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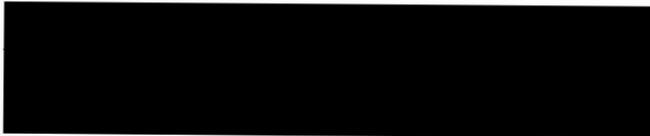


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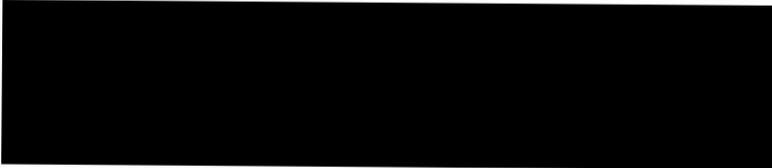
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IN RE: Petitioner:  
Beneficiary:



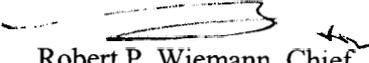
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 director denied a subsequent motion to reopen and/or reconsider and upheld the original decision. 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 chief executive officer 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 in the State of Florida that claims to be engaged in the sale of foods, foodstuffs, and supplies. It claims that it is the affiliate of [REDACTED] located in Nairobi, Kenya. 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 director upheld and affirmed her decision on motion.

The petitioner subsequently filed an appeal of the director's denial of the motion. The director declined to treat the appeal as another motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred by finding that the beneficiary did not qualify for an extension of the petition, and asserts that the petitioner did in fact establish that the regulatory requirements had been met prior to adjudication. In support of this assertion, counsel for the petitioner 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)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a 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.

With the petition, former counsel for the petitioner submitted a letter of support dated May 29, 2003. The letter explained that on June 11, 2002, the petitioner had been granted L-1 status to open a new office in the United States. Due to difficulties obtaining a visa, the beneficiary did not arrive in the United States until March 9, 2003. The petitioner indicated that during the short period of time from his arrival to the filing of the extension request, the beneficiary had negotiated the acquisition of a convenience store, identified as Star Food Store, on behalf of the petitioner. Specifically, the record indicated that the petitioner had acquired the store operations from [REDACTED]. The petitioner indicated that this retail convenience store currently employed two full-time persons who were overseen by the beneficiary, and that these employees were officers of [REDACTED] and had previously been operating the business themselves. An additional letter of support, also dated May 29, 2003, was submitted on behalf of the petitioner by the beneficiary in his capacity of president. Neither this letter nor the letter from counsel identified the daily duties of the beneficiary while in the United States.

On June 28, 2003, the director requested additional evidence. Specifically, the director requested more specific information with regard to the duties of the beneficiary and the percentage of time he devoted to each duty, as well as a statement outlining the staffing of the organization. The director also requested a similar overview of the duties of all other employees and/or contractors along with their titles and rank within the petitioner's organization.

In response, the petitioner's former counsel submitted a letter dated September 9, 2003. Counsel explained that the petitioner currently employed three persons on a full-time basis, namely:



Store Manager  
Assistant Manager  
Store Employee

In support of its claim of employment of these persons, the petitioner submitted copies of their Employment Eligibility Verification forms (Form I-9).

With regard to the beneficiary, counsel stated that the beneficiary does supervise the three full-time employees listed above, and further stated:

100% of [the beneficiary's] time is spent on discretionary, managerial, executive duties on a day-to-day basis

He does not work in the store.

The store is open 7 days a week from 8:00 a.m. to 10:00 p.m.

[The beneficiary] intends to hire one more employee to keep the staff in current.

Currently [the beneficiary] is responsible for looking for more stores for investment and therefore has no time to spend on the day-to-day management or operations of [the petitioner's] store known as Star Food Store in Titusville, Florida.

On October 2, 2003, the director denied the petition.<sup>1</sup> The director determined that the beneficiary had not acted in a primarily managerial or executive capacity during the previous year, and that the petitioner had not yet reached the point where it could support the beneficiary in such a capacity.

On appeal, newly-retained counsel for the petitioner submits additional evidence in support of the beneficiary's qualifications, and further submits copies of quarterly tax returns evidencing wages paid to the petitioner's employees. Counsel emphasizes the delays in the beneficiary arriving in the United States and asserts that he did the best he could during that short period of time in status. Counsel asserts that based on the totality of the evidence the beneficiary has met the requirements for an extension of the petition.

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 this matter, the petitioner has failed to provide an acceptable description of the beneficiary's proposed duties. Instead, it merely provided a vague overview of the general nature of his duties. As the initial

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<sup>1</sup> While the date of the decision is October 2, 2003, it is noted that the decision was not mailed until October 20, 2003.

submission was insufficient to warrant approval, the director requested more information, including a more specific description of the beneficiary's duties. Although the petitioner responded to this request, it merely provided one-to-two sentences describing the general nature of the beneficiary's role in the petitioner's enterprise. Despite the director's specific request for the petitioner to provide a detailed discussion of the beneficiary's role in the United States, as well as the percentages of time he devotes to each of his duties, the petitioner failed to thoroughly respond to the director's request. As such, the record contains little information with regard to the exact nature of the beneficiary's duties.

