



U.S. Citizenship
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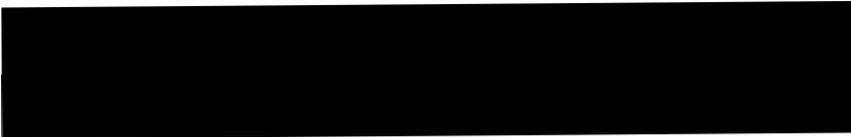
FILE: SRC 05 062 50194 Office: TEXAS SERVICE CENTER Date: **OCT 17 2006**

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)

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, a Texas corporation, claims to be a subsidiary of [REDACTED] located in Karachi, Pakistan. The petitioner states that the United States entity is engaged in the provision of service and support to energy and mineral exploration and extraction companies. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager for three years. 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 in order to continue to fill the position of president and CEO.

On May 23, 2005, the acting director denied the petition concluding that the record contains insufficient evidence to demonstrate: (1) that the United States company is doing business; or (2) that the beneficiary will be employed in a primarily managerial or executive capacity.

On June 21, 2005, the petitioner's counsel timely submitted the instant appeal. On appeal, counsel for the petitioner asserts that the beneficiary was previously granted L-1 classification to open a new office and that the petitioner is not required to establish that the beneficiary will be employed in a managerial or executive capacity pursuant to the regulations at 8 C.F.R. § 214.2(l)(14)(ii). Specifically, counsel for the petitioner states that "there is no additional showing of managerial or executive capacity required under the regulations." In addition, counsel for the petitioner asserts that the petitioner provided sufficient evidence to demonstrate that the beneficiary is responsible for acting in a managerial capacity for Adeptmax corporation, a new subsidiary of the petitioner. In addition, counsel for the petitioner asserts that sufficient evidence was provided to demonstrate that the U.S entity is doing business. Counsel submits a brief in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether the United States entity is doing business as defined in the regulations.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The nonimmigrant petition was filed on December 30, 2004. In support of its initial claim that the United States entity has been doing business, the petitioner stated on Form I-129 that its gross annual income was a "\$10,000 initial investment." The petitioner submitted a deposit receipt for \$10,000 and stated that the money was contributed by the parent company as an initial investment. The petitioner did not submit any current evidence of the financial status of the U.S. company, nor any other evidence that the U.S. company had commenced business operations.

On February 4, 2005, the director issued a notice of intent to deny the petition. The director requested that the petitioner submit evidence of the business conducted by the United States entity during the past year such as sales contracts, sales invoices and receipts. In addition, the director requested evidence of the current staffing level of the U.S. entity, including the position titles and duties of all employees, and educational qualifications of any professional employees. Finally, the director requested information as to whom provides the services offered by the United States company. Specifically, the director requested copies of the company's Form 1120, Corporate Federal Income Tax Return, for 2004 and Form 941, Employer's Quarterly Federal Tax Return, for 2004.

In the petitioner's response, dated March 4, 2005, the petitioner submitted one contract agreement between the U.S. entity and a U.S. based company dated March 20, 2004 for "catering services" at a camp in Pakistan. In addition, counsel for the petitioner asserted that the petitioner assumed majority ownership and control of another U.S. company, Adeptmax Corporation ("Adeptmax"), which is doing business as the petitioner's subsidiary. In support of this claim, the petitioner submitted: (1) the Delaware articles of incorporation for Adeptmax, dated September 12, 2002; (2) a Texas application for certificate of authority, which indicates that Adeptmax is authorized to issue 50,000 shares with \$1.00 par value, and had issued 1,000 shares as of September 27, 2002; (3) minutes of the meeting of the board of directors dated September 30, 2004, in which the board approved the sale of 5,000 shares of stock to the petitioning company; (4) a stock sales agreement indicating that the petitioning company purchased 5,000 shares of Adeptmax, representing 50% of the issued and outstanding stock, in exchange for \$50,000, on October 1, 2004; (5) a Bank of America on-line transaction detail for an unidentified checking account, showing a \$50,000 deposit on October 14, 2004; and (6) stock certificate number eight for Adeptmax,, which indicates that 5,000 shares of stock were issued to the petitioning company on October 1, 2004. The stock certificate indicates on its face that the company is authorized to issue one million shares with par value of \$0.10 per share. The petitioner also submitted Bank of America bank statements for Adeptmax, including its statement for October 2004.

