

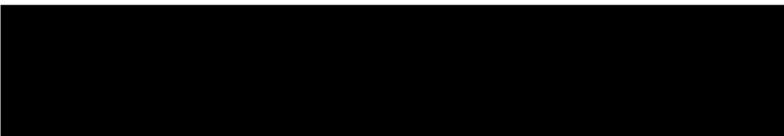
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U.S. Citizenship  
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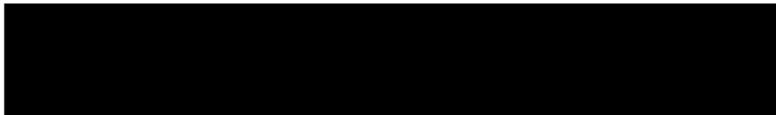
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File: SRC 04 206 50804 Office: TEXAS SERVICE CENTER Date: SEP 07 2007

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 of the Texas Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation allegedly engaged in the business of operating a gasoline station and convenience store. The petitioner seeks to extend the employment of the beneficiary as its executive vice president of operations 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 director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed primarily in an executive or managerial 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 to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of a manager. Counsel also 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.

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 primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, although counsel appears on appeal to restrict the beneficiary to a managerial classification. A beneficiary may not claim to 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 as either a manager *or* an executive and will consider both classifications.

The foreign entity described both the petitioner's business activities and the beneficiary's job duties in the United States in a letter dated July 8, 2004 as follows:

After [the petitioner] was formed in accordance with the laws of the State of Florida, an existing gas station/convenience store was purchased in September of 2001. The operation has 16 gas pumps and 2 diesel pumps and is located near a major highway, which keeps the business very busy; a majority of the customers are travelers and truck drivers. The enterprise currently has a staff of 6 employees to run the operation (see organizational chart for details). [The beneficiary's] position with the United States entity is that of Executive Vice President of Operations and he will continue to perform the following duties[:]

- Hire and fire employees consisting of managerial staff. (5%)
- Approve/disapprove the hiring and firing of lower level employees. (5%)
- Approve/disapprove the contracts with suppliers. (10%)
- Define and implement company policy and goals. (35%)
- Define and implement financial projections. (10%)
- Vendor, product and inventory analysis, review and adjustment. (15%)
- Monitor and review financial figures. (15%)
- Report to the company abroad. (5%)

The petitioner also submitted its year-to-date payroll summary report dated June 21, 2004 and an employee change report. The payroll summary lists 5 employees, including the beneficiary. However, two of these five employees were paid \$620.75 and \$682.00 respectively from January 1, 2004 until June 21, 2004. A third employee was paid a total of \$3,393.00 during this same time period. The petitioner does not explain whether these employees are recent hires, or part-time employees or whether they ceased working for the petitioner prior to the creation of the payroll summary report. Also, the employee change report indicates that a sixth employee, Shimal Patel, began working for the petitioner on or about June 28, 2004 and was assigned a salary of \$16,900.00 per year. The instant petition was filed on July 23, 2004.

Finally, the petitioner submitted an organizational chart and a description of the subordinate employees. The chart shows the beneficiary at the top of the organization supervising a "staff supervisor/assistant general manager." Shimal Patel, the individual hired 26 days before the instant petition was filed, is identified in the chart as the "staff supervisor/assistant general manager." The "staff supervisor/assistant general manager" is, in turn, shown to supervise four cashiers. While the cashiers are described as performing the tasks necessary to produce a product or to provide a service, the "staff supervisor/assistant general manager" is described as follows:

- Oversee and direct sales staff, ensure duties are carried out properly (30%)
- Assign duties and tasks to the staff (5%)
- Ensure accurate inventory (10%)
- Order inventory and stock (10%)
- Receive shipments, ensure accuracy of items (10%)
- Office administration (10%)
- Ensure customer satisfaction (10%)
- Train employees as necessary (5%)
- Hire and fire personnel (5%)

- Report to Executive Vice President of Operations (5%)

On August 3, 2004, the director requested additional evidence. The director requested, *inter alia*, a further explanation regarding the duties of the "staff supervisor/assistant general manager" and the beneficiary.

In response, counsel to the petitioner submitted a letter dated August 18, 2004 in which she explained the difference between the beneficiary and the "staff supervisor/assistant general manager" as follows:

The primary difference between the applicant/beneficiary's duties and those of the Assistant General Manager is that the beneficiary's tasks are related to overseeing the overall direction of the operation of the entity. The beneficiary is not involved with the day[-]to[-]day tasks of the operation.

