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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: EAC 02 207 53790 Office: VERMONT SERVICE CENTER Date: JUN 09 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

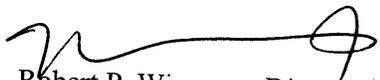
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1999 and claims to be in the business of importing and exporting food products. The petitioner claims that the U.S. entity is a subsidiary of BVM Electrical Products, located in Ahmedabad, India. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for two additional years, at an annual salary of \$45,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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 (1)(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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In a letter of support, dated May 23, 2002, the petitioner described the beneficiary's duties as:

As president of the U.S. subsidiary, [the beneficiary] will direct and manage the operations and activities of the company. He will be responsible for executive and managerial duties, directing all operations of [the U.S. entity] and will be invested with autonomous discretionary decision making authority.

[The beneficiary] is handling . . . all personnel issues such as hiring and firing of employees, compensation levels, and related issues. He will continue to meet our goals of hiring staff to accommodate our growth.

In addition to supervising and directing in-house, [the beneficiary] will be responsible for retaining and overseeing the services of outsourced professionals such as accountants, attorneys, and bankers.

The president is responsible for forgoing and maintaining contacts with clients and the business community in order to expand sales opportunities.

In response to the director's request for additional evidence on this subject, the petitioner described the beneficiary's duties in the United States as follows:

As president of the [U.S. entity], [the beneficiary] is involved in the development of new projects and expanding the business of [the foreign entity] in India. . . . His responsibilities and functions include: receiving a regular report from the vice president; acting as a main liaison between [the] U.S. company and foreign company and providing them with the latest information about business development of the U.S. company; overseeing the vice president's work in the areas of trading and marketing; concentrating on the research and development for new projects and finding out new products for export to India; attending trade conferences and exhibitions; liaison with executives of battery parts industries as well as auxiliary industries for new products; and creating new relations with other buyers and manufacturers around the world.

As president of the U.S. subsidiary, [the beneficiary] will direct and manage the operations and activities of the company. He will be responsible for executive and managerial duties, directing all operations of [the U.S. entity] and will be invested with autonomous discretionary decision making authority. [The beneficiary] will be responsible for all aspects of the business including: financial administration; planning and implementing marketing strategies (20%); developing long-term business plans for future expansion (30%);

negotiating contracts with suppliers and buyers (20%); targeting new clients and interfacing with existing clients to ensure client satisfaction (20%); and coordinating activities with future employees such as a sales manager and office manager to ensure proper purchasing, sales and maintenance of inventory and quality control as well as adherence to office management procedures and policies (10%). In administering these key functions, the president will confer with a wide array of accounting and marketing professionals, as well as industry leaders.

The petitioner submitted a copy of the U.S. entity's organizational chart that listed the beneficiary as president [REDACTED] as the vice president; [REDACTED] as the manager; [REDACTED] as sales person; [REDACTED] as sales manager; and [REDACTED] as sales manager. The petitioner also submitted a list of employees prepared by the beneficiary to include: [REDACTED] as the vice president; [REDACTED] as the manager; [REDACTED] as a sales person; [REDACTED] as a sales person; and [REDACTED] as a sales person.

The petitioner described the employees' duties and responsibilities as:

PRESIDENT – DUTIES AND RESPONSIBILITIES

- To receive a regular report from vice president.
- To receive a regular report from [the foreign entity]
- To assist Vasant Patel managing partner of the [foreign entity] by giving latest information and development.
- To assist vice president by giving latest reforms in trading and in marketing.
- To concentrate on the research and development for new project[s] and find out new products for export to India.
- To attend the conferences and exhibitions.
- To do liaison with battery parts industries as well as auxiliary industries for new products.
- To create new relations with other buyers and manufacturers around the world.

VICE PRESIDENT – DUTIES AND RESPONSIBILITIES

- Report to the president by giving information about the business.
- Follow all the instructions given by the president.
- Issue paycheck to the employees.
- Hiring/firing employees.
- To take care of banking and finance
- To assist manager for sales and purchase.
- To find new business opportunities.
- To attend business meetings and attend visitors in absence of president.
- To comply with all direct and indirect taxes of government.

MANAGER – DUTIES AND RESPONSIBILITIES

- Follow all the instructions given by the vice president.
- To take the report of market survey and development.
- Find new products for sale.

- To resolve the problems.
- To deposit money in the bank.
- To prepare accounts regularly and have it audited.
- To review and prepare the monthly progress report.
- Assist other sales persons by guiding them in their daily activity.
- Look after all other employees and maintenance.
- To check the mail, reply [to] the same and inform the vice president if its necessary.

SALES MANAGER I – DUTIES AND RESPONSIBILITIES

- To prepare the order for purchase and submit to the manager.
- To take counter during the business hours.
- Clearing the paper work and help other staff members

SALES MANAGER II – DUTIES AND RESPONSIBILITIES

- To take the counter.
- Improving the business place by making changes.
- Introduce the customers with new products.
- To check the quality of products.
- Handle the regular paperwork.

SALES PERSON – DUTIES AND RESPONSIBILITIES

- To prepare the order for purchase and submit to the manager
- To take counter during business hours
- Cleaning the paper work and help other staff members.

