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File: EAC 03 155 50456 Office: VERMONT SERVICE CENTER Date: JAN 27 2008

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:

SELF-REPRESENTED

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, Vermont Service Center denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.¹

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 was incorporated under the laws of the State of Maryland and intends to operate a Dollar Discount retail store. The petitioner claims to be a subsidiary of Silver Vision Ventures, Ltd., located in Lagos, Nigeria. The petitioner seeks to employ the beneficiary as the chief executive officer of its new office in the United States for a three-year period.

The director denied the petition, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity within one year.

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, the petitioner asserts that the director erroneously denied the petition based on “unsupported interpretations” of the franchise concept and displayed a biased and preconceived intent to deny the petition based on the petitioner’s intent to operate a franchised business. The petitioner further asserts that the director failed to consider the petitioner’s potential for growth as outlined in the U.S. company’s business plan, and erroneously concluded that the petitioner would only employ part-time staff. The petitioner contends that the petitioner’s operations will grow sufficiently to support the beneficiary in a primarily managerial or executive capacity. The petitioner submits a brief and additional evidence 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.

¹ The regulation at 8 C.F.R. § 103.2(a)(3) specifies that a petitioner may be represented “by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.” In this case, the person listed on the Form G-28 is not an authorized representative.

- (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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The issue in the present matter is whether, within one year, the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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.

The petition was filed on April 23, 2003. In a letter dated April 18, 2003, the petitioner provided the following description of the beneficiary's proposed employment in the United States:

He has been quite successful in identifying and pursuing the direction in which [the petitioner] should be headed. He has been instrumental in the negotiating and construction of contracts for [the petitioner]. He has been actively involved in all major strategic business decisions for [the petitioner]. Much of [the beneficiary's] time is spent meeting with representatives of various regulatory bodies to ensure that the company is in compliance with the licensing requirements to start and continue operating a retail store in Maryland. [The beneficiary] also spends a considerable amount of time meeting prospects and cultivating business for [the petitioner], a critical ingredient in the retail business. He also analyzes market conditions for increased profitability, works at establishing liaison with the local communities to establish a client base, and develops the personnel (management and supervisory) and policies for the U.S. business. He is constantly in the process of hiring and evaluating prospects for positions at the store. He supervises staff and directs the daily sales and related duties. [The beneficiary] has reviewed the existing credit programs to ensure that risks are

adequately covered. He also is engaged in target market definition, risk acceptance criteria, and detailed financial analysis. He also has market risk management responsibilities and price risk analysis to perform in the normal course of business. He has put a process in place to control exposures and retain appropriate decision-making policies.

The petitioner submitted evidence that it entered into a franchise agreement with Dollar Discount Stores of [REDACTED] effective on March 26, 2003, under which the petitioner would operate one store at a location that had yet to be determined. The petitioner also provided its business plan indicated its intention to open a dollar store "from a single location, as a franchisee selling general merchandise under the name "DOLLAR DISCOUNT." The business plan indicated that the petitioner's store would be located in Prince George's County, Maryland, and would be open seven days per week. The business plan outlined the petitioner's staffing requirements as follows:

The business will be owned and operated by [the beneficiary]. He will be responsible for the development of the business and will serve as the day-to-day manager, initiating and developing operational and personnel policies. He will handle the book-keeping and banking duties for the store. The staff will be comprised of five full-time employees with an average salary of \$5.50-\$8.00 per hour. The employees will be an Assistant Manager, Two cashiers and two handymen.

The director requested additional evidence on May 28, 2003. In part, the director instructed the petitioner as follows:

The nature and scope of the U.S. entity is already known since it is a franchise. There are already many Dollar discount stores in operation. Please submit documentation that describes the Dollar Discount corporation, what a Dollar Discount store is, the nature of the business, the number of employees required to run a store, the average level of business, etc.

Submit evidence to show how your new company in the United States will grow to be of sufficient size to support a managerial or executive position. This evidence should demonstrate that the beneficiary, within one year of operation, will be relieved from performing the non-managerial, day to day operations involved in producing a product or providing a service.

