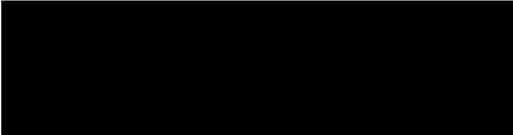


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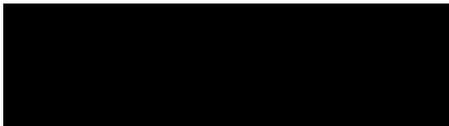
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File: EAC 03 048 54866 Office: VERMONT SERVICE CENTER Date: AUG 19 2004

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:



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, Texas 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 president and chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of New York that claims to be engaged in newspaper publishing. The petitioner claims that it is the subsidiary of [REDACTED] located in Ahmedabad, India. The beneficiary was initially granted a one-year period of stay to open a new office, and the petitioner now seeks to extend the beneficiary's stay for two more years.

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

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the denial was arbitrary and capricious, and that both the petitioner and the beneficiary are qualified for the benefit sought. In support of this contention, 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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

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 the initial petition, the petitioner, in a letter dated November 25, 2002, states that the U.S. company is a newspaper publishing company. It states that, since the publishing business was slow to start, the petitioner in the interim has commenced operations as an ethnic grocery/video rental store and, while operating said store, it would continue to pursue a business venture in the field of publishing. The petitioner submitted a copy of its franchise agreement and commercial sublease with [REDACTED] which outlines the petitioner's two-year agreement to operate the convenience store known as [REDACTED] and [REDACTED] and [REDACTED].

With regard to the beneficiary's duties, the petitioner stated:

[The beneficiary] will continue to assume the position of President and CEO. This is a key Managerial/Executive position in our organization. He will be vested with considerable discretionary authority in regard to coordinating, directing, and implementing the overall operations and policies of our company.

1. Oversee the operations in the U.S. and coordinate the same with our parent company in India.
2. Manage administrative operations, including marketing, personnel and general administrative tasks.
3. Develop and implement plans for long-term growth, set corporate policies, goals and objectives.
4. Oversee and manage financial operations.
5. Analyze, develop, and implement marketing plans and strategies.
6. Research the U.S. ethnic Indian newspaper and grocery Sales in order to develop marketing and sales strategies on a short and long term basis.

7. Communicate with parent company with regard with regard [sic] to current status of market, supply and demand issues, financial status of the US company, and implementation of long term and short-term goals.

Furthermore, the petitioner stated:

Clearly, the aforementioned duties are of an executive nature customarily associated with the position of President. In addition, [the beneficiary] will be vested with wide discretionary power with respect to handling day-to-day decision making and hiring, training, retaining and discharging support staff in accordance with applicable federal regulations.

* * *

[The beneficiary] will manage an essential function of the company, to wit, newspaper publication and wholesale trading of ethnic Indian grocery sales. It must be emphasized that the beneficiary perform [sic] the function. For example, the beneficiary will directly supervise 3 employees and Professional newspaper workers (will be 7).

The petitioner further stated that aside from the seven newspaper workers to be hired in the future, the beneficiary would oversee a manager, a marketing specialist, and an administrative/account assistant. In addition, counsel for the petitioner submitted a separate letter, also dated November 25, 2002, which outlined the law governing the transfer of intracompany managers and executives and discussed in detail the manner in which the beneficiary was qualified for such status.

The director was not satisfied with the initial evidence submitted, and issued a request for additional evidence on January 24, 2003. The director noted that the U.S. operation had not met the point where it could support a managerial position, and appeared to be engaged in a completely different business (the operation of an ethnic grocery store) than the business identified in the initial and current petitions (newspaper publishing). The director requested a statement regarding the actual nature of the petitioner's current business, as well as a statement regarding the projections for the future of the newspaper publishing aspect of the business. In addition, the director requested the petitioner to provide information with regard to any outside contractors used by the petitioner in lieu of employees during the previous year.

