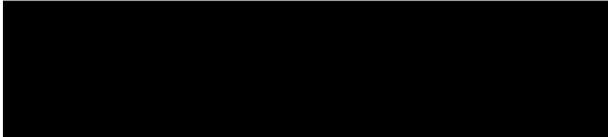




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File: EAC 03 262 50710 Office: VERMONT SERVICE CENTER Date: **AUG 03 2007**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 visa petition seeking to extend the employment of its 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 New York and allegedly operates a gas station and retail store.¹ 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 (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the petitioner still has a qualifying relationship with the foreign entity because it has not been established that the foreign entity is doing business.

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 erred, that the beneficiary's duties are primarily those of an executive or manager, and that the foreign entity is doing business abroad. The petitioner submits a brief and additional evidence, including documents concerning alleged business activity abroad.

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.

¹It is noted that the record indicates that the petitioner, [REDACTED], has frequently used the trade name [REDACTED] in the operation of its business. Given that Ibrahim is a variation of [REDACTED] and that other identifying information, such as the petitioner's address, is consistent throughout the record, the AAO will consider the evidence presented by the petitioner using the trade name "[REDACTED]" as referring to [REDACTED] in the instant petition.

- (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 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.

The petitioner does not clarify in the initial petition whether the beneficiary will 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. The petitioner may not claim that the beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed either as a manager *or* an executive and will consider both classifications.

The record indicates that the petitioner is in the business of operating a single location gasoline service station and retail store. The petitioner described the beneficiary's job duties in a letter dated September 5, 2003 appended to the petition as follows:

1. Establish company policies in collaboration with president and parent company executives.
2. Implement the organization's policies on a day-to-day basis.
3. Oversee and monitor operations.
4. Meet with customers and contractors.
5. Negotiate and sign company contracts.
6. Attend high level meetings and set goals.
7. Coordinate and direct other professionals, manage budgets and contracts, and ensure that organization's objectives are met.
8. Implement procedures to improve productivity and customer service.
9. Planning, directing, and coordinating the operations of company.

10. Hiring and firing of employees.
11. Coordinate efforts to put measures into place and monitor the company's performance against targets.
12. Formulate policy guidance on a range of company issues.

On December 12, 2003, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's job responsibilities; federal and state payroll reports; job descriptions for the petitioner's other employees; and an explanation of the petitioner's management and personnel structure.

In response, the petitioner submitted a letter dated January 7, 2004 which further describes the beneficiary's job responsibilities as follows:

The beneficiary serves an essential function and provides a major link between the parent company and the subsidiary. [The beneficiary], in collaboration with the president, manages the subsidiary and ensure[s] that company's goals are met. He is also involved in identifying potential brand name partners and acquiring more stations. [The beneficiary] provides guidance in formulating expansion plans on behalf of the parent company.

The petitioner also submitted wage reports indicating that, in the quarter in which the instant petition was filed, the petitioner employed five people including the beneficiary. The "president" of the petitioner is not identified in the wage reports as being an employee.

Finally, the petitioner submitted an organizational chart and job descriptions for the other employees. The organizational chart shows the beneficiary reporting to the president and supervising a sales manager, an office clerk, and a bookkeeper. The sales manager is, in turn, portrayed as supervising a sales associate. The petitioner described the sales manager as follows:

Evaluate and recommend suppliers. Assist in sales contract negotiations, [d]etermine inventory requirements and prepare sales forecasts.

The office clerk, bookkeeper, and sales associate/cashier are described as performing tasks necessary to produce a product or provide a service, e.g., bookkeeping, processing invoices, sales, and clerical tasks.

On June 23, 2004, the director denied the petition. The director concluded, *inter alia*, that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager.

Upon review, the petitioner's assertions are not persuasive.

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business

does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will establish policies; oversee, plan, direct, and coordinate operations; set goals; and will formulate expansion plans. However, the petitioner does not define what policies and goals will be established and set; what expansion plans will be formulated; or what, exactly, the beneficiary will do in directing the petitioner's operations. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary will actually perform managerial duties. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, many of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will meet with customers and contractors and negotiate contracts. However, such duties constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the organizational chart, wage reports, and job descriptions for the subordinate employees fail to identify any employees who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to these duties, it must be concluded that he will perform these tasks. As the petitioner has not established how much time the beneficiary will devote to such non-qualifying tasks, it cannot be confirmed that he will "primarily" be employed as a manager. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and job descriptions for the subordinate employees, the beneficiary appears to manage a staff of four employees who are engaged in operating the petitioner's business, i.e., a gasoline station and retail store. While the petitioner has given the subordinate employees

lofty titles and has implied in the organizational chart that the "sales manager" has a supervisory or managerial function, the petitioner has not established that these employees are primarily engaged in performing supervisory or managerial duties. To the contrary, the subordinate employees appear to be engaged in performing tasks related to providing a service or producing a product, e.g., sales, clerical tasks, cashier duties, and bookkeeping. Inflated job titles and artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support a managerial position. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner did not establish the skill level or educational background required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.² Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

²In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

³While the petitioner has not clearly argued that the beneficiary manages an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line manager of non-professional employees and/or will be engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will be primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, the beneficiary will be primarily employed as a first-line supervisor and/or is performing tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

It is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

The second issue in this matter is whether the petitioner has established that it still has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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" and "is or will be doing business." "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services."

As the petitioner failed to submit any evidence that the foreign employer is actively engaged in doing business with the initial petition, the director requested this evidence on December 12, 2003. In response, the petitioner submitted three documents referring generally to [REDACTED]. The first document appears to be a

Pakistani tax document referring to [REDACTED] and/or the foreign entity for the tax year ending on June 30, 2003. The second and third documents appear to be Pakistani electrical and telephone bills respectively. The instant petition was filed on September 26, 2003.

On June 23, 2004, the director denied the petition concluding that the petitioner failed to establish that the foreign entity is continuing to do business on a regular, systematic, and continuous basis.

On appeal, the petitioner attempts to supplement the record with additional evidence regarding the foreign entity's business activities.

Upon review, the petitioner's assertions are not persuasive.

As a threshold matter, the petitioner's attempt to supplement the record on appeal with documents regarding the business activities of the foreign entity was inappropriate. 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. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In this matter, the petitioner has failed to establish that the foreign entity was "doing business" at the time the petition was filed. The record is devoid of any evidence that the foreign entity was engaged in the regular, systematic, and continuous provision of goods and/or services in September 2003. The documents submitted predate the filing of the petition by several months. Moreover, the tax document and utility bills do not establish that the foreign entity was doing business in a regular, systematic, and continuous manner at any time in 2003. Absent further explanation or evidence regarding the significance of these documents, the tax document and two utility bills are simply not probative of the foreign entity's business activity.

Accordingly, the petitioner has not established that it and the foreign entity are still qualifying organizations because it has not been established that the foreign entity is "doing business." For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner failed to establish that it has been "doing business" for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). "Doing business" is defined in pertinent part as the "regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H). In this matter, the record does not establish that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services for the one-year period subsequent to the approval of the original new office petition. The record indicates that the original new office petition was approved on October 2, 2002. However, the record does not contain any evidence that the petitioner commenced doing business at that time. The record contains only a single invoice from 2002. Therefore, the record is not persuasive in establishing that the petitioner had been doing business for the previous year. To the contrary, it appears that the petitioner had been doing business for no more than the first nine months of 2003. Accordingly, the petition may not be approved for this additional reason.

