

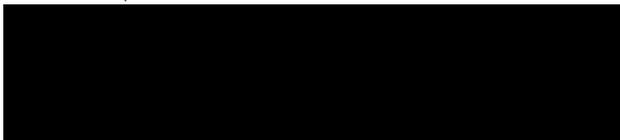
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U.S. Citizenship
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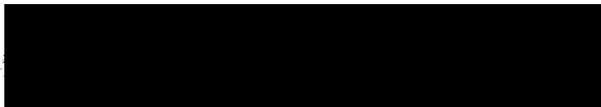


D7

FILE: SRC 03 060 50273 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 December 3, 2001, and claims to be a "washeteria" business in the hospitality and service industry. The petitioner claims to be a subsidiary of Apsara Limited, located in Pakistan. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager for a period of three years, at an annual salary of \$48,000.00. The beneficiary was initially granted a one-year period of stay to open a new office in the United States.

The director determined that the petitioner had failed to establish that: (1) the petitioning entity has been doing business; or that (2) the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the petitioner has submitted sufficient evidence to demonstrate that the organization has been doing business and that the beneficiary has been and will be employed in a primarily managerial or executive capacity.

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 (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) states that a visa petition under section 101(a)(15)(L) of the Act 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 first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the U.S. entity has been doing business.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In a letter dated November 27, 2002, the petitioner stated in part:

The U.S. subsidiary is currently actively in negotiations for the purchase of additional business outlets, which purchase will be completed by December 31, 2002. With the purchase of these additional business outlets in the United States, the subsidiary will have in excess of ten employees, in the United States.

The petitioner initially submitted copies of the U.S. entity's Articles of Incorporation, lease agreement, and a Bill of Sale, dated December 3, 2001.

The director requested that the petitioner: "Submit evidence of the business conducted by the petitioner during the past year, such as sales contracts, invoices, bills of lading, shipping receipts, orders, US Customs Forms 301, 7501, 7525-V, etc."

In response to the director's request for evidence, the petitioner submitted copies of the entity's Texas Sales and Use Tax Returns for 2003, a Texas Corporation Franchise Tax Report for the accounting period ending December 31, 2002, bank account statements dated from February 2003 through April of 2003, canceled checks, and copies of utility bills for 2002 and 2003.

The director determined that insufficient evidence had been submitted to establish that the U.S. entity had been doing business for the year prior to the filing of the instant petition.

On appeal, counsel argues that the company's letter, Bill of Sale, and tax returns demonstrate that the U.S. entity has been doing business during 2002.

Based upon information contained in the lease agreement and Bill of Sale submitted by the petitioner, it appears that the petitioner purchased and is operating a washer and dry cleaning establishment. The Bill of Sale indicates that the establishment was purchased December 3, 2001, and the Franchise Tax Return demonstrates that the entity realized gross receipts in the amount of \$106,224.00 in 2002. Therefore, the director's decision with respect to the U.S. entity doing business will be withdrawn.

The second issue in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily—

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;

- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily—

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially described the beneficiary's duties in the petition as: "The alien will manage and direct the U.S. branch's business activities, including supervising the staff, hiring and training, and directing the marketing efforts for the company."

In the letter dated November 27, 2002, the petitioner described the beneficiary's duties as:

[The beneficiary] is the General Manager of the U.S. Corporation. He has a proven track record with the parent company. He was in charge of the parent company's growth and management, as well as all marketing efforts. The skills required in expanding the business and nurturing its growth is essential and is possessed by [the beneficiary].

The director requested that the petitioner submit: "Evidence of the current staffing level in the United States and abroad. Give position titles and duties of all employees. Give the educational background of the professionals that are employed." The director also stated in the request for evidence:

Please provide a definitive statement describing the foreign and U.S. employment of the beneficiary, including:

- Number of employees who report directly to the beneficiary;
- A brief description of their job titles and duties; give their educational background; if the beneficiary does not supervise other employees, specify what essential function within the organization he manages;

Submit copies of the State Employer's Quarterly Tax Returns for the year 2002 for Apsara Enterprises of Texas, Inc.

Submit copies of Quarterly Wage Reports for all employees from 2002 to the present.