In a response dated April 14, 2003, the petitioner essentially provided almost an exact copy of the letter of support it filed with the initial petition. In addition, it attached copies of the U.S. entity's financial statement, as well as copies of the petitioner's Forms 941, Employer's Quarterly Federal Tax Return, for the quarters ending September 30, 2002, December 31, 2002, and March 31, 2003. Only the return for the quarter ending September 30, 2002 included the attachments which listed the names of employees and the wages they were paid for that quarter.

On June 26, 2003, the director denied the petition. The director concluded that the petitioner had failed to establish that the beneficiary has been and would continue to be employed in the United States in a primarily managerial or executive capacity.¹ Specifically, the director noted that the petitioner had failed to establish that the business for which the beneficiary was originally transferred to the United States to commence and manage had not yet been established, and instead, this highly qualified manager/executive, as alleged by the petitioner, was now operating an ethnic grocery and video rental store. Based on the nature of this business and the evidence provided in the record, the director concluded that the beneficiary was engaged in the day-to-day activities of the business as opposed to primarily performing managerial or executive tasks. Finally, the director concluded that the petitioner had not yet reached the point where it could support a managerial position.

On appeal, counsel for the petitioner again submits an almost identical letter to that of the initial letter of support, dated November 25, 2002, and the response to the request for evidence, dated April 14, 2003. Counsel also resubmits the legal arguments presented in his letter of November 25, 2002, which are generalized and repeated, and not specifically structured to the director's specific reasons for the denial.

Upon review, the AAO concurs with the director's findings.

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). In this case, the petitioner provided a generalized description of the beneficiary's duties and concludes that the beneficiary is thus a manager and/or an executive. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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.). 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.*, 724 F. Supp. at 1108. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.*

The AAO notes some confusion with regard to the petitioner's descriptions of the beneficiary's duties. The petitioner also provides a breakdown of the amount of hours the beneficiary devotes to each stated duty. However, since this list is under the heading entitled "IV. THE BENEFICIARY HAS BEEN

¹ The AAO notes that the director's review of the beneficiary's managerial and/or executive employment capacity during the petitioner's first year of operations was incorrect. The regulations do not require that the beneficiary be employed in a managerial or executive capacity during this first year when he is coming to the United States to open a new office; rather, they require the petitioner to support the beneficiary in a primarily managerial or executive capacity by the end of the first year of operations. See 8 C.F.R. § 214.2(l)(14)(ii).

EMPLOYED IN AN EXECUTIVE CAPACITY ABROAD FOR AT LEAST ONE YEAR," and since a separate heading lists the beneficiary's U.S. duties, it is unclear if this breakdown applies to the beneficiary's current duties while in the United States or exclusively to his position abroad. 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).

Presuming that this breakdown of hours applies to the U.S. position of the beneficiary, the AAO notes that the majority of the beneficiary's time is spent "[r]esearching the US ethnic Indian newspaper and grocery market in order to develop marketing and sales strategies on a short and long-term basis (10 hours)." The beneficiary also appears to devote a significant amount of time to "[f]ormulating the company's short and long-term business goals (5 hours)," "[m]eeting with marketing staff in order to communicate the findings of market research and instruct Representative regarding preferred course of action (5 hours)," and "[s]etting and controlling budgets and related fiscal matters, including meeting with the company's CPA to discuss financial planning for the company (5 hours)."

Based on this description, it appears that the beneficiary is devoting the majority of his time to marketing and market research. It is unclear why the beneficiary's time is primarily devoted to this area, particularly since the petitioner claims to employ ██████████ in the position of marketing specialist. Among Ms. ██████████ duties are "implementing marketing plans on a short and long-term basis as needed," a duty which is also listed as a primary duty of the beneficiary. Based on this information, it appears that the beneficiary is acting on the same level as the employees he allegedly oversees, and thus is at best a first-line supervisor engaging in the day-to-day tasks of the business. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the petitioner's employment situation is not credible. The petitioner, despite its claim that it is a newspaper publishing company, is currently operating an ethnic grocery and video rental store.² At the time of filing, the petitioner was a 2-year-old newspaper publishing company that claimed to have a projected gross annual income of \$400,000. However, its net income as claimed on its balance sheet for the period ending March 31, 2003 is only \$68,260.11. The firm claims to employ the beneficiary as president/CEO, plus a manager, a marketing specialist, and an administrative/accounting assistant. The petitioner has submitted copies of its Forms 941, Employer's Quarterly Federal Tax Return, for the quarters ending September 30, 2002, December 31, 2002, and March 31, 2003. However, only the return

