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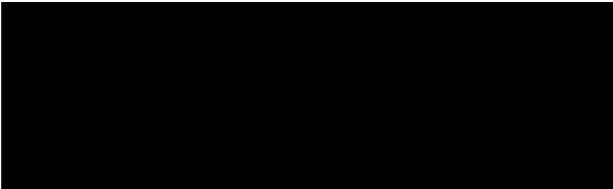
Dn

File: SRC 03 240 51390 Office: TEXAS SERVICE CENTER Date: OCT 11 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

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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 financial 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 formed in the State of Georgia that claims to be a wholesale jewelry importer and exporter. It operates a gas station and convenience store in Tennessee. The petitioner claims that it is the subsidiary [REDACTED] located in Mumbai, India. 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 for three years.

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.

On appeal, counsel for the petitioner asserts that the director's decision is in error because it (1) places undue emphasis on the small size of the petitioning company; (2) is contrary to the director's previous decision to approve the initial petition submitted on behalf of the beneficiary; and (3) the petitioner has submitted sufficient evidence to establish that "it is making normal progress in the growth and development of its business." In support of his assertions, counsel cites *Mars Jewelers Inc. v. INS*, 702, F. Supp. 1570 (N.D. Ga. 1988), and various unpublished AAO decisions. Counsel submits a detailed brief in support of the appeal.

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.

On the Form I-129 Petition submitted on September 4, 2003, the petitioner stated:

The Alien will continue to plan, direct and manage financial activities of the company. More specifically, he will continue to develop monetary sources through commercial loans and other sources and prepare reports, budgets, financial statements, and profit and loss statements.

In an August 27, 2003 letter submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

The Financial Manager of the U.S. subsidiary . . . will plan and direct financial activities of the company. The Financial Manager will direct, manage and monitor all financial activities for the company. The Financial Manager will develop monetary sources, through investments, letters of credit, lines of credit, commercial loans and other financial resources.

Further, the Financial Manager will prepare reports, budgets, financial statements, balance sheets, profit and loss statements and tax returns for the U.S. subsidiary. Also the Financial Manager will determine import and export tariffs and taxes. The Financial Manager will also prepare reports for management in the U.S. as well as the parent company abroad.

On the Form I-129 Petition, the petitioner indicated that it employed two workers. The petitioner submitted its IRS Forms 941, Employer's Quarterly Federal Tax Return, with attachments showing that the petitioner employed the beneficiary and the individual identified as president of the company as of the second quarter of 2003.

On October 22, 2003, the director requested additional evidence, including, in part: (1) evidence of the petitioner's current staffing level, including position titles and duties of all employees and the educational background of any professionals; (2) copies of the petitioner's Employer's Quarterly Tax Returns for September 2003; (3) copies of Quarterly Wage Reports for all employees from March 2003 to present; and (4) an explanation as to who performs the shipping and handling for the United States and foreign entities.

In a reply received on January 21, 2004, the petitioner submitted the requested federal and state quarterly wage reports, confirming the employment of the beneficiary and the petitioner's president as of the time of filing. Counsel for the petitioner further provided that "shipping is generally overseen by the President and CEO of the company." The petitioner also submitted a copy of the Form I-797A Approval Notice indicating that its president was working pursuant to L-1A status. In a letter dated January 13, 2004, the petitioner's president and chief executive officer stated, "please note that virtually the same evidence was submitted in a petition to extend my L-1A visa. USCIS approved my extension. . . . Therefore, in the spirit of consistency, I respectfully request that you approve this case." The petitioner did not provide the requested evidence of the company's staffing levels.

On April 6, 2004, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the petitioner had not provided all of the requested evidence, and concluded that based upon the evidence submitted the beneficiary would be directly performing the day-to-day operational duties of the petitioner's business.

On appeal, counsel for the petitioner asserts that the director erroneously concluded that the beneficiary would not be employed in a qualifying managerial or executive capacity. Counsel asserts that the director placed undue emphasis on the small size of the petitioning company and cites *Mars Jewelers, Inc. v. INS* and several unpublished AAO decisions to stand for the proposition that a small company with few employees can support a managerial or executive position. Counsel claims that the beneficiary's duties are the same as the beneficiary in the *Mars Jewelers* case and that such decision is controlling precedent, as it was decided by a federal court in the same jurisdiction. Counsel further asserts that the beneficiary's duties have not changed since the filing of the initial petition on his behalf, and contends that the director ignored the earlier approval and the subsequent growth of the petitioner's business. Counsel avers "the Regulations contemplate that for start-up businesses, the petitioner must merely establish that it is making normal progress in the growth and development of the business." Finally, counsel states that the director erroneously required the petitioner to submit a franchise agreement between itself and Texaco, and, in part, based her decision on the petitioner's failure to submit such document.

