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U.S. Citizenship  
and Immigration  
Services

D7

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File: SRC 02 096 50712 Office: TEXAS SERVICE CENTER Date: JUN 04 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 THE PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president 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, a Texas corporation, is described as an investment, real estate and retail company. The beneficiary was initially granted L-1A classification in order to open a new office in the United States in May 2001, and the petitioner now seeks to extend the beneficiary's stay for three additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends that the director's decision is arbitrary and capricious. Counsel suggests that the director overlooked the submitted evidence and erred in interpreting the statute. Finally, counsel asserts that the beneficiary will be employed in an executive capacity. Counsel provides copies of previously submitted documentation in support of the appeal.

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 sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity under the extended petition.

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 visa petition was filed on January 30, 2002. In a letter dated January 24, 2002, the petitioner noted the U.S. company's plans to establish "outlets specialized in retailing consumer goods and/or services." The petitioner noted that the company has been "laying the groundwork for undertaking our investment in the United States" and performing market research in Texas. The petitioner indicated that although it came close to closing negotiations for investments in several retail outlets, the deals did not materialize. Finally, the petitioner noted that it anticipated finalizing the purchase of a retail outlet in Houston, Texas in April 2002.

The petitioner described the beneficiary's duties as follows:

While [the petitioner's] business transactions have been limited, [the beneficiary], as President and CEO, has been very active in attempting to secure a good deal for the company. He has been very instrumental with negotiating the aforementioned investment opportunities on behalf of the company. He has liaise [sic] with business owners and companies and tendered offers for the purchase of investment properties based on market research and financial analysis of the investments. . . . He has successfully developed proposals and plans on behalf of the company. Ultimately, it will be his responsibility to market our operations and investments and to help put [the petitioner] on a sound financial footing.

[The beneficiary's] skills in nurturing the Indian operation and negotiating U.S. proposals are needed to complete our negotiations, investments and management of the U.S. operations in which he will continue to serve as President. Once our investment has been finalized: his duties will include supervision of all financial and administrative operations for the company, over which he will exercise complete discretionary authority. Ultimately, it will be his responsibility to establish [the petitioner] on sound financial footing. He will recruit and train

the staff and have hiring and firing authority over them. Additionally, he will use his marketing skills to develop and execute the company's marketing strategies, including advertising campaigns and company promotions.

The director issued a request for additional evidence on March 6, 2002, instructing the petitioner to submit a definitive statement regarding the beneficiary's employment, including a list of all duties, the percentage of time spent on each duty, and the job titles of all employees who work for the U.S. business.

In a response dated June 3, 2002, the petitioner provided the following description of the beneficiary's duties:

- Total managerial and executive authority over the company and all of its activities and employees (will in the future), including decisions regarding hiring and firing;
- Directs and formulates financial strategy to provide funding in developing and continuing the operations to maximize returns on investments; set sales and cost targets for managers and monitor progress;
- Management Decisions: possesses all rights to execute all the managerial decisions of the Company, including purchasing goods and equipment and hiring, firing and promotion of employees; assess store managers [sic] performance and assist with management issues;
- Supervision of the company's day-to-day operations; oversee store standards regarding food quality and customer satisfaction policy; provide support to plant manager and support staff;
- Organizational Development: projects the Company's future development and executes steps to accomplish the desired growth; prepare publicity and promotional campaigns; plan business strategy and target new business investments including decisions to expand operations.
- Company Representation: acts in the name of the Company in all kinds of business contacts and relations; coordinate with state governmental office to ensure compliance with state and federal regulations.

Percentage of time spent on each [d]uty:

Management Decisions (30%)

Company Representation (10%)

Financial Representation (10%)

Supervision of the company's day to day operations (25%)

Business Negotiations (10%)

Organizational Development (15%)

The petitioner did not indicate that the beneficiary would supervise lower-level employees. The petitioner submitted its Form 941, Employer' Quarterly Federal Tax Return, and a copy of its Texas Employer's Quarterly Report, which confirm that the beneficiary was the only employee as of January 2002 when the petition was filed. These documents confirm that a second employee received wages of \$500 per month during February and March 2002, but the petitioner did not provide this person's job title.

The director denied the petition on July 29, 2002, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the evidence failed to establish that the beneficiary would be involved in the supervision and control of the work of supervisory, professional or managerial employees who would relieve him from performing the day-to-day duties of the business, or that he would manage a function of the organization or perform primarily executive duties. The director determined that the U.S. business had not expanded to the point where it would require the services of a full-time president. Finally, the director found that the majority of the beneficiary's work time would be spent in the non-executive, day-to-day operations of the business.

