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U.S. Citizenship  
and Immigration  
Services

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File: SRC 03 260 51276 Office: TEXAS SERVICE CENTER Date: JUN 09 2005

IN RE: Petitioner:  
Beneficiary:



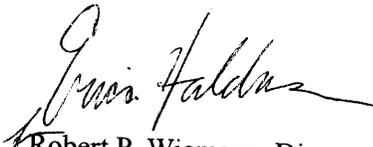
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 seeks to extend the employment of its director in the United States 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 U.S. petitioner, a corporation organized in the State of Texas, is engaged in retail trade and investment, and operates a dollar store. The petitioner claims to be the subsidiary of Crescent Knits (PVT) Ltd., located in Karachi, Pakistan. 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 for an additional three years.

On March 1, 2004, the director denied the petition, finding that the beneficiary was not employed in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary was not supervising a subordinate staff of managers, supervisors or professionals, and that the beneficiary was actually performing the day-to-day operations of the company.

On appeal, counsel for the petitioner argues that the director ignored factual evidence in making her determination, and that such evidence clearly establishes the beneficiary's eligibility in this matter. In support of these claims, 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 this matter is whether the beneficiary has been and will continue to be employed in a 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, the petitioner described the beneficiary's job duties in a supplement to the Form I-129 as follows:

Confer with Pakistani Company and develop long range goals and objectives of the US Company. Direct and coordinate activities of the organization and formulate and administer company policies: Direct and coordinate activities related to purchasing, production, operations and sales for which responsibility is delegated and targeted to further attainment of goals and objectives. Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. Discuss with employees to review achievements and discuss required changes in goals or objectives of company.

The director found the initial evidence submitted to be insufficient, and consequently issued a request for additional evidence on November 22, 2003. In the request, the director required the petitioner to submit a specific statement describing the U.S. employment of the beneficiary as well as the number of subordinate managers/supervisors or other employees who report directly to her, and a brief description of the job titles and duties of these employees. Furthermore, the director requested the qualifications required to fill the beneficiary's position, her level of authority, and her position in the organizational hierarchy of the company.

In a response dated February 12, 2004, the petitioner, through counsel, addressed the director's query. Counsel stated that upon commencement of the business, the beneficiary began work with two employees. Counsel continued to state that this number increased to five by the end of 2003. With regard to the beneficiary's duties, counsel provided a detailed list with the percentage of time she devoted to each stated duty. The list is as follows:

- Confer with the Pakistani Company and develop long range goals and objectives of the US Company in the retail trade and investment industry. [13%]
- Approve company budget and investment projects. [5%]
- Appoint the other members of the managing team and other employees for the management of the store and future stores. [7%]
- Approve public relations policies. [5%]
- Approve hiring of professional services [5%].
- Confer with the management team – i.e., the store manager and assistant store/warehouse manager – and the company officials of the parent corporation to plan business objectives, to develop organizational policies to coordinate functions and operations. [20%]
- Review activity reports and financial statements of all operations to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions. [15%]
- Direct and coordinate formulation of financial programs with the foreign parent to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity of the parent and subsidiary corporations. [15%]
- Plan and develop industrial, labor, and public relations policies designed to improve image of the subsidiary companies and relations with customers, employees, and the public. [10%]
- Evaluate performance of subordinate professionals/managers for compliance with established policies and objectives of the corporations and contributions in attaining objectives. [5%]

Counsel further indicated that the beneficiary oversaw two subordinate managers or supervisors, namely, a store manager and an assistant store manager/warehouse manager, as well as two other employees, namely, a cashier and a cashier/clerk. The petitioner provided a job description for each employee and their dates of hire.

On March 1, 2004, the director denied the petition. The director, who reviewed the record to determine eligibility under both capacities, found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization, and further concluded that the beneficiary would not be supervising subordinate managers or supervisors. On appeal, counsel asserts that the director reached numerous erroneous conclusions with regard to the beneficiary's duties, and specifically asserts that the director incorrectly interpreted the requirement that a beneficiary be "primarily" employed in a managerial or executive capacity to mean that his duties could "only" be managerial or executive. In addition, counsel asserts that the director erroneously relied on the petitioner's staffing levels in reaching her decision, and that she failed to consider the petitioner's overall stage of development.

