

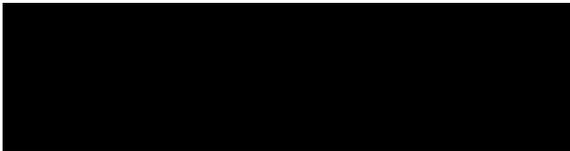
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**U.S. Citizenship
and Immigration
Services**

D7



File: SRC 04 029 52388 Office: TEXAS SERVICE CENTER Date: JUL 12 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)

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.


4 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 seeks to extend the temporary employment of the beneficiary as its manager in the United States 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 U.S. petitioner, a corporation organized in the State of Texas, claims to be engaged in retail sales, and states that it is the affiliate of Noorani Bakers Milk & General Store, located in Karachi, Pakistan. 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: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the petitioner was doing business as required by the regulations.

On appeal, counsel for the petitioner asserts that the director did not give proper weight to the evidence submitted. In support of this contention, counsel submits a brief and additional evidence.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) 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 (1)(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 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 nonimmigrant petition was filed on November 7, 2003. In a letter from the petitioner dated October 31, 2003, the following overview of the beneficiary's duties as president of the United States entity was provided:

- The beneficiary [] is appointed the President of the Corporation. As the president he is required to perform, execute and manage all the business, managerial and executive activities and functions of the organization.
- [The beneficiary] has full discretion to make all entrepreneurial and business decisions for the corporation.
- [The beneficiary] will establish the goals and policies of the corporation.
- [The beneficiary] is responsible for the survival, growth, profitability and expansion of the business.
- [The beneficiary] is required to review the economic and market trends. Evaluate the most feasible and secured investment and business opportunities. Decide either to buy an existing business or establish a new one. Make proposals and negotiate the cost and terms of acquisitions of business and/or lease/sub-lease of the business properties. Finalize the deals, review legal documents and perform the terms and legal aspects of acquisition and/or new business. [The beneficiary] has already performed these duties and is in the process of establishing the business for the Petitioner.
- [The beneficiary] is the highest management authority in the organization, and will enjoy wide latitude in the discretionary decision-making. [The beneficiary] will receive no supervision in performance of his activities.
- [The beneficiary] has the authority to hire and fire other employees and managerial staff of the Corporation. [The beneficiary] is also responsible to set their goals and manage, supervise, control and appraise the work, performance and schedule of all other managers and employees. [The beneficiary] has the authority to offer incentives to the employees.
- [The beneficiary] shall evaluate the different business strategies and make the marketing, sales and promotional decisions for the business of the Corporation.
- [The beneficiary] shall also oversee the inventory requirement, review new products and product-lines, seek the suppliers and negotiate with them, agree on prices, terms and quantities of the purchases of the corporation. [The beneficiary] shall establish the pricing policy.
- [The beneficiary] will perform all situational and incidental activities, which are required to be performed in the due course of business.

The minimal evidence provided with the petition prompted the director to issue a request for additional evidence on January 13, 2004. In this request, the director observed that based on the evidence submitted, it

was not clear what the beneficiary had actually been doing during the initial start-up phase of the U.S. business. The director requested copies of the petitioner's quarterly tax returns for the last three quarters, in addition to evidence demonstrating the nature of the petitioner's business during the previous year.

Counsel for the petitioner submitted a response dated April 12, 2004. The response included the petitioner's quarterly tax return for the fourth quarter of 2003, indicating that the beneficiary, as the petitioner's sole employee, earned \$24,000 in wages during that period. Also included in the response was a document entitled "Start up Activities Log," dated April 10, 2004, which outlined various activities of the petitioner for the previous year, culminating in the lease of a retail dollar store business approximately one year after the beneficiary was granted L-1A status.

On June 10, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would be relieved from performing the day-to-day operations of the business as its sole employee.

On appeal, counsel for the petitioner attempts to refute the director's basis for the denial by contending that the director's decision was erroneous, and in support thereof, counsel restates the beneficiary's tasks and asserts that he was the sole authority overseeing the petitioner, and therefore qualified as a manager or executive under the regulatory definitions.