On appeal, counsel provides the following statement on Form I-290B, Notice of Appeal:

The decision is arbitrary, unfair and capricious. The officer has overlooked the evidence submitted and has erred in interpreting [sic] the section 101(a)(15)(L) of the act which provides the classification. Also [sic] pursuant [sic] to 8 CFR, Part 24.2(l)(1)(ii) [sic] the beneficiary qualifies that he is employed in an executive capacity. We attach herewith documentd [sic] evidencing his eligibility for the L-1A visa. [The beneficiary] is acting as a Manager and Executive for [the petitioner], and his continued services are necessary [sic] for the success of the company.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended 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.*

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 show 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 test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the performance of non-managerial and non-executive tasks associated with the day-to-day operations of the company.

Here, the petitioner's description of the beneficiary's job duties falls short of establishing that he would perform primarily managerial or executive duties under the extended petition. For example, the petitioner indicated that the beneficiary would devote 30 percent of his time to "management decisions," including the hiring and firing of employees, purchasing goods and equipment, and assessing store managers' performance. The beneficiary's supervisory responsibility over "store managers" appears to be merely speculative, as the petitioner did not establish that it employed other workers at the time of filing. Further, the petitioner did not

indicate how the beneficiary's responsibility for purchasing goods and equipment would fall under the statutory definitions of managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner indicated that the beneficiary would allocate an additional 25 percent of his time to supervising the company's day-to-day operations, including oversight of "store standards regarding food quality and customer satisfaction policy" and provision of support to "plant manager and support staff." The petitioner does not operate a food store, nor indicate any intention to do so, and the company does not employ a plant manager or support staff. As such, these duties are not credible. 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).

Further, the beneficiary's responsibilities for organizational and financial development of the company would appear to include non-qualifying duties associated with the day-to-day marketing, advertising and financial operations of the company, absent evidence that any subordinate employees or outside contractors assist the beneficiary with non-managerial duties associated with these responsibilities. Overall, the petitioner's description of the beneficiary's duties is vague, and is not consistent with the type of business operated and its current stage of development. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's claims that the beneficiary will hire employees in the future are not probative of the beneficiary's eligibility as of the date the petition was filed.

While the beneficiary evidently exercises authority over the petitioning company as its owner and president, the petitioner has not demonstrated that the beneficiary will perform primarily managerial or executive duties. The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 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 USCIS 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.

The record suggests that the petitioner began operating a retail store shortly before the petition was filed on January 30, 2002, at which time, the beneficiary was the sole employee. As the petitioner did not claim to have any employees to perform the routine duties associated with operating a store, it is evident that the petitioner required the beneficiary to perform duties associated with ordering merchandise, maintaining inventory, handling customer transactions, and performing the day-to-day administrative and financial operations. 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). Although it appears the petitioner hired one part-time employee shortly after the petition was filed, the petitioner declined to describe his duties and has not demonstrated that a single part-time employee would relieve the beneficiary from performing the majority of the daily non-managerial tasks associated with operating a retail store. 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)).

There is no indication in this matter that the director did not consider the reasonable needs of the organization. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. The record does not establish that the beneficiary was relieved from primarily performing non-managerial duties associated with the company's sales, marketing, purchasing, customer service, financial and administrative functions.

Collectively, the lack of a subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner asserts on appeal that the beneficiary functions primarily in an executive capacity, and the fact that there are no employees does not detract from the fact that his duties are primarily executive in nature. 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, 8 U.S.C. § 1101(a)(44)(B). 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 managerial

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.* In this case, while the beneficiary evidently exercises discretion over the business as its sole employee, the petitioner has not established that his primary duties are the high-level duties contemplated by the statutory definition.

The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The actual duties themselves reveal the true nature of the employment. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Although the petitioner hired a part-time employee subsequent to the filing of the petition and anticipates a staff of four to six employees for 2002, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it has been doing business in the United States for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The beneficiary was granted a change of status to L-1A classification on May 14, 2001. The evidence submitted in support of this petition shows that the petitioner did not sign a commercial lease or commence its business operations until January 2002. As noted above, the regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, CIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B).

Upon review of the current petition, it is apparent that the petitioner was not prepared to commence doing business upon approval of its initial new office petition and did not in fact start up its operations until eight months after the approval of the petition. The petitioner claims that the beneficiary spent the majority of the first year of operations researching the market, identifying potential business opportunities, and undertaking other preliminary activities which would reasonably be expected to be completed prior to the filing of an initial new office petition. The petitioner has offered no explanation for this significant delay in commencing its business operations. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.