The petitioner submitted copies of its IRS Forms W-3 and W-2 for 2001 and a copy of its State Income Tax Return for 2001.

The director determined that the petitioner's description of job duties was insufficient to show that the beneficiary's position had been and would be managerial or executive in nature. The director noted that based upon salary figures, it appeared that the other employees were employed only on a part-time basis. The director concluded that the beneficiary would be engaged in providing sales services rather than directing the organization. The director stated that there was insufficient evidence to show that the U.S. entity was able to support a managerial or executive position. The director further stated that the petitioner had failed to show that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the day-to-day services of the organization.

On appeal, counsel argues that the director's decision was wrongfully based upon the notion that the U.S. entity did not earn enough to justify the hiring of a multinational manager. Counsel also argues that where the number of employees supervised is used to determine visa eligibility, Citizenship and Immigration Services (CIS) should also take into consideration the nature of the business and the needs of the organization. Counsel reiterates the U.S. entity's employees' position descriptions. Counsel asserts that the U.S. entity began hiring employees in October of 2001, and that one of the employees [REDACTED] worked for two months before taking a leave of absence from the company. Counsel contends that the beneficiary, in

addition to operating a convenience store, also provides consultancy services for marketing purposes. Counsel contends that the current petition is for an extension of an earlier approved petition, and barring a finding of "gross error," should be approved. As evidence on appeal, the petitioner resubmits copies of its business plan, company organization chart, employee duty descriptions, and IRS Forms W-2 and W-3 for 2001. The petitioner also submits company IRS Form 941 for the quarters ending March 31, 2002, June 30, 2002, and September 30, 2002, and IRS computer printouts for the U.S. entity dated August 13, 2002.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. 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 petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial.

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 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 evaluating the petitioner's eligibility, the AAO will consider on appeal the size of the enterprise, the number of staff, as well as 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 two and one-half-year-old import and export company that claimed to have a gross annual income of \$525,490.00. The firm employed the beneficiary as president, a vice president, a manager, one sales manager, one sales person, and one sales manager who was on leave of absence. The AAO notes that all but one employee had managerial or executive titles. 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 company on a full-time basis. 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 four managerial personnel and one subordinate worker. Furthermore, the nature of the entity necessitates more than one non-professional worker to assure its viability. Notwithstanding, the reasonable needs of the petitioner serves 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.

The AAO now turns to counsel's assertion that this petition must be approved because it pertains to the extension of the beneficiary's L-1 status. Counsel contends, barring a showing of "gross error," the instant petition should

be approved where it is an extension of an earlier approved petition. Counsel implies that the director's favorable review of the initial L-1 petition is sufficient, by itself, to approve the petition before CIS at the present time.

The AAO does not concur with counsel on this point. The record of proceeding before the AAO at the present time does not contain any of the supporting evidence that was submitted to the Vermont Service Center with the initial request for the L-1 petition approval. In the absence of all of the corroborating evidence contained in that record of proceeding, the AAO cannot determine whether the L-1A nonimmigrant petition initially filed on the beneficiary's behalf for the same position as the proffered position was approved in error.

Nevertheless, it is important to emphasize that each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If, however, the prior petition was approved based on evidence that was substantially similar to the evidence contained in the record of proceeding that is now before the AAO, the approval of the initial petition would have been gross error. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988).

On appeal, counsel refers to an unpublished decision in which the AAO determined that a beneficiary was serving in an 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.

Counsel further cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D.GA. 1988), as support for the petitioner's position. Counsel has not established that the facts in the *Mars Jewelers* case are analogous to the facts in the instant case or that the statutory and regulatory provisions used are applicable. In the *Mars Jewelers, Inc.* decision, the court ruled that the size of an organization was not to be considered as a sole factor in determining the beneficiary's eligibility. In the current petition, the company size was not the only factor considered in determining the beneficiary's ineligibility as an intracompany transferee. Accordingly, counsel's reference to *Mars Jewelers* is not persuasive.

Counsel also cites to other unpublished decisions to bolster his arguments regarding the beneficiary's status as a manager or executive. As noted above, unpublished decisions have no precedential effect and are not binding. Furthermore, counsel has not established that the facts of the unpublished cases are parallel to those of the current case. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Although counsel states on appeal that the beneficiary is responsible for retaining and overseeing the services of outsourced professionals such as an accountant, attorney, and banker, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Again, without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record contains inconsistencies regarding the U.S. entity's employees' job titles and duty descriptions. In a letter dated May 23, 2002, the petitioner asserted that it employed a president, vice president, marketing officer, and two staff members. In contrast, the company's organization chart lists a president, vice president, manager, two sales managers, and a sales person as employees. The petitioner supplied an employee list that lists a president, vice president, manager, and three sales persons as employees of the company. In response to the director's request for additional evidence, the petitioner submitted position descriptions that differ from those initially submitted in support of the petition. In addition, the duties of the president, vice president and manager overlap, as do the duties of the sales manager and sales person. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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 that it plans to expand its business by hiring additional managers and employees in the future. However, 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). Furthermore, 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. The petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.