The petitioner also submitted the following documentation regarding Adeptmax: bank statements, an office lease agreement, a list of employees with their titles, salaries and resumes; the company's 2003 IRS

Form 1120, U.S. Corporation Income Tax Return; and evidence of wages paid to employees in 2003 and 2004.

On review, the evidence submitted is insufficient to establish that the U.S. entity has been or is engaged in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. The petitioner failed to submit the evidence requested by the director to establish that the U.S. company has been doing business such as sales contracts, sales invoices, and/or receipts. The petitioner was given ample opportunity to produce the required initial evidence and other business records to substantiate its claim of doing business as a viable entity in the United States. The petitioner submitted several documents evidencing that Adeptmax Corporation was doing business in the United States but the petitioner did not submit any evidence to demonstrate that the petitioner has control and ownership of this company. 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)). The non-existence or unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Furthermore, the petitioner indicated that the U.S. entity commenced operations in February 2004, prior to acquiring the claimed control of Adeptmax Corporation. The petitioner provided documentation of one contract negotiated by the U.S. entity on behalf of the parent company in March 2004 but has failed to provide any additional documentation of the U.S. company's business activities, and in fact claimed no income on Form I-129. Thus, the petitioner has not provided sufficient evidence of the U.S. entity doing business in the United States for the previous year. Although the petitioner claims to be doing business through a majority-owned subsidiary acquired in October 2004, the petitioner is required to demonstrate that the U.S. company has been doing business for the previous year. *See* 8 C.F.R. 214.2(l)(14)(ii)(B). As discussed above, the petitioner has not provided evidence that the U.S. company has been doing business at any point during the previous year. Furthermore, the evidence submitted does not support the petitioner's claim that Adeptmax is a majority-owned subsidiary of the petitioning company, or that the petitioner actually manages this company. The only documentary evidence which suggests the percentage of stock owned by the petitioner is the above-referenced stock purchase agreement, which indicates that the 5,000 shares purchased by the petitioner represent 50 percent of the issued shares. This document contradicts the petitioner's claim that it owns a majority interest in Adeptmax, and the record is devoid of evidence that Adeptmax relinquished control of the company to the petitioning company. Furthermore, the record contains conflicting information regarding the number of shares Adeptmax is authorized to issue, and the petitioner failed to submit copies of stock certificates number one through seven for Adeptmax, the company's stock transfer ledger, or credible evidence that the petitioner paid for its claimed interest in Adeptmax. 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).

The regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. 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. Accordingly, the appeal will be dismissed.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means 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), provides:

The term “executive capacity” means 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 nonimmigrant petition was filed on December 16, 2004. The Form I-129 indicates that the beneficiary will continue to be employed in the position of president and CEO. The petitioner stated the beneficiary’s

proposed duties in the United States are: “establish and manage new business enterprises and oversee US operations to expand company offerings to US clients.”

On February 4, 2005, the director requested a definitive statement describing the beneficiary’s employment including a list of all duties, the percentage of time spent on each duty and the beneficiary’s position within the organizational structure.

In the response letter dated March 4, 2005, counsel for the petitioner describes the duties the beneficiary performed in the past year and the duties the beneficiary will continue to perform as the following:

In that capacity he [the beneficiary] is responsible for facilitating transactions with US companies seeking to work in Pakistan doing major resource extraction or exploration projects....

Another function of the position is to look for and manage business diversification and expansion opportunities for the company inside the US.

