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File: WAC 02 202 53140 Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2005

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

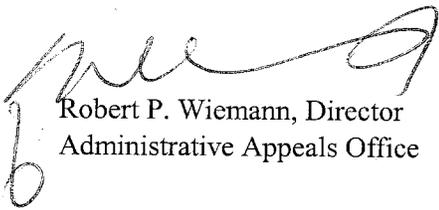
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California 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 chief executive officer 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, a Delaware limited liability company doing business in the State of California, claims to be the subsidiary of Comcept Pvt. Ltd., located in Islamabad, Pakistan. The petitioner is an information technology firm. 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 the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

Counsel for the petitioner filed an appeal in response to the denial. On appeal, the petitioner contends that the director disregarded evidence that established the ongoing business activities of the petitioner which demonstrated the need for the beneficiary's executive position. In support of this contention, the petitioner 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 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, counsel submitted a letter from the U.S. petitioner, dated June 6, 2000,¹ outlining the beneficiary's intended duties while employed in the United States. The petitioner described his duties as follows:

This year [the beneficiary] has directed [the petitioner's] efforts to secure new business contracts. These efforts have included presenting at trade shows, meeting with business managers at numerous technology companies and making detailed presentations to them about [the petitioner's] products and services, as well as conducting market research and identifying the market segment appropriate for [the petitioner's] products and services. The petitioner] also invested US \$35,000 in a venture in Chicago to provide remote database services.

* * * *

As CEO of [the petitioner, the beneficiary] has directed all operations and has served as a liaison between [the petitioner] and the Board of Directors of its parent corporation Comcept Pvt. Ltd. in Pakistan. [The beneficiary] has drawn and will continue to draw an annual salary from [the petitioner] (guaranteed by Comcept) of US \$72,000 and standard corporate benefits including health insurance. [The beneficiary] will work a minimum of a forty-hour workweek, but generally much longer hours.

[The beneficiary is in the process of hiring a Business development manager and is in the final stages of offering the position to a United States Citizen. The second position Mr. [REDACTED] seeking to fill is for an office manager -- and he is seeking a United States Citizen

¹ The AAO notes that this date is undoubtedly a typographical error, and that the true date was intended to be June 6, 2002.

for this position as well. [The beneficiary] has been and will continue to be responsible for evaluating, hiring, and managing new US employees, and developing Comcept's technology for sale in the United States. He will also be responsible for setting corporate policy and hiring consultants and analysts to define and analyze US market opportunities, as well as organizing strategic partnerships with complimentary service providers.

On July 2, 2002, the director requested additional evidence. Specifically, the director requested more specific information with regard to the managerial and/or executive capacity in which the beneficiary operated, including detailed information about the beneficiary's duties and the positions and duties of the other employees of the petitioner. In addition, the director requested evidence demonstrating the viability of the U.S. entity, in addition to evidence that it had secured adequate commercial premises from which to operate its business.

In a response dated September 23, 2002, the petitioner submitted a reply in response to the director's request. Specifically, the petitioner provided an organizational chart demonstrating the composition of the U.S. petitioner, which showed that the beneficiary oversaw two contract employees and one part-time office manager. Additionally, counsel for the petitioner provided an updated description of the beneficiary's duties in the United States, which stated the beneficiary's primary job descriptions and work load distributions as follows:

Strategic Planning (10% of the total work load)

- Defining [the petitioner's] corporate goals.
- Targeting opportunities for future investments.
- Business plan reviews.

Business development (40% of the total work load)

- Cultivating business relationships
- Networking
- Market Research
- Proposal preparation and reviews

Technology Development (30% of the total work load)

- Forming alliances and partnerships with technology companies
- Leading technology developments
- Mentoring the offshore development team

Operational Management (15% of the total work load)

- Identifying and signing up companies and professionals to outsource corporate, HR and legal affairs.
- Team building through focused head hunting
- Contract negotiations and finalizations
- Coordinating the inter-working of the on-site and offshore team.
- Liaison with the Board of Directors

Financial Management (5% of the total work load)