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 definitions of executive and managerial capacity have two specific requirements. 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 description of duties provided, both in the initial letter of support and in response to the request for evidence, simply adopt many of the key phrases used in the regulatory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. General statements such as "directing the entire operation of the organization," "establishing goals and policies of the organization," and "exercising sole discretionary decision making" do little to clarify the exact nature of the beneficiary's 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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. at 1108.

Based on this vague description of duties, the director found that the beneficiary must be performing many of the day-to-day operations of the business. Counsel, however, claims that this finding is erroneous and not supported by specific evidence in the decision. Upon review, however, the AAO concurs with the director's finding regarding this issue. In addition to the vague duties presented in the record, the list of duties also includes such tasks as "seek the suppliers and negotiate with them" and "oversee the inventory requirement." These tasks are not traditionally considered to be managerial or executive in nature, and are commonly designated to sales, marketing or purchasing personnel.

Most importantly, however, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). While the beneficiary, as the petitioner's owner and president, undoubtedly performs the high level responsibilities outlined in the definitions, the record is insufficient to establish that these are his *primary* duties. The petitioner's business is allegedly a dollar store, and although the petitioner claims that it employs another person in addition to the beneficiary, the quarterly tax return for the fourth quarter of 2003 indicates that the beneficiary was the petitioner's sole employee at that time. No additional documentary evidence showing wages paid to a second person has been submitted, thereby diminishing the petitioner's claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Regardless, according to the terms of the submitted lease agreement for the petitioner's store, the petitioner is required to be open for business 16 hours per day, seven days per week. The petitioner has not established that a single additional employee would relieve the beneficiary from primarily operating the store.

Furthermore, counsel asserts in the response to the request for evidence that a large amount of the beneficiary's time during the previous year was devoted to finding a new business to acquire. This statement raises questions with regard to the exact nature of the beneficiary's day-to-day duties. In fact, the record indicates that the petitioner's business, Memona's 99 Cent + Gift Store, did not become active until the week prior to the expiration of the initial petition. The record further indicates, by way of the lease signed on October 31, 2003, that sufficient physical premises were not acquired at the time of the initial approval.¹ Therefore, the legitimacy of the petitioner's claims regarding the duties of the beneficiary during this period are subject to further scrutiny, since the employment situation during the first year of operations was not focused on operation of a retail venture. The statements presented by counsel, both in response to the request for evidence and again on appeal, suggest that the beneficiary was actually engaged in entrepreneurial

¹ The record reflects that the U.S. entity did not secure any lease until October 31, 2003, one week prior to the expiration of the original new office petition. 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 sufficient physical premises. *See* 8 C.F.R. § 214.2(1)(3)(v). 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(1)(9)(iii).

activities, and not primarily in managerial or executive activities as defined by the regulations, during the first year of operations.

Based on the record of proceeding, and absent evidence to the contrary, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. The record as presently constituted, therefore, is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C), however, 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. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" 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."

In this matter, the record shows and the petitioner admits that it had no business to run until it completed the acquisition of a store late into the first year of the petition's validity. On appeal, however, counsel asserts that a difficult economy precluded the immediate purchase of a business by the beneficiary upon arrival in the United States.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. The record indicates that the beneficiary was granted a one-year period of stay from November 7, 2002 to November 6, 2003 to open a new office. The record further indicates that the petitioner would engage in retail sales. However, there is no indication of any business activities whatsoever until October 31, 2003, when the petitioner entered into a commercial lease to house its 99 cent store. Counsel argues that while the beneficiary attempts to acquire various businesses during this initial period were unsuccessful, these activities do not constitute doing business as defined by the regulations. The beneficiary, instead, was engaged in entrepreneurial activities that normally would have resulted in securing a business venture prior to the approval of the initial new office petition.

It is clear that the petitioner was not doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claim that business was slow to start due to a difficult economy. However, the fact that the petitioner did not commence operations until one week prior to the expiration of the validity period does not excuse the petitioner from meeting the regulatory requirements. 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 a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted at the time of filing confirmed that the petitioner had not been conducting business as required. The fact that the petitioner has

since opened a 99 cent store and began consistently improving its sales after the expiration of the beneficiary's initial stay does not entitle the petitioner to an extension of the visa, for it fails to change the fact that the petitioner failed to conduct business during the previous year. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner indicates that the beneficiary is the sole owner of both the U.S. and foreign 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 he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See id.*

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.