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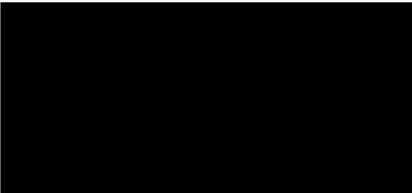
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FILE: SRC 03 036 50321 Office: TEXAS SERVICE CENTER Date: **AUG 01 2005**

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

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

ON BEHALF OF PETITIONER:



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 incorporated on October 25, 1994, and claims to be in the retail stores business. The petitioner claims that the U.S. entity is an affiliate of M/S Taj General Merchant Shop #A-25, located in Karachi, Pakistan. The petitioner claims four employees. The petitioner seeks to employ the beneficiary temporarily in the United States as its president for a period of three years, at an annual salary of \$18,000.00. The director determined that the petitioner failed to establish that the beneficiary would be primarily employed in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and submits a brief in opposition thereto.

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 issue presented in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be primarily employed by the U.S. entity in a 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.

In a letter dated November 15, 2002, the petitioner stated that the U.S. entity was established in 1994 as a "retail stores business," and employed four persons. The petitioner also stated that the beneficiary owned and controlled the majority of shares in the U.S. entity and foreign entity. The petitioner described the beneficiary's duties with the U.S. entity as:

The beneficiary will be employed as the president of the petitioner, and will be responsible for performing the following duties; setting and establishing the company's goals and objectives; reviewing locations for the establishment of additional retail outlets; and managing the company; reviewing and approving inventory orders prepared by subordinate staff; reviewing and approving marketing strategy; establishing sales and marketing goals and overseeing implementation of such goals; supervising and controlling work of subordinate managers and supervisors; hiring and firing managers and supervisors; and reviewing financial records prepared by professional staff.

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

The petitioner submitted copies of the U.S. entity's Certificate of Incorporation, Stock Purchase Agreement, Share Certificates, summary bank statements, IRS Form 1120S, Corporate Income Tax Return for 2001, Employer's Quarterly Reports for 2001, and a company financial statement for the year ending 2001.

In a letter dated December 24, 2002, the petitioner described the beneficiary's proposed duties with the U.S. entity and the percentage of time to be spent performing each duty as:

- Setting and establishing the company's goals and objectives, directing and managing the company - 20%;
- Reviewing locations for the establishment of additional retail outlets - 15%;
- Reviewing and analyzing market conditions, and establishing sales and marketing goals and overseeing implementation of such goals - 15%;
- Reviewing and approving budgets - 10%;
- Reviewing and approving inventory orders prepared by subordinate staff - 10%;
- Reviewing and approving marketing strategy - 10%;
- Supervising and controlling work of subordinate managers and supervisors, and hiring/firing managers and supervisors - 10%; and
- Reviewing financial records prepared by professional staff - 10%.

The petitioner stated that it anticipated locating and adding additional retail stores in the future; and within six months, hire an additional eight employees. The petitioner described the managerial, assistant managerial, and cashier positions within the U.S. entity as:

Manager - Preparing employee work schedule; preparing and maintaining inventory report; prepare inventory orders; prepare sales report; and prepare budget and expense reports;

maintain records of underground petroleum storage tanks in accordance with state and federal environmental laws; and supervise subordinate employees.

Assistant Manager – Maintain/order inventory; assist in preparation and maintenance of inventory report; reconcile all accounts and assist in prepare daily sales report; and supervise subordinate employees.

Cashier – Operate cash register/credit card machine; and reconcile daily cash with sales receipts.

The petitioner also submitted an organizational chart demonstrating the U.S. entity's proposed hierarchy to include: a president, manager, two assistant managers, and five cashiers. The petitioner further noted that the beneficiary would be responsible for supervising the manager and assistant manager of the U.S. company and; therefore, meets the managerial or executive criteria. The petitioner submitted as evidence copies of the U.S. entity's Employer's Quarterly Reports for the quarters ending March 30, 2002, June 30, 2002, and September 30, 2002, respectively. The petitioner resubmitted copies of the U.S. entity's Corporate Income Tax Return for 2001, bank statements, and financial statements.

The director denied the petition determining that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity. The director noted that the petitioner failed to clarify what the duties and titles of each employee were. The director also noted that based upon the small size of the U.S. entity's staff, it would appear that the beneficiary would be primarily engaged in the day-to-day operations of the business, rather than primarily performing managerial or executive duties.

