

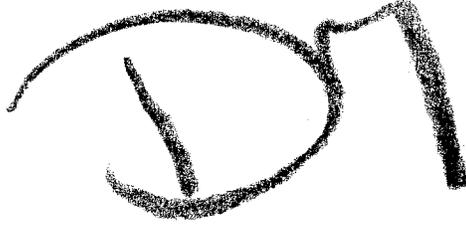
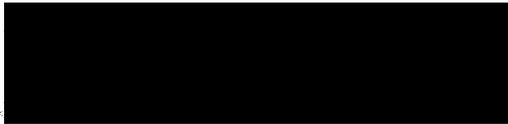
Identification Card
U.S. Citizenship and Immigration Services
Division of Naturalization

U.S. Department of Homeland Security
20 Mass. Ave, N.W. Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FEB 15 2008

File: SRC 03 140 52548 Office: TEXAS SERVICE CENTER Date:

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)

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 vice president 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 claims to be an affiliate of [REDACTED] and Company, located in Karachi, Pakistan, and is engaged in the retail sale of wireless communications. 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.

On appeal, counsel for the petitioner alleges that the beneficiary's duties meet the definition of "managerial capacity." Specifically, counsel asserts that the director erroneously relied on the U.S. entity's income and its inability to compensate employees as a means for determining that the beneficiary was not eligible 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 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 submitted a letter from the U.S. petitioner, dated April 17, 2003, outlining the beneficiary's duties while employed in the United States. Specifically, the petitioner alleged that the beneficiary oversees two wireless communications stores, and described his duties as follows:

[The beneficiary] supervises a staff of six other employees and ensures compliance with federal, state, and local laws and tax requirements [The beneficiary] maintains a full-time work schedule averaging 50 hours per week overseeing the operation of both stores. He is also involved in exploring expansion opportunities in the trade of wireless communications and meets with other retailers and shopping center management entities with a view to expanding the operation of the U.S. company. [The beneficiary's] research into the business of wireless communications gives our company insight which greatly assists in developing additional retail sites. There have been no changes in the terms and conditions of [the beneficiary's] employment with our company. [The beneficiary's] salary remains \$40,000 per year although he does not have a need to draw a fixed amount due to sufficient reserves from the initial investment by the overseas company.

On June 24, 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 information on all seven employees of the U.S. entity, including their names and job titles. The director further requested documentation explaining the low wages paid to these employees in the last

quarter of 2002. Finally, the director requested a definitive answer with regard to the petitioner's gross annual income, and required documentary evidence corroborating this amount.

On September 3, 2003, the petitioner submitted the specific documentation requested by the director. Counsel for the petitioner provided the employees' names and job titles and noted that the petitioner had already submitted copies of the W-2 forms for its employees. In addition, the petitioner submitted a statement regarding the employees' low wages and a financial statement confirming the gross annual income of the U.S. entity. On September 22, 2003, however, 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 evidence failed to establish that the beneficiary would be engaged primarily in managerial or executive tasks. The director concluded that it was reasonable to presume that the beneficiary was required to perform a number of the day-to-day tasks essential to the operation 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 in nature. Counsel restates the definition of "managerial capacity" as it pertains to the beneficiary's stated duties, and further concludes that the small amount of wages paid by the petitioner to its employees as well as its small projected income were incorrectly considered as a basis for the petition's denial. Counsel further alleges that the director's decision erroneously went "back and forth between the definitions of managerial capacity and executive level work as its basis for denial." The AAO will address each of these issues separately.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

In this case, counsel for the petitioner contends that the beneficiary has been employed in a capacity that is primarily managerial in nature. Prior to adjudication, the petitioner indicated that that the beneficiary's duties included exploring expansion opportunities in the trade of wireless communications and supervising six subordinate employees. 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. 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. Based on the current record, however, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In the appeal brief, counsel summarizes the regulatory definition of "managerial capacity" in an attempt to demonstrate the managerial nature of the beneficiary's duties. Counsel concludes that the beneficiary's duties are of a managerial nature, and submits the following statement:

[The beneficiary] primarily: (1) Manages the organization, or a department, subdivision, function, or component of the organization, that being [the petitioner]; (2) Supervises and controls the work of other supervisory, professional, or managerial employees. Here, [the beneficiary] supervises the work of the Manager of the two wireless stores, [REDACTED] who in turn supervises the five other employees; (3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised. [The beneficiary] as the Vice-President of the Company and direct supervisor of the Manager, [REDACTED] has the authority to make the described personnel decisions as it relates to the other employees; and (4) Exercises discretion over the day-to-day operations of the activity or function for which the employees has the authority. [The beneficiary] is the most senior employee of the Petitioner in the United States, and has the discretion to make decisions in furtherance of the best interests of the business, including increasing the number of retail stores, negotiating and entering into agreements with major retail centers, exploring other opportunities for expansion of the business.

As set forth above, counsel concludes on appeal that the beneficiary is employed in a capacity that is primarily managerial. However, there is no independent evidence to support this claim. Without documentary evidence to corroborate these contentions, 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). In fact, counsel's statement of the duties on appeal appears to heavily paraphrase the regulatory definition of "managerial capacity." 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.). The actual duties themselves reveal the true nature of the employment. *Fedin Bros.*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner claims, in its list of the beneficiary's duties, that the beneficiary exercises authority over the other employees and that he has the authority to hire and fire personnel. 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.

