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**U.S. Citizenship
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Services**

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File: SRC 04 066 52298 Office: TEXAS SERVICE CENTER Date: NOV 10 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, 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 employ the beneficiary 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 Georgia corporation, operates a dry cleaning store. The petitioner claims that it is the subsidiary of Pravin Builders located in Kolol, India. The petitioner seeks to change the beneficiary's status from that of a B-2 visitor so that he may serve as its general manager for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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 erroneously concluded that the beneficiary would be engaged in non-managerial duties, and failed to consider the reasonable needs of the petitioner's small business when analyzing its staffing levels. 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 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 a December 16, 2003 letter submitted with the initial petition, the petitioner described the beneficiary's proposed job duties as follows:

As General Manager [the beneficiary] will plan, develop, and establish policies and objectives of [the foreign company] in the United States. He will direct and coordinate business contracts in the entire operation of the subsidiary's market, and develop other relevant policies and procedures implementing the overall objectives of [the foreign entity].

The petitioner further stated on the Form I-129 Petition that the beneficiary "will seek to expand the company while overseeing all daily operations, including accounts, personnel, and vendor contact." On Form I-129, the petitioner indicated that it had four employees.

On January 10, 2004, the director requested additional evidence. In part, the director requested a copy of the current organizational chart for the United States entity. In a response dated February 10, 2004, the petitioner, through counsel, submitted the following description of its staffing:

1. Position: Vice President/General Manager

List All Duties: Conduct all business accounting activities, banking, bill payment, salary, and insure funds availability; Marketing and sale of services; Negotiate cost of goods and merchandise purchases to assure timely and economic resupply [sic] of merchandise; Oversee display and pricing of goods; Insure facilities comply with state and local safety and operational requirements; Provide overall supervision for all subordinates.

2. Position: Store Manager

List All Duties: Oversee daily store activities, including work schedules, payroll, daily bank transactions, and customer service.

3. Position: Pressers (2 employees)

List All Duties: Responsible for providing front-end customer service, including dry-cleaning services.

The petitioner also submitted copies of its Forms 941, Employer's Quarterly Federal Tax Return and its Georgia Employer's Quarterly Wage and Tax Report for all four quarters of 2002 and the first three quarters of 2003. The most recent report reflected total wage payments of \$6,194.25 to three employees during the third quarter of 2003. Based on the wages reported over the seven quarters, the business consistently employed one full-time and two part-time employees.

On March 4, 2004, the director denied the petition concluding that the beneficiary would not be employed in a managerial or executive capacity. The director specifically stated "the beneficiary will have to engage in [the] day to day business given the current structure of the company," noting that the petitioner only had three other employees at the time of filing.

On appeal, counsel for the petitioner asserts that the director erred by concluding that the beneficiary would engage in non-managerial duties, noting that the business employs a sufficient staff to relieve the beneficiary from performing operational functions. Counsel further describes the beneficiary's proposed duties as follows:

[The beneficiary] is responsible for establishing policies and procedures for the U.S. subsidiary, as well as for all personnel decisions. He reports back to the Board of [the foreign entity] in India, but all [sic] [the beneficiary] makes all decisions for [the petitioner] taking into account the best interests of the Parent and U.S. companies. The Store Manager assists [the beneficiary] in his executive/management duties, including performing any work necessary in the marketing, inventory, and accounting fields. The two pressers at the dry cleaning store function as sales clerks while also undertaking pressing duties. Fortunately, [the beneficiary] is not called upon to perform any nonmanagerial functions in the day-to-day running of the company, due to the nature of the small business that is currently being operated. A dry cleaning store needs only one clerk on duty at any given time, and that clerk is supervised by the Store Manager, leaving [the beneficiary] free to pursue other business matters and opportunities.

The [beneficiary's] job duties include negotiating all contracts with suppliers, as well as scouting for additional investment opportunities. He also is in charge of accounts and marketing, duties similar to those he performed in India.

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 does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will "plan, develop and establish policies and objectives," and "direct and coordinate business contracts." The petitioner did not, however, define the beneficiary's goals or policies, or clarify the types of contracts to be coordinated by the beneficiary, such that the AAO could determine whether such duty can be considered managerial. The petitioner also asserts that the beneficiary is "in charge" of marketing and accounts, but did not identify any subordinate employees who perform routine day-to-day marketing or bookkeeping duties. Finally, the petitioner asserts that the beneficiary is "scouting for additional investment opportunities" but provided no additional explanation as to the specific duties involved within this broad responsibility.

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). Counsel is required to substantiate his vague claims with a detailed description of how the beneficiary's responsibility of running and managing the company would satisfy the requirements of either managerial or executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The provided job descriptions do not allow the AAO to determine the actual tasks the beneficiary will perform such that they can be classified as managerial or executive. See 8 C.F.R. § 214.2(l)(3)(ii).

Whether the beneficiary is a managerial 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 fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's proposed tasks, such as direct responsibility for marketing and sale of services, banking, bill payment and purchasing, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

As noted by counsel on appeal, although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration 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-year-old company operating a dry cleaning establishment. The company claimed to employ a store manager, plus two pressers. The petitioner's quarterly wage reports establish that it consistently employed one full time and two part-time employees in the seven quarters preceding the filing of this petition. In the most recent quarter, the two part-time employees, whose job titles have not been identified, worked, respectively, 16 and 24 hours per week on average, assuming that they received minimum wage. The petitioner submitted a copy of an advertisement for its store that states that the business is open six days a week for a total of 68 hours. The petitioner, although it has suggested that only two employees are needed in the store at one time, has not explained who would perform dry cleaning services, handle customer transactions, receive deliveries, and perform other operational duties during the many hours when these part-time employees are not available. Collectively, a critical analysis of the nature of the petitioner's business brings into question how much of the beneficiary's time would actually be devoted to managerial or executive duties. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-

executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive. Rather, based on the record of proceeding, the beneficiary's job duties will principally be composed of non-qualifying duties related to the daily operations of the dry cleaning establishment. Such duties would necessarily preclude him from functioning in a primarily managerial or executive role. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Finally, although the petitioner asserts that the beneficiary is managing a 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. 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. Although one of the petitioner's employees is designated "store manager" the petitioner has not established that this position is, in fact, managerial or even supervisory in nature. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The beneficiary's vaguely defined responsibilities and lack of a subordinate staff to perform non-qualifying duties preclude CIS from classifying the beneficiary as a manager or executive. The petitioner's evidence is not sufficient in establishing that the beneficiary will be primarily directing the management of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; or receiving only general supervision or direction from higher level executives. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

Furthermore, the record does not establish that the beneficiary will be primarily managing a function of the organization or functioning at a senior level within an organizational hierarchy other than in position title. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). The beneficiary's job descriptions depict an individual in charge of the day-to-day services of the organization, not that of a functional manager.

The petitioner indicates that it plans to hire additional 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*

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Michelin Tire Corp., 17 I&N Dec. 248 (Reg. Comm. 1978). Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(1)(3). For this reason the appeal will be dismissed.

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.

ORDER: The appeal is dismissed.