In a response dated August 5, 2003, the petitioner indicated that the U.S. company "as an operation will most likely require four to six employees working part-time a total of 150 hours per week. The average level of business is anticipated to be between \$500,000.00 and \$600,000.00 from the first through the third years." The petitioner further indicated that it anticipates growth from \$500,000 in the first year to \$550,000 the second year and "anticipating more than one franchise in operation [the petitioner] is looking forward to at least two times the volume of work for the executive management of the franchised business." The petitioner submitted a new business plan which essentially outlines the terms of the franchise agreement, including the requirement that a qualified manager be "upon the store premises at all times." The business plan describes the petitioner's proposed personnel structure as follows:

[The beneficiary] will operate the store on a full-time basis. My wife [REDACTED] and my brother [REDACTED] will help out on a part-time basis. In addition I will need: Four to six part-time employees with an average salary of \$5.25 - \$7.00 per hour. These employees will work (in total) approximately 60 -150 hours per week.

The director denied the petition on October 3, 2003, concluding that that the petitioner did not establish that the new office in the United States will employ the beneficiary in a managerial or executive capacity within one year. The director noted that, because the petitioner intended to operate a franchise store with only four to six part-time employees, its potential for growth was limited. The director further explained:

The petitioner has purchased a ready-made store. The size, number of employees needed, sales volume, is known for the most part based upon the previously established franchises. The only way to grow beyond the limits of that one small operation would be to buy another store or a different business. But there is no evidence in the record that the petitioner has the ability or desire to do this, especially within one year. Were the petitioner starting a business from scratch there is really no limit to potential growth.

The director emphasized that the new office must be sufficiently staffed at the end of the first year of operations and generating enough business that the beneficiary would be relieved from performing duties necessary to produce a product or provide a service. The director concluded that at the end of one or more years in business, the beneficiary would be, at most, performing the duties of a first-line supervisor and therefore would not qualify for classification as a manager or executive.

On appeal, the petitioner asserts that the director "misunderstands the concept of the franchise store, or underestimates the ability of the franchisee to expand its services beyond the initial store in a period of one (1) year." The petitioner contends that it previously stated its intention to operate more than one store within a year from the establishment of the initial store, "or enough growth at the initial store to focus the beneficiary's managerial skill in preparing a staff to operate the franchise as he continues the managerial or executive level functions." The petitioner claims that it currently employs "at least four full-time employees" and submits payroll records for the month of September 2003. The petitioner further asserts "it is fallacious to conclude, as the Service does, that the number of employees at Petitioner's store would not increase within one year or over the course of several years. A larger or expanded store will employ more people just as more stores would require more employees."

The petitioner also disputes the director's conclusion that the petitioner is purchasing a "ready-made" store, emphasizing that the petitioner is "starting the business from scratch" and is ultimately responsible for the profitability of its store. The petitioner asserts that its business plan is to "start with one franchise store and expand into the immediate region" and also into Africa.

With respect to the beneficiary's duties, the petitioner contends that "it is rather shortsighted for the Service to conclude that this store will not generate enough income to be sufficient to relieve the beneficiary from non-managerial duties after one year in operation." The petitioner further provides:

Without question thee [sic] is a lot of executive work to be done for the petitioner to reach the goals and ambitions of [the U.S. entity]. Since this is a new office petition, the beneficiary, while supervising his staff on a day to day basis, is also involved in executive-level duties including communication with Dollar Discount store management, negotiating contracts and procuring supplies, . . . making contacts, analyzing business trends and negotiating with financial and business contacts in Nigeria to expand the business horizons

The petitioner concludes that beneficiary will not be merely a first-line supervisor.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year. Preliminarily, however, the AAO concurs that the language used by the director in her request for evidence and in her notice of decision suggests that her conclusions were based, at least in part, on the fact that the petitioner chose to operate a franchised business in the United States. The petitioner's decision to operate a retail store pursuant to a franchise agreement is irrelevant to a determination regarding the beneficiary's employment in a managerial or executive capacity. The director's generalized and conclusory statements regarding franchised businesses are hereby withdrawn.

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.*

In the instant matter, the petitioner has provided only a vague description of the beneficiary's job duties that fails to identify what managerial or executive tasks he will perform on a day-to-day basis once the petitioner's business is operational. For example, the petitioner initially indicated that the beneficiary will "direct daily sales and related duties," engage in "target market definition, risk acceptance criteria, and detailed financial analysis," review and analyze sales data, be responsible for "sales and marketing agreements, and service contracts," "negotiat[e] contracts and procur[e] supplies," "mak[e] contacts," and "negotiat[e] with operatives in America and Africa." The petitioner's initial business plan also indicated that the beneficiary will serve as the store's "day to day manager," responsible for bookkeeping and banking duties. These duties depict an employee involved in purchasing, market research, business analysis, routine financial duties and first-line sales supervision tasks that have not been established as managerial or executive in nature. 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 AAO does not doubt that the beneficiary will have managerial or executive authority over the petitioner's start up operations and would eventually supervise the day-to-day operations of the business once it is operational. However, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World*,

