



U.S. Citizenship
and Immigration
Services

INVESTIGATION REPORT IN
PROSECUTION OF
INVASION OF PERSONAL PROPERTY

PUBLIC COPY

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FEB 15 2005

[Redacted]

File: SRC 03 150 54728 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

[Redacted]

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

IN BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, 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 director 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 subsidiary of Burki International, located in Lahore, Pakistan, and is engaged in the distribution of durable and non-durable goods to retail stores. In addition, the petitioner owns and operates gas stations. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends that the director erroneously denied the petition by relying solely on the small number of employees that the petitioner retained, and concludes that the level of the beneficiary's duties in the United States "requires significant authority over generalized policies which constitutes to the conclusion that the beneficiary's duties are primarily managerial in nature."

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

In the initial petition, counsel for the petitioner submitted a letter from the U.S. petitioner, dated April 30, 2003, outlining the beneficiary's duties while employed in the United States. Specifically, the petitioner alleged that the beneficiary's duties were managerial and/or executive in nature, and described his duties as follows:

[The beneficiary] has led the company in the formative year through his leadership and professional management. We look forward to our growth phase in the coming year. This would call for expansion in scope of operation. We are confident that [the beneficiary] is in [the] best position to steer the company to further heights through his insight, experience and thorough grasp of our business.

* * * * *

[The beneficiary] will continue to enjoy absolute authority to hire, train, supervise, and de-hire managerial personnel. He will have [an] additional role in evolving customer driven corporate culture at [the U.S. petitioner]. We intend to retain [the beneficiary] for a period of three years. [The beneficiary] will be compensated at \$30,000.00 per year for his services to the company.

On May 14, 2003, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. Specifically, the director requested an explanation with regard to the manner in which the beneficiary functioned primarily as a manager and/or executive when there was evidence that the petitioner employed only a minimal staff. Additionally, the

director requested documentation establishing that the other employees supervised by the beneficiary were professional employees, and further requested photographs of the petitioner's business location.

On August 12, 2003, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. The response included an updated description of the beneficiary's duties in a letter from the petitioner dated August 8, 2003, in addition to black and white faxed copies of photographs of the interior and exterior of the petitioner's business.

On August 25, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the beneficiary would not be supervising other professional employees, and further concluded that the structure of the petitioner's organization suggested that the beneficiary must have been performing a substantial portion of the daily activities of the business.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and states that the beneficiary's duties are in fact primarily managerial or executive in nature. Specifically, counsel alleges that the director erroneously based his decision on the conclusion that the small number of employees retained by the petitioner required the beneficiary to directly participate in the daily functions of the organization. Counsel further contends that the director incorrectly noted that the U.S. entity employed only three persons. Finally, counsel provided evidence of the petitioner's acquisition of a gas station and its intent to participate in two additional investments as evidence that the U.S. entity supported the beneficiary in a position that was primarily managerial or executive.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Prior to adjudication of the petition, counsel contended that the beneficiary had been employed in a capacity that was primarily managerial and/or executive in nature. In support of these contentions, counsel submitted an updated description of the beneficiary's duties in response to the request for evidence, which provided the following:

[The beneficiary] is responsible for undertaking the Strategic Planning for the company. He has the insight, knowledge and familiarity with the strengths and weaknesses of the firm to decide which macro environmental trends are relevant for the company. He is an important influence in defining the strategic vision and mission of the company. He is responsible for finalizing the long term business plans of the organization. No other person in the organization spends that much time on this important issue. This involves:

- Investigat[ing] business opportunities and assign[ing] personnel to analyze their feasibility.
- Set[ting] personnel policy.
- Identify[ing] ways of instilling customer driven culture.
- Report[ing] to the parent company in Pakistan.

Organizing and directing is another set of his responsibilities. In this respect, [the beneficiary];

- Direct[s] and oversee[s] the overall operation of the corporation.
- Hire[s], train[s], supervise[s], and fire[s] top level Managers who, in turn, perform the same functions with respect to lower echelon employees.
- Work[s] closely with the headquarters in Pakistan.

Coordination across organization and with external entities is also part of [the beneficiary's] portfolio. It involves;

- Interfac[ing] with professional accountant and direct[ing] his activities with respect to preparation of financial statements and tax returns.
- Interfac[ing] with Attorney and direct his activities in providing legal representation to the corporation.

