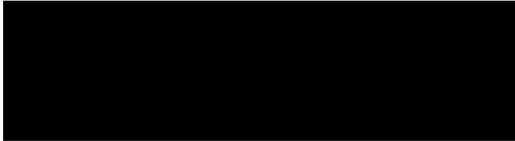


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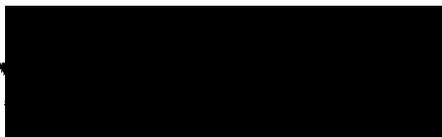
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FILE: SRC 02 130 52746 Office: TEXAS SERVICE CENTER Date: **AUG 04 2006**

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)

ON 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, 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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president and general 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, a Texas Limited Liability Company,¹ claims to be the subsidiary of LA-Apple Enterprise of Mumbai, India. The petitioner claims to be engaged in the marketing and retail sale of food, automotive, and household products through the operation of grocery or convenience stores. 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 will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous, and that contrary to the director's findings, the beneficiary was in fact employed in a primarily managerial or executive capacity. In support of this contention, counsel 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)(14)(ii) 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;

¹ It should be noted that, according to the Texas Comptroller of Public Accounts, the petitioner is not currently in good standing in Texas due to its failure to satisfy all state tax requirements. Therefore, regardless of whether the petitioner's tax issues in Texas can be easily remedied or not, it raises the critical issue of the company's continued existence as a legal entity in the United States.

- (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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in this 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 letter from the petitioner dated March 18, 2002, the beneficiary's duties were described as follows:

As the President and General Manager of [the petitioner], the position [the beneficiary] has held since his initial transfer, he has responsibility for ensuring the profitable operation of the U.S. Company. In this capacity, [the beneficiary] establishes goals and policies of [the petitioner] and exercises discretionary decision-making authority based upon policies and procedures developed by [the foreign entity]. [The beneficiary] also hires and supervises personnel and assumes sole responsibility of all discretionary actions taken by [the petitioner]. In addition, [the beneficiary] has the overall executive responsibility for developing, organizing, and establishing the purchase, sale, and retail distribution of retail products in the U.S. domestic market. His other duties includes [sic]: (i) identifying, recruiting, and building a management team and staff with background and experience in the U.S. market; (ii) hiring appropriate personnel, leasing equipment and acquiring further retail distribution facilities; (iii) negotiating and supervising the drafting of purchase agreements; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing trade and consumer market strategies based on guidelines formulated by [the foreign entity]; and (vi) developing and implementing plans to ensure [the petitioner's] profitable operation and securing [the foreign entity's] investment in the United States.

Additionally, the petitioner provided the following breakdown of the percentage of time the beneficiary spent on each duty:

Description of Duties	Time Spent %
Management Decisions / Team Building	40%
Business Negotiations	15%
Financial Decisions	10%
Supervision of management staff and company functions	15%
Organizational Development of Company	20%

On August 8, 2002, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit a more detailed description of the beneficiary's duties and those of his co-workers, as well as a list of all subordinates of the beneficiary, with a description of each person's position title, their duties, and their educational backgrounds. In addition, the director requested the petitioner's most recent quarterly tax return for the quarter covering January to March 2002, and asked for details regarding employee work schedules and the petitioner's hours of operation.

In a response dated November 5, 2002, the petitioner, through counsel, responded to the director's request. Counsel stated that the petitioner currently employed five persons in addition to the beneficiary, namely, four cashiers and one manager. The commencement dates of employment for these persons indicated that only three of the cashiers were actually employed by the petitioner at the time the extension request was filed in March 2002. The response further indicated that the hours of operation of the business were as follows:

Sunday to Friday:	7:00 a.m. to midnight
Saturday:	7:00 a.m. to 1:00 a.m.

Additionally, the hours of the cashiers were divided into 8 hour shifts, namely, 7:00 a.m. to 3:00 p.m., 3:00 p.m. to midnight, and 4:00 p.m. to 1:00 a.m. on Saturdays.

With regard to its business operation, the response indicated that the petitioner "completed its business renovations in January 2002" and thus did not commence doing business until late January and early February 2002. The petitioner therefore indicated that it had not filed an income tax return for 2001 since it had not been doing business during that year.

On November 27, 2002, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. Specifically, the director concluded that the beneficiary would be required to perform many of the day-to-day tasks of the business since the evidence did not establish that the beneficiary had sufficient subordinate staff to relieve him of engaging in non-qualifying duties.