- Budgeting
- Securing operational funds
- Acting as the financial controller

On January 23, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the overall size and scope of the business, as set forth in the organizational chart and as reflected by the most recent federal tax return filed by the petitioner, suggested that the beneficiary would not be primarily engaged in managerial or executive tasks. The director concluded that based on the evidence presented, the beneficiary was not supervising other professional or supervisory employees at the time of the petition's filing, and thus had failed to demonstrate that the beneficiary was acting in a capacity that was primarily managerial or executive in nature.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and that the director failed to consider the petitioner's relatively new business operations in rendering the decision. Specifically, counsel asserts that contrary to the director's assertions, the petitioner had only been in operation since September of 2001 and not since the year 2000 as stated by the director. Additionally, counsel alleges that the director's reliance on the most recently filed tax return for the year 2001, which demonstrated that the petitioner had generated zero income and had only one employee (the beneficiary), prohibited the director from examining the true state of the petitioner's business in the relative months of 2002. Specifically, counsel asserts that the 2001 return was not representative of the actual staffing levels of the business, and thereby resulted in the director's incorrect conclusion that the beneficiary was unable to perform in a primarily managerial or executive capacity. Counsel alleges that in addition to the fact that the beneficiary's duties conformed to the regulatory definitions, the beneficiary had also hired subordinate staff members which would relieve him of performing non-qualifying duties and thus satisfying the regulatory requirements.

Upon review, counsel's assertions are 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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

In support of the contention that the beneficiary would be functioning primarily as a manager or executive, the petitioner submitted a brief statement in its letter accompanying the petition and a detailed breakdown of the petitioner's duties in response to the director's request for evidence. On appeal, counsel clarifies that the petitioner is employing the beneficiary in a primarily managerial or executive capacity, and addresses each of the broadly described duties with specific examples. Upon review of the record of proceeding, the AAO concurs with the director's finding that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity. 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. Here, the petitioner claims that the beneficiary's

duties are exclusively managerial or executive, yet the identified duties of the beneficiary in the record include non-executive tasks. For example, the petitioner states that the majority of the beneficiary's time is spent performing market research, preparing proposals, and cultivating business relationships. Such duties are not included in the definitions of managerial or executive capacity. Other than the descriptions identified above, the record contains no additional evidence or explanation with regard to the manner in which the duties of the beneficiary qualify as managerial or executive. Merely claiming that the beneficiary is a manager or an executive is insufficient to establish eligibility in this matter, because conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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). In addition, counsel's assertions on appeal are unsupported by independent evidence. Without documentary evidence to support the claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The second issue affecting the eligibility of the beneficiary in this matter is the staffing of the U.S. entity. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, 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).

In this matter, the record indicates that at the time of the petition's filing on June 7, 2002, the petitioner had not yet hired any additional employees. Although the record reflects that Iftikhar Rathore was contracted to work as the vice president of engineering on or about June 1, 2002, the petitioner has not explained how the services of the contracted employee obviates the need for the beneficiary to primarily conduct the petitioner's business. 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). Additionally, the record reflects that after the filing of the petition, the services of an additional contractor, [REDACTED] were retained on or about August 1, 2002. Finally, a part-time officer manager was hired as an employee on or about September 13, 2002. Although at the present time, the petitioner alleges to have these additional personnel available to perform the non-managerial and non-executive tasks of the business, this was not the case at the time of the filing of the petition. 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. As discussed above, at the expiration of the one-year period in June 2002, the petitioner employed only the beneficiary, who consequently was burdened with the full operational obligations of the business. Consequently, it cannot be concluded that the petitioner had reached the point that it could employ the beneficiary in a predominantly managerial or executive position.

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). In this case, the petitioner had not established the need for a managerial or executive position at the time of filing. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted no invoices to suggest that it has been selling its goods on a regular basis. In fact, in response to the request for evidence in September 2002, nearly three months after the extension request was filed, counsel for the petitioner asserted "there are no sales invoices yet as [the petitioner] is still becoming established in the United States." Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from the granting of the initial petition until its expiration in June 2002. For this additional reason the petition may not be approved.

Further, it should be noted that on the petitioner's I-129 petition for extension of L-1A status, it was indicated that a qualifying relationship with a foreign parent company no longer existed. Counsel did not submit an explanation as to why this qualifying relationship no longer existed, and what the current structure of the existing qualifying relationship is.

For an extension of visa petition validity originally granted under §101(a)(15)(L), the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires that a new I-129 must be submitted 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).

The petitioner failed to submit the required initial evidence in order to qualify for an extension of visa petition validity. 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).

The petitioner shall submit additional evidence as deemed necessary in his or her discretion by the director. 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 non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. §103.2(b)(2)(i).

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.