In response to the director's request for evidence, the petitioner submitted a listing entitled "Current Staffing Levels, Apsara Enterprises of Texas, Inc." The list included the following names and job titles for the U.S. entity:

1. [REDACTED] - General Manager
2. [REDACTED] Supervising Manager
3. [REDACTED] Manager
4. [REDACTED] - Assistant Manager
5. [REDACTED] - Mechanical Technician
6. [REDACTED] Clerical
7. [REDACTED] - Accounts
8. [REDACTED] - Cashier
9. [REDACTED] Stocker
10. [REDACTED] - Cashier

The petitioner described the U.S. entity's chain of command as:

The clerical and accounts staff report directly to the Assistant Manager, who in turn reports to Manager. The Assistant Manager holds a diploma in commerce and has many years of management experience.

The Manager and the Supervising Manager report to the beneficiary ... [the beneficiary] report to the parent company, Managing Director. The supervising manager position is a senior level position.

As part of his job duties, [the beneficiary] is engaged in planning the company's continued growth in the USA including analyzing additional locations for expansion of the company's business and identifying potential business opportunities and also exploring financial matters. Under [the beneficiary] the company has seen continuous growth, and expects to have sales in the USA in excess of \$2,300,000.00.

The day to day [sic] operations of the business are primarily looked after by the Assistant Manager.

The petitioner submitted as evidence copies of the U.S. entity's Form 941, Employer's Quarterly Federal Tax Return for the quarters ending December 31, 2002, and March 31, 2003.

The director determined that the petitioner had failed to present evidence demonstrating the U.S. entity's employees' duties and responsibilities as specifically requested. The director stated that the petitioner had failed to provide an explanation for the inconsistencies that existed in the number of employees employed by the U.S. organization. The director also stated that the evidence submitted fails to demonstrate that the beneficiary was performing in a managerial capacity at the time the petition was filed or would be performing in a managerial or executive capacity.

On appeal, counsel argues that the director misinterpreted the company tax records demonstrating the number of employees employed by the petitioner. Counsel also argues that the director admitted that the beneficiary is now functioning in a managerial capacity and that where a new business is being established, the manager may be engaged in a variety of responsibilities. Counsel further argues that the evidence submitted is sufficient to establish that the beneficiary has been and will be performing in a primarily managerial or executive capacity. The petitioner resubmits as evidence on appeal, a copy of the employee list, explanation of chain of command, and Quarterly Wage Reports for the quarters ending December 31, 2002, and March 31, 2003. The petitioner also submitted a copy of the company's IRS Form 1120, U.S. Corporation Income Tax Return for 2002 and attachments.

Counsel's assertions are not persuasive. In evaluating whether the beneficiary has been or will be employed in a primarily managerial or executive capacity, the AAO will look first to the petitioner's description of the beneficiary's 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.* In this matter, the record demonstrates that the beneficiary has and will continue to perform various non-qualifying job duties for the U.S. entity.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary is responsible for managing and directing the U.S. entity's business activities, supervising subordinate staff, and directing the marketing efforts of the organization. The petitioner did not, however, detail the organization's business activities, nor clarify the beneficiary's duties in marketing the petitioner's products or in supervising subordinate staff. 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).

The petitioner fails to document what proportion of the beneficiary's duties will be managerial functions and what proportion will 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 daily tasks, such as marketing the petitioner's product, are not managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the petitioner asserts that the beneficiary will be managing the company manager and supervising manager, 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. 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. In addition, there has been no evidence submitted to establish the titles and job descriptions of the employees employed by the U.S. entity at the time the petition was filed. The AAO notes that the organization's quarterly wage report for the fourth quarter of 2002 and the first month of the first quarter ending March 2003 shows only three employees employed by the company at the time the petition was filed. To the contrary, the petitioner provided a list of ten U.S. entity employee names and titles. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based upon the evidence presented, it appears that two out of the three employees were employed only on a part-time basis. It appears that the beneficiary has been and will be primarily performing the day-to-day activities of the organization rather than performing in a primarily managerial or executive capacity. It also appears from the record that the U.S. entity has not yet reached a level of complexity sufficient to support a managerial or executive position.

The petitioner claims that the beneficiary directs and manages the petitioner's marketing activities, however, it does not claim to have anyone on its staff to actually perform the marketing function. Thus, either the beneficiary himself is performing the marketing function or he does not actually manage the marketing function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the marketing function, the AAO notes that 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).

The petitioner infers throughout the record that the U.S. entity is still in its developmental stages. 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). Furthermore,

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. 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. In this matter, the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position. For this reason, the petition may not be approved.

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.