Over the past several months that the company has been operational, [the beneficiary] has been successful in these early corporate goals. Early on, he spent 90% of his time facilitating the relationship between the parent company and DFS Logistics referred to above, while spending 10% of his time looking for expansion opportunities. Once the deal was done, those numbers reversed.

He located and negotiated the purchase of Adeptmax Corporation for the company in October, 2004. Since that time, 80% of his time has been spent working as the chief executive for the new company. In that capacity, he is responsible to [sic] planning, developing and establishing the policies, goals and objectives of the new subsidiary, as he does with the Petitioner. He works with other management to develop strategies for attaining corporate goal and to coordinate the efforts of the departments.

Within the company, there are the Software Development and Business Operations department. These employees handle the day-to-day operations, management and execution of corporate goals and objectives. [The beneficiary] is responsible for exercising his discretion over the day-to-day operations, and has the ultimate authority to hire and fire employees. He also recommends personnel actions. He receives minimal guidance from the parent company, the executives of which may be considered his only superiors.

The director denied the petition on May 23, 2005 determining that the petitioner had not submitted sufficient evidence to establish that the beneficiary will be employed primarily in a managerial or executive capacity. The director went on to state that in light of the organization’s configuration, it was apparent that the beneficiary would be functioning in both managerial duties and day-to-day non-managerial duties.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. 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 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 prove 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 beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. The beneficiary's job description includes vague duties such as the beneficiary will "look for and manage business diversification and expansion opportunities for the company inside the U.S.," "work as chief executive officer for the new company," and is responsible for "planning, developing and establishing the policies, goals and objectives of the new subsidiary, as he does with the petitioner." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

Furthermore, the director specifically requested that the petitioner provide a detailed job description, including the beneficiary's specific duties and the percentage of time the beneficiary would allocate to each duty. The petitioner did not submit the requested job description as requested by the director. Instead, counsel for the petitioner submitted a very vague description and indicated that "[the beneficiary] will have to focus more of his time to its general management. So, the focus of his attention will be 90% on the operations of the new subsidiary, while 10% will continue to be spent seeking out and facilitating the execution of new contract for the parent company and seeking out new business expansion and diversification opportunities." The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). Furthermore, 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). In the original petition, the petitioner did not indicate that the U.S. entity had acquired Adeptmax Corporation, and that the beneficiary will be managing the operations of the new subsidiary. However, in the petitioner's response to the director's request for evidence, the petitioner for the first time presents all the evidence regarding Adeptmax Corporation and indicates that the beneficiary is managing the operations of that company rather than the petitioning company. When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts

in the record. The information provided by the petitioner in its response to the director did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the original petition.

The statutory definitions of executive and managerial capacity refer to an assignment within an organization in which the employee either manages the organization or directs the management of the organization. Section 101(a)(28) of the Act defines "organization" as follows: "The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, which or not incorporated, permanent or temporarily associated together with joint action on any subject or subjects." The statutory definition of an organization would not ordinarily include a partially owned corporation that is an entity separate and distinct from the petitioning organization. However, the petitioner may provide evidence to establish that the petitioner and the petitioner's partially owned entity are either permanently or temporarily associated through controlling ownership, contract, or other legal means. Accordingly, a beneficiary's claimed managerial or executive duties that relate to a partially owned entity may be considered in certain instances. In the instant matter, the petitioner did not submit sufficient evidence to establish that the petitioner owns a controlling interest in Adeptmax. 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. Since the petitioner has not established that the petitioner has control over Adeptmax Corporation, the AAO must view the beneficiary's managerial or executive capacity with the petitioning company, S. Zia ul Haq & Sons, Inc. rather than with Adeptmax Corporation.

As the United States company has only employed the beneficiary, it is reasonable to assume, and has not been proven otherwise, that the beneficiary is performing all sales, acquisition and marketing functions and financial development, and all of the various operational tasks inherent in operating a company on a daily basis, such as acquiring new businesses, negotiating contracts, paying bills, and performing marketing functions. 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. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Since the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity, the appeal will be dismissed.

The petitioner will be denied and the appeal dismissed 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.