



U.S. Citizenship
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File: [Redacted]
SRC 04 114 51348

Office: TEXAS SERVICE CENTER

Date: JUN 16 2006

IN RE: Petitioner:
Beneficiary:



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 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 is a corporation organized under the laws of the State of Texas and claims to be engaged in the retail sale of gasoline and food products. The petitioner claims that it is the subsidiary of [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.

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 executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner disputes the director's conclusion and 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(I)(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 (I)(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 managerial 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.

In the initial petition, the petitioner in its March 11, 2004 letter described the beneficiary's job duties as follows:

[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 service 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, discharging, and transferring employees according to work performance and production needs; (iii) leasing equipment and retail service facilities; [iv] negotiating and supervising the drafting of service agreements; [v] overseeing the legal and financial due diligence process and resolving any related issues; [vi] developing trade and consumer market strategies based on guidelines formulated by the shareholders and directors; [vii] preparing and analyzing reports on labor cost and production operations to determine whether operating cost standards are being met; and [viii] developing and implementing plans to ensure [the petitioner]'s profitable operation.

Percentage of time spent on each duty:

<u>Description of Duties</u>	<u>Time Spent %</u>
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 April 12, 2004, the director requested additional evidence. Specifically, the director requested the following: (1) the business hours of the petitioner's U.S. subsidiary; (2) the Employer's Quarterly Federal Tax Reports ending March 2004 for both the petitioner and its U.S. subsidiary; (3) the employee that works the first shift for the petitioner's U.S. subsidiary; (4) the employee that works the second shift for the petitioner's U.S. subsidiary; (5) a copy of the U.S. subsidiary's franchise agreement; (6) information on which employee/officer attended franchise meetings or training classes; (7) a copy of a lease for the petitioner from March 2003 to January 2004; and (8) photographs of the space used by the beneficiary to identify and recruit a management team and staff, to develop trade and consumer market strategies, and to analyze reports.

In response, the petitioner submitted some of the requested information and documentation, along with explanations of why the remaining, requested documentation was unavailable. In addition, in the letter dated July 9, 2004, counsel for the petitioner provided the following, additional job description for the beneficiary:

[The beneficiary] is the primary officer responsible for the creation, implementation and monitoring of marketing operations for the US company. [The beneficiary] formulates all company policies and will execute expansion strategies for [the petitioner]. He also continues to explore further business investments for the foreign company. As [p]resident, [the beneficiary] handles all financial arrangements and oversees our overall financial administration. To accomplish these goals, [the beneficiary] has been given the authority to engage in market analysis, negotiate and enter into contracts on behalf of the company, hire employees, direct their training, dismiss employees, and oversee domestic operations. [The beneficiary] has been granted broad discretion over the day[-]to[-]day operations of [the petitioner].

On November 16, 2004, the director denied the petition. The director determined that the petitioner had not reached the point where it could support a full-time president. As such, the director concluded that the petitioner failed to show that the beneficiary would be primarily employed in an executive capacity.

On appeal, counsel for the petitioner asserts in his brief that, while the petitioner has faced set-backs, it has become a thriving and growing business that is able to support the executive capacity position held by the beneficiary. Counsel also submitted the following additional job description:

The beneficiary, acting as the [p]resident of the [c]orporation, is performing in the exclusive executive capacity.

- He functions at the top level within the organizational hierarchy.
- He manages the organization, supervises and controls the work of store manager.
- He enjoys the sole authority to hire and fire his employees.
- He exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

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.

In the March 11, 2004 letter submitted with the petition, the petitioner claimed that the beneficiary would serve in "an executive position." On appeal, although counsel for the petitioner claims in part that the beneficiary is acting in an "exclusive executive capacity," he claims elsewhere in the same brief that the beneficiary is being employed in a "managerial/executive" capacity and provides a brief job description that paraphrases the statutory and regulatory definition of managerial capacity. As such, it remains unclear whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act or primarily executive duties under section 101(a)(44)(B) of the Act, or whether the petitioner is attempting to offer a new position on appeal.¹ Assuming the petitioner is seeking to qualify the beneficiary under either category, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

On review, whether the petitioner is seeking to qualify the proffered position as managerial or executive, 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 "establish[ing] goals and policies," "developing trade and consumer market strategies," and "developing and implementing plans." The petitioner did not, however, define the goals, policies, or plans to be established and/or implemented, or clarify who actually would implement the trade and consumer market strategies to be developed by the beneficiary. 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)). 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).

¹ It is noted that the claim that the beneficiary would be employed primarily in a managerial capacity is made for the first time on appeal. A petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities after a petition is filed. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of managerial capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "manag[ing] the organization," "supervis[ing] and control[ing] the work of [a] store manager," "enjoy[ing] the sole authority to hire and fire employees," and "exercis[ing] discretion over the day-to-day operations of the activity or function for which the employee has authority." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary as negotiating contracts, providing marketing analysis, leasing equipment and retail service facilities, preparing reports, and implementing plans. Since the beneficiary will actually negotiate the contracts, market the petitioner's product/services, lease equipment and space, prepare reports, and implement plans, he will be performing tasks necessary to provide a service or product, and these duties will not be considered 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).