The petitioner provided an abbreviated description of the positions of the beneficiary's subordinates in its response to the request for evidence, and indicates that five of these employees are "sales representatives." Although one of the subordinates, namely, [REDACTED] retains the title of "manager,"

this minimal information regarding all employees is insufficient to establish that these employees possess or 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. Although counsel alleges that the manager supervises the sales representatives, no corroborating evidence has been submitted to support this contention. As previously discussed, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter Of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. 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). 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.

Finally, counsel for the petitioner challenges the director's consideration of the petitioner's minimal income as a factor for denying the petition. On appeal, counsel alleges that the petitioner's gross income for the first six months of 2003 was \$63,585.83, and submits a profit and loss statement to corroborate this claim. Counsel further alleges that this figure is more than sufficient to pay all operating expenses and salaries and still result in a net positive operating income for the petitioner.

The director noted that the petitioner employs six employees in addition to the beneficiary. Since the beneficiary's stated salary is \$40,000.00 per year, it is questionable as to how the petitioner is readily able to pay the salaries of all the other employees named in the petition, who are depended upon to efficiently operate the two wireless stores operated by the petitioner. The AAO notes some discrepancies in the record which raise doubts with regard to the validity of these claimed employees. 8 C.F.R. § 214.2(l)(14)(ii)(d).

The petitioner has submitted its Form 941, Employer's Quarterly Federal Tax Return, for the quarters ending September 30, 2002 and December 31, 2002. In addition, the petitioner has submitted what appears to be its State quarterly report for the fourth quarter of 2002. These returns indicate that wages totaling no more than \$12,805.00 were paid during a three month period to seven employees. Assuming the wage payouts are accurate, the highest amount paid for one quarter, \$12,805.00, multiplied by four quarters, yields a total amount of \$51,220.00 designated for wages for the beneficiary and six additional full time employees. Since the beneficiary's salary is \$40,000.00 per year, it is unlikely that the petitioner will be able to retain a complete full-time staff of six persons with an allotted budget of \$11,220.00. The figures presented suggest that the additional staff members could only reasonably be retained on a part-time basis, and since there is no supporting evidence to the contrary, the AAO is inclined to infer that this is in fact the case.

The petitioner has not submitted legitimate documentation that establishes that these additional employees are full-time employees, nor is the nature of their duties and hours of work discussed. The regulation at 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.

Finally, counsel asserts that the director erred by "going back and forth" between the definitions of managerial capacity and executive capacity in his decision. As a courtesy to petitioners, Citizenship and Immigration Services (CIS) will examine the beneficiary's stated duties for compliance under both of these regulatory definitions in an attempt to afford the greatest opportunity for meeting the eligibility requirements. Although counsel alleges that the beneficiary's duties are primarily managerial, the title of "vice-president" is an executive title by nature, thereby suggesting that the beneficiary's duties may in fact have been executive in nature. Upon review of the record, however, the AAO is precluded from finding that the beneficiary was primarily engaged in executive duties based on the vague description of duties provided and the unsupported assertions of counsel.

Beyond the decision of the director, the AAO notes some deficiencies with regard to the qualifying relationship between the U.S. and foreign entities. See 8 C.F.R. § 214.2(l)(1)(ii)(G). In this case, the petitioner claims that the U.S. entity is an affiliate of the foreign entity located in Pakistan. Specifically, the petitioner asserts that [REDACTED] is the majority owner of both companies. The 2002 Partnership Tax Return filed by the U.S. entity indicates that the beneficiary owns an 80% interest in the company, whereas [REDACTED] owns a 20% interest. This evidence contradicts the claimed breakdown of ownership set forth in the Minutes of the Organizational Meeting, dated March 28, 2002, where it states that the beneficiary owns 30% of the company, [REDACTED] owns 10% of the company, and [REDACTED] owns 60% of the company. In addition, the petitioner's business plan indicates that [REDACTED] owns 50% of the company, the beneficiary owns 35% of the company, and [REDACTED] owns 15% of the company. No additional documentation has been provided to clarify this inconsistency. 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). Furthermore, if [REDACTED] is no longer the majority owner of both the U.S. and foreign entities, as suggested by the petitioner's 2002 tax return, then the petitioner no longer has a qualifying relationship with a foreign entity to which the beneficiary could be transferred upon completion of his U.S. assignment. See 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

In addition, the petitioner has submitted no evidence establishing the ownership structure of 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 (BIA 1988); 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 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*, 19 I&N Dec. at 595. For this additional reason, the petition may not be approved.

Another issue in this proceeding, also not raised by the director, 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 Iovic*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). The record indicates that the beneficiary is the majority owner of the U.S. petitioner. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

A final issue not addressed by the director prior to adjudication is whether the petitioner has been doing business for the previous year. The minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. The evidence in the record indicates that although the beneficiary was granted L-1A status in April of 2004, the petitioner did not purchase a business until August 2004. Again, as the appeal will be dismissed on other grounds, this issue need not be examined further.

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.