

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**



**U.S. Citizenship  
and Immigration  
Services**

D7



FILE: EAC 03 196 53125 Office: VERMONT SERVICE CENTER Date: JUN 29 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:



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 established in 2001 and claims to be an importer and seller of Turkish and Mediterranean based foods. The petitioner claims to be a subsidiary of Aykut Gida Ticaret Ltd., located in Mersin, Turkey. The petitioner's initial petition was approved allowing the beneficiary to enter the United States to operate its new office in an L-1A classification. The petitioner now seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for three years, at an annual salary of \$35,000.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that (1) there was a qualifying relationship between the U.S. and foreign entities; (2) the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity; and (3) the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity.

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.

The director determined that the petitioner had failed to submit requested evidence to show that the foreign entity had paid for its stock ownership in the U.S. entity as reported in the amount of \$15,300.00. The director also determined that the petitioner had failed to submit sufficient evidence to reconcile the discrepancies noted in the petitioner's tax documents and other business records. The director concluded that the petitioner had failed to establish that the U.S. entity and the foreign company continued to be qualifying organizations as required by the regulations. Counsel fails to address the director's objections on appeal. Therefore, the director's decision with regard to the nonexistence of a qualifying relationship between the U.S. and foreign entities is affirmed.

The director stated that the petitioner had failed to submit sufficient evidence to establish that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director noted that the petitioner failed to submit as requested an organizational chart, foreign employee's job descriptions, and a list of the subordinate managers under the direction of the beneficiary. On appeal, counsel fails to address the director's objections. Therefore, the director's decision with regard to the lack of evidence to demonstrate that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity will be affirmed.

In a letter of support, dated June 23, 2003, counsel described the beneficiary's duties as:

The beneficiary has been working for the petitioner company as president ....In this position the beneficiary has been responsible for expanding the petitioner company's business in the United States. In fulfilling his job duties the beneficiary is responsible to and answers only to the parent company Board of Directors ....Due to the work of the beneficiary the petitioner company has also hired staff – which now consist of five employees....

The beneficiary shall continue to work for the petitioner company as president. In this capacity he shall continue with his executive efforts for the petitioner company. He shall develop the policy, monitor the staff in import & export issues, negotiate with new vendors and ensure that the company to [sic] continues to expand and has enough adequate trained staff to meet the growing needs of the clients.

In the request for evidence, dated July 2, 2003, the director requested that the petitioner:

Submit a comprehensive description of the beneficiary's proposed duties. Also indicate how the beneficiary's duties will be managerial or executive in nature. For executive or managerial consideration, you must also: (1) demonstrate that the beneficiary will function at a senior level within an organizational hierarchy as well as in position title; or (2) demonstrate that the beneficiary will be managing a subordinate staff of professional,

managerial, or supervisory personnel who will relieve him/her from performing non-qualifying duties, if appropriate.

Submit a list of your United States employees that identifies each employee by name and position title. In addition, submit a complete position description for each of these employees, including the beneficiary. Submit a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary.

Submit copies of Form 941 and Form WR-30, with all attachments, for the two most recent quarters available.

In response to the director's request for evidence, counsel stated:

Presently there are five people that work for the US Company. The beneficiary is the highest executive of the US Company. The beneficiary hired the four other persons to work for the US Company. The beneficiary hired [two] management positions and three sales and administrative positions.... We expect that in 2004 we will hire [sic] an additional staff of four to five persons.

The petitioner submitted as evidence copies of the U.S. entity's IRS Form 1120, U.S. Corporation Income Tax Return for 2002, and Form 941, Employer's Quarterly Federal Tax Return for the quarters ending March 31, 2003, and June 30, 2003. There's also a Form WR-30 for the quarter ending March 31, 2003.

The director noted that there existed inconsistencies in the number of employees employed by the U.S. entity. The director also noted that the petitioner had failed to submit job descriptions or a breakdown of the employee's duties on a weekly basis. The director stated that based upon evidence in the record, it appeared that the petitioning entity was a "grocery store" and that as such, with the limited number of employees, the beneficiary would be engaged primarily in the day-to-day non-managerial operational duties of the organization. The director also stated that the petitioner had failed to demonstrate that the entity had grown to a point where it would be able to support a managerial or executive position.

On appeal, counsel argues that the evidence of record is sufficient to establish that the U.S. entity has conducted sufficient business to support an executive position in that it has realized over one million dollars in sales and trade. Counsel also argues that the petitioning entity employs five individuals and that the business will continue to expand. Counsel further argues that it would be illogical for Citizenship and Immigration Services (CIS) to deny the instant petition where it has approved a previous petition submitted by the petitioner.

Counsel's argument is not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The 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). The petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions, and that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9<sup>th</sup> Cir.

July 30, 1991). Although the petitioner describes the beneficiary's duties as being managerial or executive in nature, a review of the record demonstrates that the petitioning entity is still in its developmental stages and that as such the beneficiary will primarily perform the day-to-day business activities of the organization rather than primarily performing the high level responsibilities that are specified in the definitions.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties will include developing policy. The petitioner did not, however, define the policies of the organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1103.

The petitioner noted that CIS approved other petitions that it had filed on behalf of the beneficiary. The director's decision does not indicate whether he/she reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or 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, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In the request for evidence, the director requested that the petitioner submit a comprehensive description of the beneficiary's proposed duties, a list of U.S. employees including their names, titles, position descriptions, and a breakdown of the number of hours devoted to each task. The petitioner failed to submit this evidence in response. This evidence was critical, as it would have established whether the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In the response to the director's request for evidence, counsel implies that the beneficiary manages or supervises two managers and three sales and administrative personnel. However, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

On review, the record as presently constituted is not persuasive in demonstrating that the U.S. entity has reached a level of complexity sufficient to support a managerial or executive position. The petitioner indicates that it plans to hire 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.

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.