On appeal, counsel disagrees with the director's decision, and asserts that she abused her authority in determining that based upon the company's staff size, the beneficiary would be primarily performing the day-to-day operations of the business, rather than primarily performing managerial or executive duties. Counsel asserts that the petitioner currently employs a manager, assistant manager, and three cashiers. Counsel also asserts that the beneficiary will be responsible for overseeing the management of the U.S. entity, as well as for reviewing additional store locations. Counsel contends that the beneficiary will not be delegating his responsibility for locating additional retail locations; and therefore, will be engaged in the essential function of expanding the petitioner's business. In support of his position, counsel cites to *National Hand Tool Corp. v. Pasquarell*, 889F.2d1472, n.5 (5<sup>th</sup> Cir. 1989); *Mars Jewelers, Inc. v. INS*, 702 F.Supp.1570, 1573 (N.D. Ga. 1988); and an unpublished AAO decision. Counsel reiterates the proposed duties and responsibilities of the beneficiary in the United States. The petitioner submitted as evidence a copy of the U.S. entity's Employer's Quarterly Report for the quarter ending December 31, 2002.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial in nature. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the

two statutory definitions. The petitioner described the beneficiary's proposed duties in part as: "managing the company" and "supervising and controlling the work of subordinates, managers, and supervisors." The petitioner also described the beneficiary's proposed duties as: "the beneficiary will exercise wide discretion and latitude in the performance of his duties." Further, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In the instant matter, there is insufficient evidence to show that the beneficiary will perform the high-level responsibilities as defined, or that he will primarily perform those duties rather than spending the majority of his time performing day-to-day functions of the organization.

Counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

As required by section 101(a)(44)(C) of the Act, 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. At the time of filing, the petitioner was an eight-year-old retail stores business that claimed to have a gross annual income of \$658,562.00. The firm claimed to employ four employees including a manager, assistant manager, and cashiers. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's employment in a position described by counsel as "solely executive or managerial."

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying 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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will be doing on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include establishing goals and policies, and directing and managing the company. The petitioner did not, however, define the beneficiary's goals, policies, or clarify how the beneficiary will actually be managing the company. In addition, the evidence shows that over 50 percent of the beneficiary's duties are to consist of sales, marketing, budget and inventory analysis and review.

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. 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. 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).

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. The petitioner stated that the beneficiary would be spending "10 percent of his time supervising and controlling the work of subordinate managers and supervisors." This percentage does not represent that the beneficiary will be spending the majority of his time in a managerial position, managing subordinates. In addition, there is no evidence in the record to clarify that the subordinate's positions are supervisory, professional, or managerial in nature other than in position title. 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. Because the beneficiary will be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. 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 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 the instant matter, although the U.S. entity was established in 1994, it does not appear that the petitioner has reached the point that it can employ the beneficiary in a primarily managerial or executive position.

While not directly addressed by the director, the record contains insufficient evidence to establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity. Although the petitioner refers to the beneficiary's overseas position as "General Manager," the petitioner's description of the beneficiary's duties including: "overseeing development of marketing campaigns; conferring with managers; reviewing market conditions; supervising subordinate employees who prepare marketing strategy; reviewing and analyzing data relating to market conditions . . ." alone is insufficient to establish who or what he manages. Another issue, not directly addressed by the director in this proceeding, is whether the evidence submitted is persuasive in demonstrating that a qualifying relationship exists between the petitioner and a foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). In the U.S. entity's Articles of Incorporation dated October 25, 1994, it is stated "The aggregate number of shares which the corporation shall have authority to issue is: 10,000 shares with no par value." Article eight of the Articles of Incorporation states that Iqbal Manji owns "100%" of the stock in the company. An Agreement for the Sale of Corporate Stock reads in part: "This agreement is executed on this October 25, 2002 between [redacted], who is also a fifty percent (50%) shareholder of [the U.S. entity], and [the beneficiary]." The agreement also states "Seller conveys, transfers, sells and assigns to Buyer TWO HUNDRED AND FIFTY (250) (emphasis added) shares, representing in total Twenty Five Percent (25%) shares of the corporation." The petitioner submitted copies of the U.S. entity's stock certificates issued as:

<u>Stock Certificate #</u>	<u>Name of Owner</u>	<u># of Shares Issued</u>	<u>Date Issued</u>
1	[redacted]	1,000	11/03/94
2	[redacted]	500	01/01/95
3	[redacted]	250	01/01/95
4	[redacted]	250	01/01/95
5	[redacted]	510	10/25/02
6	[redacted]	250	10/25/02
7	[redacted]	120	10/25/02
8	[redacted]	120	10/25/02

The petitioner stated that the majority of the U.S. entity was owned and controlled by the beneficiary and that the foreign entity is likewise, majority owned and controlled by the beneficiary. The inconsistencies between the petitioner's assertions and the submitted evidence raise serious doubts regarding the claim that an affiliate relationship exists between the U.S. entity and a foreign entity. 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). It cannot be concluded that the petitioner is a qualifying organization doing business in the United States and at least one foreign country, or that it maintains a qualifying relationship with a foreign entity. See 8 C.F.R. § 214.2(l)(1)(ii)(G). For these additional reasons, the petition may not be approved.

Beyond the decision of the director, another issue in this proceeding is whether the employment offered to the beneficiary is temporary. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982); see also 8 C.F.R. § 214.2(l)(3)(vii). The petitioner indicated that the beneficiary is the majority owner of the petitioning organization, and that it appears that there is no existing qualifying

relationship between the U.S. entity and a foreign entity to employ the beneficiary upon his return abroad. Therefore, the beneficiary's stay in the U.S. does not appear to be temporary. For this additional 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.