

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

U.S. Department of Homeland Security  
20 Mass Ave., Room A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

DA

File: SRC 03 051 52109 Office: TEXAS SERVICE CENTER Date: JUN 28 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)

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its executive manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Texas that is engaging in the restaurant business. The petitioner claims that it is a subsidiary of [REDACTED] located in the West Bank, Israel. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition, concluding that (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; (2) the petitioner has not shown that the U.S. entity is generating sufficient income to support an executive/managerial level position; (3) the petitioner failed to submit certain evidence to show that the U.S. entity was "doing business" at the time of the petition; and (4) the foreign entity and the U.S. entity are still qualifying organizations as required by the regulations.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director made several errors of fact and law in her decision to deny the petition. In support of this assertion, the petitioner submits 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 first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner described the beneficiary's anticipated job duties in the U.S. entity as follows:

- Plan and direct company's major functions
- Work through and manage subordinate employees to achieve company goals
- Implement additional and long-term corporate policies and procedures
- Hire additional subordinate staff
- Manage laborers
- Supervise day-to-day operations and employ business judgment in day-to-day decisions
- Identify and assess new markets for corporate/business expansion
- Identify and acquire different locations for expansion restaurants
- Secure premises to house expansions

On May 6, 2003, the director requested additional evidence. The director requested the following evidence in connection with the U.S. entity: a copy of the corporate tax return for 2001 and 2002; copies of Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, with attachments for 2002 and the first quarter of 2003; copies of the sales tax report for January, February, and March 2003, and a current copy of the occupancy permit, business license, commercial lease and Texas Sales and Use Tax Permit. With respect to the employees of the U.S. entity, the director requested the names, titles, and duties of the employees who perform the routine tasks of the business, and a schedule for the month of February 2003 showing the hours worked and duties performed of each employee, along with the payroll record for that period. The director also requested evidence relating to the foreign company, including a copy of the corporate tax return for 2001 and 2002, a copy of the payroll register for January through March 2003;

evidence of doing business in February and March 2003; documentation that the U.S. entity and the foreign entity are qualifying organizations; and documentation of the ownership of the foreign entity.

In response, counsel for the petitioner submitted the names, titles, and duties of the U.S. entity's four employees, including the beneficiary, and a list of employees and a payroll journal for February 2003. The following description of the beneficiary's duties was provided:

- Owner/operator of the corporation and executive officer/manager;
- Plans, organizes, directs, and controls all major functions and work through employment personnel including: [sic]
- Establishes company goals and policies;
- Deals with employee hiring/firing in managerial capacity;
- Deals with accountants for purposes of long-term planning in preparation of annual taxes, etc.;
- Deals with bank regarding long term financing goals;
- Public relations for certain in-town activities.

The petitioner also submitted a copy of the corporate tax return for 2002; copies of Form 941 with attachments for 2002 and the first quarter of 2003; a copy of the most recent commercial lease and Texas Sales and Use Tax Permit, and other evidence of license to do business. With respect to the foreign entity, the petitioner provided no documentation and advised the director that the foreign company has gone out of business and no longer exists.

On October 10, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director noted that the evidence indicates that the U.S. entity employs only two other employees, one of whom appears to be employed part-time. Given the limited number of employees, the director concluded, the beneficiary would be devoting more time to daily functions associated with running a business than to executive or managerial duties. The director also found that the petitioner did not show that the U.S. entity is generating sufficient income to support an executive/managerial level position. The director also noted that the petitioner failed to submit a copy of the Sales Tax Report for January, February, and March of 2003, and a copy of the current lease for the U.S. entity's business premises, as requested. Finally, the director determined that the petitioner has failed to meet the requirement of establishing that the U.S. entity and the foreign entity are still qualifying organizations as required by the regulations.

On appeal, counsel for the petitioner asserts that the director made several errors of law and fact in her decision to deny the petition. Specifically, counsel asserts that the petitioner employs four persons, and sometimes up to nine, rather than just two in addition to the beneficiary, as the director stated. Counsel also contends that the beneficiary's job duties meet the regulatory definition of an executive or manager. Counsel also challenges the director's finding that the U.S. entity is not generating sufficient income to support an executive/managerial position. Counsel claims that the director's interpretation of the company's tax returns and financial statements is in error. Counsel further comments on the potential of the business and its economic significance within the community. Counsel then attempts to account for the lack of documentation

to establish that the U.S. entity was "doing business" and that the foreign entity is a qualifying organization as required by the regulations.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily 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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The AAO notes that the petitioner did not specify whether the duties to be performed by the beneficiary are in an executive or managerial capacity. Further, rather than providing a specific description of the beneficiary's duties that would demonstrate what the beneficiary does on a day-to-day basis, the petitioner generally paraphrased the statutory definitions of executive and managerial capacity. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For example, the petitioner states that the beneficiary's duties include "plan and direct company's major functions," "work through and manage subordinate employees to achieve company goals," "implement additional and long-term corporate policies and procedures," and "deal with employee hiring/firing in managerial capacity." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Moreover, although the petitioner asserts that the beneficiary "plans, organizes, directs, and controls all major functions" of the company through subordinate staff, 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. In his letter dated August 4, 2003, responding to the director's request for further evidence, counsel for the petitioner indicated that the staff consists of four persons: the beneficiary, with the title "executive officer," a "manager/employee," and two other "employees." Although one is given the title "manager," all three of the beneficiary's subordinate employees appear to have the same duties of food preparation, cleaning, answering the phone, and handling the cash register or pizza delivery. The petitioner has submitted no evidence that these employees possess or require an advanced degree, such that they could be classified as professionals. The petitioner also has not shown that any of the employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. Because the beneficiary is primarily supervising a staff of non-professional, non-supervisory, and non-managerial employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