Upon review, counsel's assertions are not persuasive. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily"

managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a manager and/or executive by virtue of her position title, experience, and associated duties, and her supervision of four subordinate managerial or supervisory employees. Although counsel argues that the director misinterpreted the term "primarily" and consequently performed a restrictive examination of the beneficiary's duties, the AAO disagrees with counsel's position. First, although in response to the request for evidence, the petitioner provided documentation establishing that the petitioner employed a total of five employees, four of whom were subordinate to the beneficiary, the fact remains that three of these employees were not hired until after the filing of the petition. Specifically, the record indicates that the assistant store manager/warehouse manager was hired on October 3, 2003, the cashier was hired on October 15, 2003, and the cashier/clerk was hired on December 22, 2003. Since the petition was filed on September 30, 2003, the presence of these employees is not applicable to the determination of the beneficiary's eligibility. 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).

Consequently, the AAO will determine the capacity in which the beneficiary was employed by examining the structure of the petitioner during the validity dates of the initial new office petition, which expired on September 25, 2003. The record indicates that the petitioner employed the beneficiary as director, and that Roshanali Bhimani was hired on October 1, 2002 to serve as store manager. Her duties as stated in the response to the request for evidence include managing the store, planning and preparing work schedules for employees, supervising employees, coordinating sales promotion activities, and formulating pricing policies. The petitioner claims that Roshanali Bhimani is a college graduate, and works forty hours per week. However, since she had no subordinates at the time the petition was filed, it is clear that the store manager did not devote any time to "planning and preparing work schedules" or "supervising employees." 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). Based on the record of proceeding, the store manager would have been required to perform the duties of a cashier, rather than the claimed supervisory duties.

In reviewing the beneficiary's stated duties, it appears that a large portion of her time is devoted to conferring with the management "team" and company officials to plan business objectives, develop organizational policies, and coordinate functions and operations (20%). However, since it appears that the only "team" member was a store manager, it is questionable whether the beneficiary actually devoted 20% of her time to these duties.

In addition, the record indicates that there was no cashier or clerk employed by the petitioner until October of 2003. Thus, it seems logical to conclude that the beneficiary was responsible for the sales in the store and organization of merchandise on a regular basis. The photographs of the dollar store operated by the petitioner display a large inventory, which clearly suggests that the management of routine operations could not be served by one employee. Rather, given the nature of the petitioner's business, it is assumed, and has not been proven otherwise, that both the beneficiary and the store manager would be required to perform routine duties such as taking inventory, ordering merchandise, receiving deliveries, stocking merchandise, assisting customers, and operating a cash register, on a daily basis in order for the business to remain operational. One

subordinate working 40 hours per week is clearly unable to relieve the beneficiary from performing non-qualifying duties. Further, assuming that the petitioner's store is open for business more than 40 hours per week, these non-qualifying duties would require the majority of the beneficiary's time. 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).

As discussed above, the evidence demonstrates that the petitioner only employed one subordinate manager at the time of filing. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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 only minimal details with regard to the duties of the store manager. With regard to education, counsel's response to the director's request for evidence indicates that the store manager possesses a college degree. While such credentials are certainly impressive, the petitioner has not established that this employee actually requires a college degree to perform the duties of the position she holds, such that she could be classified as a professional. Nor has the petitioner shown that she supervised subordinate staff members or managed a clearly defined department or function of the petitioner prior to the filing of the petition, such that she could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employee was supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel further asserts on appeal that the director erred by relying on the petitioner's staffing levels and failed to take into account the reasonable needs of the petitioner at its current stage of development. 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). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are

analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Other than the allegations of counsel, there is no clear evidence establishing that the one subordinate employee relieves the beneficiary from performing non-qualifying duties. 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)). Thus, in the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

As discussed above, 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 did not reach the point where it could employ the beneficiary in a predominantly managerial or executive position by the end of this one-year period. Although the petitioner hired additional employees in the end of 2003, and alleges that it will be expanding its business and that it will hire additional employees in the future, this claim is not persuasive for purposes of overcoming this denial. As noted above, 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).

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties are primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner alleges that the U.S. entity is the subsidiary of the foreign entity. However, the petitioner has provided only a stock certificate as evidence of the petitioner's ownership. There is no verification that the certificate represents all of the outstanding shares of the company.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also 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. 362 (BIA 1986). 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, 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 September 25, 2003. However, the petition for an extension of the beneficiary's L-1A status was filed on September 30, 2003, five 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 director's decision revoking the approval will be affirmed.

**ORDER:** The appeal is dismissed.