The beneficiary also takes care of the corporate representation. It involves activities like;

- Keeping track of the Industry trends by visits, meetings, reading and participation in Industry events.
- Be[ing] on the lookout for the emerging trends and explor[ing] [the] possibility of placing the organization in an advantageous position.
- Review[ing] the operations with a holistic view and look[ing] for ways of improvement.

The petitioner further provided a description of the duties of its other employees. Specifically, the petitioner stated that in addition to the beneficiary, it employed a Vice President, an Investment Manager, and a Service Industries Manager.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity. Specifically, the beneficiary's stated duties indicate that he performs a number of non-managerial duties, such as participating in industry events and being "on the lookout for the emerging trends" of the industry. Additionally, the three subordinate employees listed in the record all possess managerial titles; yet appear to be performing the day-to-day operations of the company. There is insufficient evidence to establish that these employees are actually managerial or professional, and additionally, the record fails to support a finding that these

employees actually relieve the beneficiary from performing essential tasks associated with the operation of the business.

Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner claims that the beneficiary's duties are exclusively managerial and/or executive, yet the list of duties provided includes a significant amount of non-managerial tasks. For example, the petitioner states that the beneficiary keeps track of industry trends by reading and "visits," that he reviews the operations of the petitioner "with a holistic view," and that he identifies ways of "instilling customer driven culture." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). In this case, although requested by the director, the petitioner failed to provide a sufficiently thorough description of the beneficiary's actual duties. Instead, the petitioner and counsel conclude that the beneficiary is employed in a capacity that is primarily managerial, and that he has the authority to hire and fire managerial employees. 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Since the record contains insufficient evidence to support these assertions, the AAO cannot conclude that the beneficiary will be employed in a primarily managerial capacity.

The petitioner claims, in its list of the beneficiary's duties, that the beneficiary exercises authority over managerial employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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 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 merely stated that the vice president and the investment manager held bachelors degrees, whereas it indicated that the service industries manager held an associate degree. This information is insufficient to establish that such degrees are required as a prerequisite for

employment with the petitioner in these positions. Thus, the petitioner has not established that the positions occupied by these employees require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that any of the employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

On appeal, counsel contends that the director erroneously focused on the small number of subordinate employees retained by the petitioner in concluding that the beneficiary was not employed in a capacity that was primarily managerial or executive in nature. 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 Citizenship and Immigration Services (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.*

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. 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.

At the time of filing, the petitioner was a one-year-old import, export and investment company that claimed to have a gross annual income of \$120,190.00. The firm employed the beneficiary as president, plus a vice-president, an investment manager and a "service industries manager." The AAO notes that all of the employees have managerial or executive titles. Moreover, the record indicates that in addition to its alleged import and export business, the petitioner also acquired a Mobil gas station and convenience store in April 2003. 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 the import and export company, nor did it discuss the staffing of the Mobil gas station. Instead, the petitioner in its letter dated August 8, 2003 merely stated that its vice president would handle the petitioner's "day-to-day operations."

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 managerial employees. The petitioner failed to discuss the staffing of the gas station, which leads the AAO to reasonably conclude that the beneficiary and his three co-workers are equally sharing the burden of operating the two businesses while actively pursuing the two additional investments discussed by counsel on appeal.¹

¹ The AAO notes that on the Form I-290B, counsel for the petitioner indicates for the first time that the service industries manager is operating the "existing retail location." Without documentary evidence to

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

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates on appeal that it plans to pursue additional investment opportunities and thus will hire additional staff members as needed. Furthermore, counsel alleges that the petitioner now has "double the employees," and that the petitioner, prior to the petition's adjudication, had five employees. None of the allegations are supported by independent evidence. 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). Furthermore, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Nevertheless, counsel relies on these allegations as a basis for approval of the visa extension. 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. While the petitioner may in fact be pursuing additional investment opportunities, 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.

Although not discussed by the director, the AAO notes that the record contains insufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is required to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence in the record that the petitioner has been doing business for the year prior to the filing of the request for extension. Although counsel, on appeal, introduces evidence of the petitioner's acquisition of a gas station and its participation in potential new investment, the record is devoid of evidence such as invoices or bills of lading that establish that the business has been functioning regularly during the past year. Under 8 C.F.R. § 214.2(l)(14)(ii)(b), the petitioner must present evidence that the U.S. entity has been doing business for the previous year in order to be eligible for an extension. This requirement is not met by the mere presence of an agent or office of the qualifying organization in the United States. 8 C.F.R. § 214.2(l)(1)(ii)(H). Therefore, for this additional reason the petition may not be approved.

support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.