Counsel's assertions are not persuasive. Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. 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(I)(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's initial description of the beneficiary's job duties did not establish that the beneficiary would be employed in a primarily managerial or executive capacity, other than in job title. The petitioner described the beneficiary as preparing reports, budgets, financial statements, balance sheets, profit and loss statements and tax returns, preparing reports for the president to review, and determining import and export tariffs and taxes. These duties, although somewhat complex in nature, are administrative tasks which do not fall under the statutory definition of managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. 1101 §§ (a)(44)(A) and (B). Although the petitioner claims that the beneficiary will "direct, manage and monitor all financial activities for the company" the petitioner has not described any duties performed by the beneficiary that rise to the level of managerial capacity. 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. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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 or executive 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, as noted above, the majority of the beneficiary's daily tasks do not meet any of the criteria for executive or managerial capacity as described in the statute. For this additional reason, the AAO cannot determine whether the beneficiary has been or will be primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, counsel states that the director placed undue emphasis on the petitioner's small staff size in making her determination, noting that the statute, regulations and case law do not impose such a requirement with respect to the size of the petitioning organization. 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).

Contrary to counsel's statement on appeal that the petitioner must "merely establish that it is making normal progress in the growth and development of the business," 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.

A review of the record with respect to the petitioner's staffing levels undermines the petitioner's claim that the beneficiary performs managerial or executive-level duties associated with the company's financial

management. As noted above, pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(D), the petitioner is required to describe the staffing of the new operation, including the number of employees, the types of positions held, and evidence of wages paid to employees. The petitioner in this case indicated that it employs the beneficiary as financial manager and a president and chief executive officer. Although requested by the director, the petitioner declined to provide a description of its staffing. However, the petitioner submitted quarterly reports and copies of canceled checks which confirm that the petitioner had no other employees during the first year of operations.

At the time of filing, the petitioner was a one-year old company primarily engaged in operating a gas station and convenience store. Although the petitioner claimed that it was involved in the import and wholesale of jewelry, the evidence shows that this aspect of its business was limited to importing inventory from its parent company at the time of filing. The AAO notes that both of the employees have 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. Based on a critical analysis of the nature of the petitioner's business it can be assumed, and has not been proven otherwise, that the beneficiary and the other employee are performing all of the operational functions necessary to operate a retail store, including ordering inventory, stocking and arranging merchandise on shelves, receiving deliveries of food, gasoline and other merchandise, assisting customers with gasoline and other purchases, providing janitorial services, operating a cash register, paying bills and maintaining a checking account. Since gas station/convenience stores typically maintain long operating hours, and the petitioner only has two employees to cover such hours, it is reasonable to assume that the majority of the beneficiary's time is actually devoted to performing non-qualifying operational duties in the petitioner's store.

While the petitioner claims that the beneficiary performs primarily managerial or executive duties, the petitioner has not established that it reasonably requires a financial manager in light of its current stage of development. The beneficiary may indeed perform some of the claimed duties; however, the petitioner has not substantiated its claim that such duties are his primary duties. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that 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 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).

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988) and several unpublished AAO decision to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts in the instant matter are analogous to *Mars Jewelers, Inc. v. INS*. It is

noted that this case relates to an immigrant visa petition, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii). Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. With respect to the unpublished AAO decision cited by counsel, 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. As counsel has not discussed the facts of any of the cited matters, they will not be considered in this proceeding.

The AAO acknowledges counsel's statement on appeal that the director based her decision, in part, on the petitioner's failure to provide a copy of a franchise agreement between the petitioner and Texaco. Counsel states that no such agreement exists. The director requested a copy of such agreement in her request for evidence based on the petitioner's representation that it was doing business as a Texaco gas station at the time the petition was filed. In response, the petitioner submitted a copy of its lease agreement for the gas station, but did not specifically indicate that no franchise agreement existed. Therefore, the director was still under the impression that such an agreement may exist. However, the AAO finds this issue had no bearing on the director's determination as to whether the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. As this issue was clearly not the basis for denial of the petition, counsel's arguments on appeal are not persuasive.

The AAO will address counsel's assertion that the director erred in denying the petitioner's petition for an extension of the beneficiary's status when CIS previously approved a petition based on similar facts, and also approved an extension of L-1A status for the petitioner's other employee. Established precedent reflects that prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the petitioner's prior petition to which counsel refers was a petition to allow the beneficiary to enter the United States to open a new office. Thus, that petition was governed by the regulations pertaining to new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status after completing a one-year period to open a new office. Thus, the present petition is governed by a different set of regulations pertaining specifically to new office extensions. *See* 8 C.F.R. § 214.2(l)(14)(ii). As different law and evidentiary requirements apply to the present petition, the director has a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to counsel's suggestion, the fact that a prior petition was approved on behalf of the beneficiary does not serve as prima facie evidence that eligibility has been established in the present proceeding.

On review, 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 record indicates that a significant portion of the beneficiary's duties have been and will be directly providing the services of the business. 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). The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. 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 began operating its gas station and convenience store in March or April of 2003. However, the petition was approved in September 2002. Thus, 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 minimal evidence that the petitioner was engaged in the regular, systematic and continuous provision of goods prior to commencing operations as a convenience store. With respect to the petitioner's jewelry import and wholesale business, the petitioner merely claims to have imported inventory and claims that it "will sell" jewelry in the United States. There is no evidence that the petitioner's planned wholesale jewelry business had progressed past the initial stages. In addition, the petitioner submitted no evidence of the financial status of the U.S. company, such as income tax returns or audited financial statements, as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). For these additional reasons the petition may not be approved.

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 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.