On appeal, counsel for the petitioner asserts that the beneficiary is in fact functioning in a primarily managerial or executive capacity by virtue of his position and level of responsibility. Counsel contends that the beneficiary's core job functions constitute managerial and/or executive capacity, and that the director erroneously concluded that the beneficiary was performing non-qualifying tasks.

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 initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a generic description of the nature of his duties, and paraphrased the regulatory definitions. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including a more specific overview of the petitioner's organizational hierarchy and the beneficiary's position therein.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. First, the petitioner failed to specifically articulate the nature of the beneficiary's duties. For example, in

response to the director's request for evidence, the petitioner merely submitted one paragraph that merely repeated the general duties described in the initial petition. These duties, accompanied by the overly broad descriptions provided in the initial letters of support, fail 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).

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, *aff'd*, 905 F.2d 41. Although the petitioner provided a broad statement of the beneficiary's duties in the initial petition and again in response to the request for evidence, this description did not articulate what a specific day in the role of the beneficiary would consist of. Instead, the descriptions merely provided a brief synopsis of the beneficiary's managerial/executive duties, and failed to discuss or identify job-specific tasks or obligations the beneficiary is required to perform. Essentially, the petitioner equates managerial and executive capacity with the beneficiary's title of president, yet fails to provide solid examples of how this managerial or executive capacity is actually attained. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner has failed to show that the beneficiary oversees sufficient subordinate staff to relieve him of performing non-qualifying duties. Although it is not disputed that the beneficiary is in charge of supervising the cashiers, this fact alone does not attribute managerial authority to the beneficiary as contemplated by the regulations. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

The petitioner did not provide the level of education required to perform the duties of its cashiers. The petitioner, therefore, has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these 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. 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. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business

in a regular and continuous manner. *See e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the director noted that the beneficiary's employment capacity with the petitioner, accompanied by the small number of subordinates, did not appear to be primarily managerial or executive. Again, the AAO notes that at the time of the petition's filing, only three cashiers were employed by the petitioner. 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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner indicates that the hours of operation of its convenience store are from 7:00 a.m. to midnight, with an extra hour on Saturday evenings. Therefore, the petitioner is operating a business that is open for 120 hours a week. Assuming that the three cashiers listed each work a 40 hour week, the petitioner would therefore just barely meet its staffing requirements, with only one cashier per shift. The operation of a convenience store, however, entails much more than minimal staff to operate the cash register. The petitioner has failed to explain how the shelves will be stocked, how inventory will be taken and products reordered, and who will handle the day-to-day communication with vendors and general administrative tasks. It is not feasible to conclude that the one cashier on duty per shift will simultaneously take inventory, stock shelves, prepare hot food items such as coffee or hot dogs, if offered, handle gasoline pumps, if offered, and still be able to ring all customer sales.

It is impossible to ignore this discrepancy when analyzing the beneficiary's role in the organization. The only logical conclusion is that the beneficiary will handle all inventory issues and other related duties that the cashier will not be able to perform. 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. at 604.

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). 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Despite evidence indicating that an additional manager and cashier have been hired since the filing of the petition, 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).

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 a statement claiming that it did not commence business until late January/early February 2002. However, the petition was approved in March of 2001, more than 10 months prior to the commencement of business. 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 for the first ten months of the petition's approval. For this additional reason the petition may not be approved.

In addition, the record contains insufficient evidence to establish that the petitioner and the foreign entity are qualifying organizations as required by 8 C.F.R. § 214.2(l)(3)(i). In this matter, the petitioner claims that the U.S. subsidiary is 100% owned by the foreign entity, LA-Apple Enterprise, a partnership organized under the laws of Pakistan. However, the petitioner has failed to submit any documentation that demonstrates the ownership of the petitioner by the foreign partnership. As general evidence of a petitioner's claimed qualifying relationship, documentary evidence must be submitted to determine whether a stockholder maintains ownership and control of a corporate entity. Stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In addition to the petitioner's failure to submit evidence of the ownership of the U.S. entity, the AAO notes numerous discrepancies in the petitioner's claims. For example, the petitioner's Form 1065, U.S. Return of Partnership Income for 2001, indicates on Schedule B, line 6, that it has no foreign partners. In addition, though claiming that the foreign entity is a partnership owned by two persons, line 2 of Schedule B indicates that no partners in the U.S. entity are also partnerships. This conflicting information has not been resolved. 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). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For this additional reason, the petition may not be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. 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).

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.