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U.S. Citizenship  
and Immigration  
Services

DF



FILE:



Office: TEXAS SERVICE CENTER

Date: JUN 01 2005

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Director  
Administrative Appeals Office

v

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] endeavors to classify the beneficiary as a nonimmigrant manager or executive 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 a subsidiary of [REDACTED] located in Pakistan. The petitioner is engaged in the printing services business. The initial petition was approved to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's vice president and secretary. The petitioner was incorporated in the State of Texas in August 2001 and claims to have one employee.<sup>1</sup>

On March 17, 2003, the director denied the petition and determined that the petitioner had not established that the beneficiary will be primarily performing duties in a managerial capacity.

On appeal, the petitioner's counsel states that the beneficiary "serves in a managerial/executive capacity" and claims that the U.S. company employs sufficient staff to relieve the beneficiary from performing non-qualifying duties. Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

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<sup>1</sup> The petitioner indicated that the current number of employees is one to four estimated. However, a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In addition, the Employer's Quarterly Report for the quarter ending December 31, 2002 shows that the petitioner employs three individuals. The petitioner submitted this report in response to the director's request for additional evidence on November 21, 2002 and the report is dated after the time of filing on October 22, 2002. The petitioner also submitted its Employer's Quarterly Federal Tax Return indicating that there was one employee in the pay period for the quarter ending December 31, 2002. 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).

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (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.

The issue in this proceeding is whether the beneficiary will be primarily performing managerial or executive duties for the United States entity. 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.

On October 21, 2002, the petitioner filed Form I-129. In an addendum to the Form I-129, the beneficiary's proposed duties are described as:

Direct and coordinate activities of the organization and formulate and administer company policies: In consultation with the management and the Pakistani Company develop long-range goals and objectives of the company. Be responsible for corporate planning, general administration, marketing-sales and purchasing activities for the subsidiary. Direct and coordinate activities of managers and employees in the production, operations, purchasing and marketing departments for which responsibility is delegated for further attainment of goals and objectives. Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. Review with management and employees company's achievements and discuss required changes in goals or objectives of the company.

In addition, on the Form I-129, the petitioner indicated its number of employees as "1 and 4 estimated."

On November 21, 2002, the director requested additional evidence. In particular, the director requested the number of employees working for the U.S. entity, their job titles and evidence, such as the most recent quarterly tax return to establish that these employees are receiving a salary.

In response to the request for additional evidence, the petitioner submitted a copy of the its Employer's Quarterly Report for the fourth quarter of 2002; Form 941' Employer's Quarterly Federal Tax Return for the fourth quarter of 2002; Form 940-EZ; Forms W-2, Wage and Tax Statement; and Form W-3, Transmittal of Wage and Tax Statement for 2002. The petitioner also submitted a copy of the U.S. company's organizational chart showing seven employees. Three of these employees received wages in the fourth quarter of 2002. Their job titles are "production/quality control," "marketing," and "graphic design."

On March 17, 2003, the director denied the petition and determined that the petitioner had not established that the beneficiary will be primarily performing duties in a managerial or executive capacity. The director found that there were inconsistencies in the record concerning the number of workers the U.S. entity employs and that the majority of the beneficiary's time would be spent in the non-managerial, day-to-day operations of the business.

On appeal, counsel states that the beneficiary "serves in a managerial/executive capacity" and "does not perform any of the tasks necessary to provide the services of the organization." Counsel further describes the beneficiary's proposed U.S. duties as:

- (i) Make decisions regarding the expansion of the business, including manner, type and additional locations.
- (ii) Liaise with financial institutions to explore obtaining venture financing for expansion.
- (iii) Liaise with external accountants/auditors to ensure compliance with applicable financial requirements.
- (iv) Liaise with parent company to answer any queries and forward appropriate reports to parent company.
- (v) Ensure through subordinate managers that company policies are being implemented
- (vi) Oversee management and other employees.
- (vii) Direct and coordinate activities of the organization and formulate and administer company policies.
- (viii) Review and analyze activities, costs, operations and purchasing.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the description of the beneficiary's U.S. job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In this matter,

the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

On review, the petitioner has not established that the beneficiary will be employed in a primarily managerial and executive capacity. The petitioner has provided a vague description of the beneficiary’s duties that fails to describe exactly what the beneficiary will be doing on a daily basis. For example, the petitioner states that the beneficiary’s duties include “develop[ing] long-range goals and objectives of the company,” “[d]irect and coordinate activities of managers,” and “formulate and administer company policies.” However, it is unclear what long-range policies the beneficiary will develop or formulate and what “managers” the beneficiary will direct. 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)).

In addition, the petitioner claims that the beneficiary’s U.S. duties include tasks such as “direct and coordinate activities of managers and employees in the production, operations, purchasing and marketing departments for which responsibility is delegated for further attainment of goals and objectives.” However, the record does not indicate who actually comprises the marketing and purchasing departments or who will perform these lower level tasks. Therefore, although the petitioner claims that the beneficiary will “direct and coordinate activities of managers and employees,” it is evident from the record that the beneficiary actually performs the operational tasks that he has been assigned to direct. 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).

Moreover, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. On appeal, counsel claims that the beneficiary will “[o]versee management and other employees.” However, it is uncertain how many employees the petitioner actually employs or if there were any subordinate employees at the time of filing. The petition was signed on October 10, 2002 and the petitioner indicated that it had one employee and “estimated” having four employees. Based on the Texas Employer’s Quarterly Report, the petitioner hired three part-time workers during the last three months of 2002; however, there is insufficient evidence to establish that any of them were hired prior to the filing of the instant petition. 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). Regardless, the petitioner did not adequately describe the petitioner’s staffing at the time of filing, or the types of positions held by its employees, if any, as required by 8 C.F.R. § 214.2(l)(14)(ii)(D). 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)). Since the petitioner has not established that the beneficiary has had any subordinates at the time of filing, the AAO must conclude that he was performing all of the production, design, printing, sales, and marketing tasks of the company and that these non-qualifying tasks were his primary duties. The actual duties themselves reveal the true nature of the employment. *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).

Finally, 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. At the time of filing, the petitioner had not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO is not persuaded that the beneficiary has been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act. As previously stated to established L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *Id.* The petitioner has submitted insufficient evidence to establish that the beneficiary's employment abroad was of a qualifying nature. For instance, the beneficiary's foreign duties are described as "conducting general administration affairs of the company," "developed long range goals and objectives of the company," and "engaging in long-range planning and identifying business opportunities in the U.S." However, this description is vague and it is unclear what affairs of the company the beneficiary conducts or what goals the beneficiary has developed. Again, 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)). For this additional reason, the petition may not be approved.

Another issue beyond the decision of the director is whether the petitioner had been doing business for the previous year. The record does not contain sufficient 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. The petitioner submitted no documentation to establish that it has been selling its goods on a regular basis. The record includes evidence that the petitioner began purchasing supplies and equipment for a printing business beginning in August 2002, and the petitioner indicated in its October 11, 2002 letter that the company "has already started taking the necessary steps to conduct business." However, it is not evident that the petitioner was even operational at the time of filing. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected 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 that the petitioner was doing business from October 2001 through October of 2002. The petitioner also failed to provide evidence of the financial status of the U.S. company, as required by 8 C.F.R. § 214.2(l)(14)(ii)(E).

In addition, the petitioner indicates that the beneficiary is the sole proprietor of the foreign company, and which in turn owns the U.S. company. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. 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. For these additional reasons the petition may not be approved.

Finally, beyond the decision of the director, the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's authorized period of stay expired on October 14, 2002. However, the petition for an extension of the beneficiary's L-1A status was filed on October 21, 2002, almost seven days following the expiration of the beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.