Moreover, although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the petitioner has any employees. The first quarter 2003 Texas wage statement submitted by the petitioner indicates that it only employed one individual, the beneficiary, in the second and third months of that year. In the request for evidence, the director specifically asks the petitioner to submit its quarterly tax report for the quarter ending March 2004. In response, however, counsel for the petitioner states that "[as] all company operations are pursued through [the petitioner's U.S. subsidiary], all relevant tax records are under the name [of its subsidiary]." An examination of those records, however, reveal that the beneficiary was not being paid by the petitioner's subsidiary. Furthermore, no explanation is given as to why the petitioner completed one quarterly wage report in 2003 but discontinued that practice after that time, or why there is no evidence that the beneficiary was employed by either the petitioner or the beneficiary apart from February and March of 2003.

Irregardless of the lack of evidence concerning the beneficiary's employment and maintenance of status, the petitioner claims that the petitioner conducts its business operations through its U.S. subsidiary and that the beneficiary manages and directs the employees of its subsidiary. Even if the staff of a subsidiary qualified as employees of the petitioner, which they do not, the record still does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. Here, the petitioner asserts that the beneficiary manages the manager of the petitioner's subsidiary, who in turn manages the shift supervisor/back-up cashier, who in turn oversees the work of two cashier/clerks. Based on the quarterly wage statement submitted for the U.S. subsidiary, however, the two cashier/clerks appear to only be employed part-time. Therefore, given (1) the two shifts necessary to cover the operational hours of the U.S. subsidiary, (2) the part-time employment of two of the four employees, and (3) the inability for both the manager and supervisor to cover both shifts for the entire week and have a subordinate employee at all times, the petitioner's claimed organizational chart is not credible and is not supported by the evidence

of record. Therefore, at most, it would appear that the beneficiary would be a first-line supervisor and, as such, will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily supervising a staff of non-professional employees at another company, the beneficiary cannot be deemed to be primarily acting in a managerial capacity for the petitioner.

The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. Whether the petitioner will eventually reach the point where it can support such a position is irrelevant for purposes of the current matter. 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. 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 managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

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. In fact, the petitioner did not submit any evidence of the petitioner's business activities in the United States. Instead, as noted above, the petitioner claimed that all of its business operations were conducted through its U.S. subsidiary. For purposes of proving that the petitioner is doing business in the United State, however, the business activities of a petitioner's subsidiary are irrelevant. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Therefore, the business activities of a separate and distinct company, the U.S. subsidiary, do not establish that the petitioner itself is doing business in the United States.

Even assuming *arguendo* that the business activities of a subsidiary establish that the parent company is also doing business, the petitioner in this matter also failed to submit sufficient evidence that its U.S. subsidiary was doing business for the year prior to the filing of the instant petition. The few months of bank statements and bills for the U.S. subsidiary are insufficient to establish that it had been doing business since March 2003. Moreover, the fact that the U.S. subsidiary was not incorporated until October 2003 makes it a legal impossibility for that entity to have conducted business prior to that date. 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 matter, there is insufficient evidence that the petitioner or its U.S. subsidiary was doing business from March 2003 through March 2004. For this additional reason the petition may not be approved.

Furthermore, the petitioner has also failed to demonstrate that it has a qualifying relationship with the foreign entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner claims that it is the subsidiary of the foreign entity, and in support of this assertion the petitioner submits a copy of its Articles of Organization, which indicate that its sole member is the foreign entity. As general evidence of a petitioner's claimed qualifying relationship, Articles of Organization alone are not sufficient evidence to determine whether a member maintains ownership and control of a corporate entity. The operating agreement, corporate bylaws, buy-sell agreement, and the minutes of relevant corporate meetings and, if applicable, stocks, the corporate stock certificate ledger, and stock certificate registry must also be examined to determine current ownership and 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.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Also beyond the decision of the director, the petitioner has failed to establish that it has secured sufficient physical premises to house its business. While the petitioner's U.S. subsidiary appears to have met this requirement, according to the letter dated July 9, 2004, the petitioner itself is still operating out of the beneficiary's home. The record further reflects that the petitioner is still exploring lease options but that it uses one dedicated room in his home to operate the business in the meantime. In this situation, the petitioner must at a minimum also establish that the residential zoning laws governing the residence permit the home business and its related business activities. Moreover, the petitioner has not described its anticipated space requirements for its claimed retail business, and the lease in question does not specify the amount or type of space secured. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the petitioner's office. For this additional reason, the petition may not be approved.

Finally, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement, misrepresented that it had complied, or the director committed gross error in approving the initial, new office petition without evidence of the petitioner's physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

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. 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 at 1043.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.

FURTHER ORDERED: The director shall review the prior L-1 nonimmigrant petition approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(1)(9).