Inc. v. INS, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. In the instant matter, the provided job descriptions suggest that the beneficiary, while responsible for the company's overall performance, will primarily engage in supervising the store's sales staff and performing operational duties inherent in operating a dollar store.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose its business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner's proposed business plan is too general to demonstrate that the U.S. entity would employ a subordinate staff sufficient to relieve the beneficiary from primarily performing non-qualifying operational or first-line supervisory duties associated with operating a retail store within one year. The petitioner has failed to provide a detailed or consistent account of its proposed organizational structure for the first year of operations. On the Form I-129 petition, the petitioner stated that it would employ four individuals. In the initial business plan, the petitioner indicated that it intended to hire five full-time employees, including an assistant manager, two cashiers, and two handymen. In response to the director's request for evidence, the petitioner stated that it would likely require four to six part-time employees working a total of 150 hours per week. The business plan submitted in response to the director's request for evidence indicated that the beneficiary would operate the store on a full-time basis, assisted by his spouse and brother who would "help out" on a part-time basis in an unknown capacity, as well as four to six part-time employees, whose job titles and job duties were not identified, working a total of 60 to 150 hours per week. 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). Without the required information regarding number and type of positions to be filled during the first year of operations and the duties the beneficiary's subordinates will perform, the AAO cannot conclude that the beneficiary will supervise a staff sufficient to relieve him from performing primarily non-qualifying duties associated with operating a retail store. Further, even if the AAO accepted that the petitioner intends to hire five full-time employees as stated in its original business plan, the petitioner only anticipated hiring one assistant manager for a store that will be open for 72 hours per week, thus supporting a conclusion that the beneficiary would have to devote a substantial portion of his time to supervising the store's lower-level employees.

On appeal, the petitioner submits evidence that it is operating with four employees, including the beneficiary, as of September 2003, yet the petitioner still offers no information regarding the position titles and duties of the beneficiary's subordinates, or the company's anticipated organizational structure at the end of its first year of operations. 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)). Regardless, 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).

The AAO acknowledges the petitioner's assertion on appeal that the U.S. entity anticipates operating more than one store or expanding its initial store within the first year of operation, such that it will expand to the point where it will require more employees and require the beneficiary's services in a primarily managerial or executive capacity. The petitioner's statements are not supported by evidence in the record. Rather, the petitioner's business plan indicates that the petitioner anticipated operating one store with very modest increases in sales and salaries during its first three years of operations. It is reasonable to assume that if the petitioner actually anticipated the major expansion referenced on appeal, it would also anticipate expenses related to opening and operating a second store or expanding its existing store, a substantial increase in salaries paid to its employees, and a substantial increase in gross sales. The petitioner's unsupported assertions on appeal are insufficient to establish that the petitioner will grow to the point where it would require the beneficiary's services in a primarily managerial or executive capacity within one year. 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.

Collectively, the beneficiary's vague job description, the petitioner's failure to consistently or comprehensively describe its proposed organizational structure, and the business plans submitted do not demonstrate a realistic expectation that the enterprise will rapidly expand to the point where it would require a manager or executive to perform primarily qualifying duties within one year. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record does not contain evidence that the petitioner had secured sufficient physical premises to house the new office in the United States as required by 8 C.F.R. § 214.2(l)(3)(v)(A), as of the date the petition was filed.

In support of the initial petition, the petitioner submitted a deed and settlement statement, apparently for a residential property purchased by the beneficiary five months before the U.S. company was incorporated, located at [REDACTED] in Bowie, Maryland. Although the petitioner indicated that it is located at this address, the petitioner did not submit evidence that the property was suitable for operating a dollar store. The petitioner's "franchise data sheet" indicated that the location of the petitioner's store had not been determined as of the time the franchise agreement was signed, approximately one month prior to the filing of the petition.

Accordingly, the director requested evidence in the form of photographs of the interior and exterior of all premises secured for the United States entity. In response, the petitioner submitted a lease agreement for a retail store located in a shopping center signed on July 1, 2003, along with photographs of the store. The petitioner did not provide photographs of the Bowie, Maryland property identified on the deed submitted with the initial petition. The record does not contain evidence that the petitioner had located, much less secured, sufficient physical premises to house its new office and commence doing business as of the date the petition was filed on April 23, 2003. 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 additional reason, the petition will be denied.

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).

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.