² It should be noted that while the U.S. entity is not bound to operate the same type of business as the foreign entity, the fact that the petitioner initially claimed to operate a newspaper publishing business but now operates an ethnic grocery/video rental store raises questions with regard to the petitioner's credibility. 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).

for the quarter ending September 30, 2002 included the attachments which listed the names of employees and the wages they were paid for that quarter. The only true evidence, not including the petitioner's unsupported contentions, that the petitioner actually employs these persons is the September 30, 2002 quarterly tax return. This return, however, covers only the period from July 1, 2002 through September 30, 2002. Aside from the petitioner's contentions, there is no other definitive evidence which confirms that the petitioner in fact employs the beneficiary and the three named subordinate employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Even if the employment of these employees was verified, the credibility of the petitioner's business is still at issue. The AAO notes that one of these employees has a managerial or executive title, whereas the other two employees appear, by nature of their position title and stated duties, to be performing higher level marketing and accounting duties. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of a grocery store/video rental store, such as stocking shelves, running the cash register, and maintaining inventory. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and three other managerial or mid-level employees. In fact, it seems more likely that the beneficiary is actually performing many of the tasks necessary to continue the business operations of the petitioner. 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).

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 § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, an executive's duties must be the critical factor. However, if CIS fails to believe the facts stated in the petition are true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. Rather, it appears from the record that the only individuals performing any marketing-related functions are the beneficiary and the marketing specialist. The manager and the administrative assistant also have specific duties which are broken down into hourly allotments; therefore, no additional time has been designated in their schedules for the day-to-day tasks crucial to the continued operation of a grocery store. It can only be assumed, since it has not been proven otherwise, that the beneficiary is performing all other marketing functions, as well as many of the daily tasks associated with the business, such as operating the cash register and taking inventory. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. As previously stated, 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. at 604.

Finally, the petitioner's explanation regarding the failure of the publishing business to commence operations relies heavily on the fact that the beneficiary did not enter the United States until May 20, 2002, despite the fact that he was granted L1-A status on November 29, 2001. The petitioner indicates that it plans to hire seven additional newspaper workers and branch out in this area in the future. However, 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, 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.

Beyond the decision of the director, it does not appear that a qualifying relationship has been established between the petitioner and the foreign entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, aside from the petitioner's assertions that a qualifying relationship exists, there is no documentary evidence in the record to corroborate this claim. As general evidence of a petitioner's claimed qualifying relationship, stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, the petition may not be approved.

Furthermore, it does not appear that the petitioner was doing business as required by the regulations. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as "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 this matter, the petitioner claims that it is a newspaper publishing company and that it operates an ethnic grocery and video rental store. By the petitioner's own admission, it is not currently engaged in the publishing business. With regard to the grocery store, the only documentation contained in the record is a copy of the petitioner's commercial sublease and franchise agreement to operate this store. Despite the

director's request for additional evidence in the form of photographs of the interior and exterior of the location, the petitioner failed to submit this evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The documentation in the record is insufficient to confirm that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and services as required by the regulations. Acceptable evidence of the petitioner's business dealings, being a grocery store and video supplier, would include invoices or copies of receipts for inventory purchased or sales records for a given period of time. The balance sheet submitted does not establish that the petitioner has been not doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). For this additional reason, the petition may not be approved.

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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

ORDER: The appeal is dismissed.