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 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). In response to the director's request, former counsel for the petitioner stated simply that the beneficiary's time is spent on discretionary, managerial and executive duties. 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. *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 this matter, despite the director's specific request for detailed information, the petitioner failed to adhere to this request. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). In this matter, the petitioner's failure to thoroughly address the director's specific requests have rendered it impossible to conclude that the beneficiary is functioning in a primarily managerial or executive capacity.

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). The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner indicates that it recently hired three employees to work in the newly-acquired store, and that it intends to hire a fourth employee in the near future. However, no evidence of wages paid to the persons has been submitted. To establish that the petitioner has staffed the new operation in the previous year, the petitioner must submit a description of staffing, including the number of employees and the types of positions, as well as evidence of the wages paid to the employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). Any Citizenship and Immigration Services (CIS) Forms I-9 presented by a petitioner must be accompanied by other evidence to show that these employees have commenced work activities. Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. See *Matter of Ho*, 22 I&N Dec. 206, 212 (Assoc. Comm. 1998). In the absence of such evidence as pay stubs and payroll records, the petitioner has not established that the petitioner employs a subordinate staff that would relieve the beneficiary from performing non-qualifying duties.

Although counsel submits copies of the petitioner's quarterly tax returns on appeal, which demonstrate that these employees were in fact paid wages for the quarters ending September 2003 and thereafter, there is no evidence that shows that these persons received wages or salaries from the petitioner in May and/or June 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. *Id.* 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 addition, it should be noted that even if the evidence established that these employees were in fact employed full-time at the time the instant petition was filed, their employment alone is insufficient to establish that the beneficiary was employed in a primarily managerial or executive capacity. The petitioner indicates that its store is open from 8:00 a.m. to 10:00 p.m. seven days a week, and that the beneficiary does not work in the store but merely supervises its personnel. It would appear, therefore, that the three recently-hired employees would be responsible for the day-to-day operational tasks necessary to keep the business active. 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.

Though requested by the director, the petitioner did not provide the duties and qualifications of the newly-hired employees. Any 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). Thus, the petitioner 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. Despite the fact that two employees possess managerial titles, their scope and nature of their duties has not been defined, making it impossible to conclude that they oversee subordinates. 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.

As discussed above, this issue is moot since these employees were not on the petitioner's payroll at the time of filing. However, even if they had been actively employed by the petitioner when the instant petition was filed, the record was devoid of evidence to establish that these subordinates allowed the beneficiary to function in a capacity that was primarily managerial or executive. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position as required by 8 C.F.R. § 214.2(l)(3). 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 evidence that it acquired the Star Food convenience store on or about May 15, 2003. However, the petition

was approved on June 11, 2002, over eleven months prior to this acquisition. The record contains no other evidence of the petitioner's activities during this period. Although the beneficiary did not enter the United States until March of 2003, the fact remains that 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. As stated above, at the time the petitioner seeks an extension of the new office petition, the regulation 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. The term "doing business" is defined in the regulations as "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." 8 C.F.R. § 214.2(l)(1)(ii). Again, 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 case, there is no evidence that the petitioner was doing business from June 11, 2002 to May 15, 2003. It is evident, therefore, that the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this additional reason the petition may not be approved.

In addition, the record reflects inconsistencies in the evidence pertaining to the physical premises designated for its business. The petitioner's letter, dated May 29, 2003, indicates that the beneficiary negotiated the acquisition of the [REDACTED], located [REDACTED] in May of 2003 after his arrival in the United States. Therefore, it appears that the U.S. entity did not secure sufficient physical premises until after the approval of the original new office petition. 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 they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises. More important, however, is the inconsistent evidence in the record regarding the business address stated above.

The petitioner's articles of incorporation, filed on August 29, 2001, indicate that its principal office was located at [REDACTED]. However, the evidence in the record indicates that this address actually belonged to [REDACTED] the corporation that sold the Stars Food market to the petitioner in May of 2003. The corporate tax returns for [REDACTED] or the years 2001 and 2002, submitted by the petitioner in support of the gross sales of the Stars Food market, indicate that the company operated at this address during this period. Additionally, in the contract of sale dated May 15, 2003, the petitioner's address is listed as [REDACTED]. No explanation regarding the discrepancies in the addresses has been submitted. 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).

Furthermore, Florida state records indicate that the petitioner was reinstated on March 24, 2003, approximately two weeks after the beneficiary entered the United States. Since the regulation at 8 C.F.R. § 214.2(l)(3)(i) requires evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations, this raises the question of whether the petitioner was actually a qualifying

legal entity at the time the initial petition was filed. As stated above, either the petitioner did not comply with these requirements, misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises or evidence that it met the definition of a qualifying organization. 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).

Finally, the petitioner indicates that the beneficiary is the majority shareholder of both companies. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

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).

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.

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.

**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(l)(9).