The AAO also notes counsel's assertion on appeal that the petitioner employs four persons, and sometimes up to nine, rather than just two in addition to the beneficiary, as the director stated. Upon reviewing the record,

the AAO finds that the director's conclusion accurately reflects the record before her. While counsel indicated in his August 4, 2003 letter that the U.S. entity has four employees, the attachments to the company's IRS Forms 941 for the last two quarters of 2002 and the first quarter of 2003 indicate that the U.S. entity had only three employees in the last half of 2002, and only two employees in 2003. As the director noted, one of these employees could only have been working part-time given the minimal wages paid. First, given that there is only one other full-time employee, and one part-time employee working minimal hours, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be *primarily* performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Second, the AAO notes that the petitioner did not explain or reconcile these inconsistencies regarding the number and composition of its staff anywhere in the record. 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 either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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. *Id.*

In light of the foregoing, the AAO concurs with the director that the petitioner has failed to establish that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

The second issue in this proceeding is whether the U.S. entity is generating sufficient income to support an executive/managerial position. The director found it not to be the case here, since the U.S. entity is not generating sufficient income to cover the routine expenses of the company, and in fact is showing a net operating loss in 2002. Counsel contends on appeal that the director's finding in this respect is in error. To the contrary, upon review of the record, the AAO finds that the director's factual finding accurately reflects information set forth in the company's 2002 financial statement and corporate income tax return. Therefore, the record does not support counsel's assertion that "[i]n a nine month period, this business has done significantly well and will only improve as it continues to develop." Counsel also contends that "basic business economics provides for a certain period prior to the business realizing a profit." The regulations 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 record does not show that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The third issue in this proceeding is whether there is sufficient evidence to show that the United States entity has been doing business during the year preceding the filing of the petition, as required under 8 C.F.R. § 214.2(l)(14)(ii)(B). The director noted that in responding to the request for further evidence, the petitioner failed to submit the sales tax reports for the U.S. entity for January, February, and March 2003. On appeal, counsel claims that the petitioner was not operating during those months, and was still in the process of establishing the enterprise, and that the issue was explained in the response. Contrary to counsel's claim, the

response contains no explanation for the petitioner's failure to submit the requested evidence. Moreover, if the business is still not operating more than a year after the initial grant of the L-1 visa in connection with the opening of a new office, then it cannot be concluded that the U.S. entity has been "doing business" for the previous year.

The director also noted that the petitioner has failed to submit a current lease, as the lease submitted had expired by the time it was provided to the director in response to the request for further evidence. Counsel claims on appeal that a new lease was not required because the "option to extend" clause allows the lease to be automatically renewed at the lessee's option. The AAO notes that the lease clearly states that the option to extend can only be exercised through 60-day prior written notice to the lessor. The petitioner did not provide to the director a copy of such notice, or any other indication that the lease was renewed or extended, as counsel claimed.<sup>1</sup>

In light of the petitioner's failure to provide the documentation discussed above, the AAO agrees with the director's conclusion that there is insufficient evidence to show that the United States entity has been doing business for the previous year. Furthermore, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

The final issue in this proceeding is whether the petitioner has established that the foreign entity is still a qualifying organization, as required under 8 C.F.R. § 214.2(l)(14)(ii)(A). Counsel indicated, both in response to the director's request for further evidence and on appeal, that the foreign company has gone out of business and no longer exists. Counsel further asserted, citing to *Matter of Chartier*, 16 I & N Dec. 284 (BIA 1977) and *Matter of Thompson*, I & N Dec. 169 (Comm. 1981), that the existence of a foreign employer or a foreign office of the U.S. employer is not required. Counsel's assertion is without merit. In connection with an application for extension of a visa involving the opening of a new office, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) plainly requires "evidence that the United States and foreign entities are *still* qualifying organizations as defined in paragraph (l)(1)(ii)(G) of [that] section" at the time the application was filed (emphasis added). In the absence of any documentation relating to the foreign entity, the petitioner simply has failed to meet that requirement.

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

---

<sup>1</sup> The AAO notes that on appeal, counsel submitted a copy of a lease signed on October 24, 2003, for a two-year term beginning July 1, 2003. However, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

part, that a petition for extension may be filed only if the validity of the original petition has not expired. In the present matter, the beneficiary's authorized period of stay expired on December 6, 2002. However, the petition for an extension of the beneficiary's L-1A status was not filed until December 19, 2002. 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 will be affirmed and the petition will be denied.

**ORDER:**       The appeal is dismissed.