary is the sole owner of both the U.S. and foreign companies. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For these additional reasons, the petition must be denied and 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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.