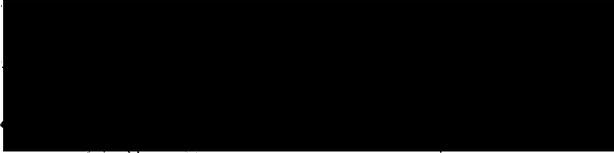




U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy

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File: SRC-03-260-53461 Office: TEXAS SERVICE CENTER Date: AUG 03 2006

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

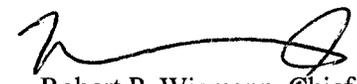
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief
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 president and operations 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 partnership organized under the laws of the state of Texas and is engaged in meat preparation and sales. The petitioner claims that it is the affiliate of [REDACTED], located in Irbid, Jordan. 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, and (2) that the petitioner had not grown to a level which would support a managerial or executive position.

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 it has submitted sufficient evidence to eligibility. 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 job duties as follows:

Plan, direct and coordinate all operations of the company. Hire, fire, train and supervise employees. Develop and implement accounting procedures, billing methods, profit/loss analysis and internal auditing measures for the company. Oversee services development. Manage daily operations including the sale of products.

On November 12, 2003, the director requested additional evidence. Specifically, the director requested a detailed description of the staffing levels, organizational charts, and a percentage breakdown with detailed description of the beneficiary's duties. The director also requested evidence of marketing in the form of local advertisements.

In response, the petitioner submitted a copy of its 2002 tax return, a percentage breakdown and description of the beneficiary's duties, a copy of a local advertisement, an organizational chart and description of the petitioner's staffing. The petitioner described the beneficiary's duties as follows:

1. Plan, direct and coordinate all operations of the company.
Required hours per week: 10
This includes planning, developing, and establishing policies and objectives for business operations. Plans business objectives and develops organizational policies to coordinate functions and operations.
2. Hire, fire train and supervise employees. Manage daily operations.
Required hours per week: 22

This currently includes directly training and supervising employees, [REDACTED] and [REDACTED] serves as the Marketing Manager for the company and is responsible for the company's marketing, which includes identifying competitors and potential customers. The President & Operations Manager is the only person directly responsible for the hiring, firing, training and supervising employees. This position also requires overseeing and managing the daily operations of the U.S. entity, which includes direct daily supervision of employees and their performance.

3. Develop and implement accounting procedures, billing methods, profit/loss analysis and internal auditing measures for the company.
Required hours per week: 6
Directs and coordinates billing methods and internal auditing measures for the company to maximize returns on investments, and to increase productivity. Supply procurement. Responsible for inventory measure control.
4. Oversee service development.
Required hours per week: 2
Gathers data and reviews activity reports and financial statements to determine progress. Revises objectives and plans in accordance with current conditions.

On November 26, 2004, the director denied the petition. The director determined that the beneficiary would not be employed in a primarily managerial or executive position and that the petitioner had not reached a level of operations that would support a primarily managerial or executive position.

On appeal, counsel for the petitioner asserts that the evidence submitted establishes eligibility.

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. 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.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "establishing goals and policies," "supply procurement" and "overseeing and managing the daily operations of the U.S. entity." The petitioner did not, however, define the beneficiary's goals, policies, or clarify who actually purchases the materials. Nor did the petitioner provide evidence that any of these activities had occurred or would occur. For example, there are no policy memos, no profit/loss analysis, records of personnel management, or other documentary evidence that might corroborate the petitioner's description. 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). 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).

In addition, the petitioner describes the beneficiary as "directly training, and supervising employees", gathering data and reviewing working with customers and managing the sale of products. The AAO would note that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be primarily employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Since the beneficiary actually performs clerical work, sells the product, and trains employees he is performing a task necessary to provide a service or product and this duty will not be considered managerial or executive in nature. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *Id.* In this case the beneficiary is directly supervising the remaining three employees and is thus operating as a first-line supervisor capacity.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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(l)(3).

The second issue in this proceeding is whether the petitioner is sufficiently operational to sustain managerial or executive position.

Other evidence in the record does not support the facts as the petitioner has characterized them. As an example the petition asserts that the beneficiary is to earn a salary of \$47,000.00 annually, and yet the tax form submitted indicates that in 2002 the petitioner only had \$83,210 in gross receipts and paid -0- in salaries and wages. See IRS Form 1065, 2002, attached hereto as petitioner's exhibit. On appeal the petitioner submits a letter from a third party, dated January 9, 2005, which asserts that the 2003 IRS Form 1065 filed for the petitioner shows \$21,532 in net income. This evidence runs contrary to the assertion that the petitioner can pay the beneficiary \$47,000.00 annually, and raises doubt as to whether the petitioner can

support an executive or managerial position. See 8 C.F.R. 214.2(l)(3)(v)(C), see also 8 C.F.R. 214.2(l)(14)(ii)(E).

In this case, the record indicates that the petitioner is earning less revenue than what it proposes to pay the beneficiary as an annual salary. It is unclear what salaries and wages the employees of the petitioner are earning, as the W-2 forms submitted indicate a less than full time salaries are being paid, and the IRS Form 1065 for 2002 indicates that no salaries or wages were paid. 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 visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The burden of the petitioner includes clearly articulating a basis of eligibility and submitting probative documentary evidence which corroborates assertions made in the petition. The AAO will not construct or presume assertions on behalf of a petitioner, nor will it extrapolate facts from evidentiary submissions where the relevance of those submissions has not been made clear.

In this case, the record contains conflicting evidence with regard to the amount of revenue earned by the petitioner and what is paid to the beneficiary and the employees. The record indicates that petitioner is operating a labor-intensive meat preparation business with four employees and earning less than the beneficiary's proffered wage. The director's decision was reasonable and based on the record, and will therefore not be disturbed.

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).

Another issue in this proceeding, although not raised by the director, is whether the employment offered to the beneficiary is temporary. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the beneficiary is a partner and an owner. The petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. For this additional reason, the petition must be denied.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 and the petition hereby denied.