The Assistant General Manager oversees the day[-]to[-]day tasks of the operation like inventory, money counting, office administration, and ordering of stock from suppliers. The Assistant General Manager also oversees and directs the 4 other employees with tasks such as scheduling the employees and assigning tasks to the employees.

On September 1, 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 a manager.

Upon review, the petitioner'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(1)(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 must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

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 devote 35% of his time defining and implementing "company policy and goals," although the petitioner never specifically explains what goals and policies for this single-location gasoline station and convenience store are being defined and implemented. Further, the petitioner states that the beneficiary will devote 15% of his time to "[v]endor, product and inventory analysis, review and adjustment." However, the petitioner does not explain what, exactly, the beneficiary will do in performing this duty. The fact that the petitioner has given the beneficiary a managerial

title and has prepared a vague job description 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).

Furthermore, some of the duties ascribed to the beneficiary are simply not credible and are inconsistent with the facts surrounding the petitioner's operation of a single-location, six-employee gasoline station and convenience store. For example, the petitioner asserts that the beneficiary will spend 5% of his time hiring and firing "employees consisting of managerial staff." However, the petitioner purports to employ only one first-line supervisor, and the record indicates that this worker was hired approximately 26 days before the instant petition was filed and that the petitioner has no plans to hire additional employees. Also, the petitioner asserts that the beneficiary spends 5% of his time reporting "to the company abroad." However, the beneficiary owns and controls both entities as a 50% owner.

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, payroll reports, and job descriptions for the subordinate staff members, the beneficiary appears to directly or indirectly supervise a staff of approximately five employees. The petitioner asserts that the beneficiary supervises a first-line supervisor, the "staff supervisor/assistant general manager," who, in turn, supervises the approximately four cashiers as well as the performance of the day-to-day tasks of the operation. However, the petitioner has not established that the "staff supervisor/assistant general manager" is primarily engaged in performing first-line supervisory duties. To the contrary, it appears that this employee is primarily performing the tasks necessary to produce a product or to provide a service. A majority of the tasks ascribed to the "staff supervisor/assistant general manager" are tasks relating to inventory, stocking, receiving shipments, office administration, customer relations, training, and reporting to the beneficiary. Only a minority of the tasks appear related the supervision of subordinate employees. Moreover, it is simply not credible that a six-employee, single-location gasoline station and convenience store with no specific expansion plans would require a subordinate level of supervisors and managers. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The petitioner has not established that the reasonable needs of the United States operation compel the employment of a managerial or executive employee to oversee one or more subordinate supervisors. To the contrary, it is more likely than not that both the beneficiary and the "staff supervisor/assistant general manager" are primarily performing non-qualifying tasks alongside the petitioner's other employees. *See Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9<sup>th</sup> Cir. 2006).

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. 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). 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. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. As the petitioner did not reveal the skill level or educational background of the subordinate employees, the petitioner has not established that the beneficiary will manage professional employees. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>1</sup>

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 be acting primarily in an executive capacity. The job description provided

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<sup>1</sup>While the petitioner has not clearly argued that the beneficiary will manage 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 is primarily a first-line manager of non-professional employees and/or is 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 primarily perform 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).

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 appears to 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.

Beyond the decision of the director, it must be noted that the director should have denied the petition as untimely pursuant to 8 C.F.R. § 214.2(l)(14)(i). Title 8 C.F.R. § 214.2(l)(14)(i) clearly states that an extension petition may only be filed if the validity of the original petition has not expired. The previous petition was approved from July 19, 2002 until July 18, 2004. The instant extension petition was filed on July 23, 2004, and the petitioner clearly indicates that its basis for the classification sought is the "continuation of previously approved employment without change." The petitioner also seeks to "extend the stay of [the beneficiary] since [he] now hold[s] this status." However, since the validity of the original petition expired on July 18, 2004, the instant extension petition filed on July 23, 2005 should have been denied as untimely. Therefore, the petition will be denied for this additional reason.<sup>2</sup>

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the foreign employer. 8 C.F.R. § 214.2(l)(3)(i). The record is devoid of evidence establishing the ownership and control of both the foreign employer. Once again, 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. Accordingly, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for one year in a position that was managerial, executive, or involved specialized knowledge. 8 C.F.R. §§

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<sup>2</sup>The AAO notes that counsel to the petitioner included a letter with the petition taking full responsibility for the late filing of the petition extension due to a family crisis and asks Citizenship and Immigration Services (CIS) to consider the petition as "timely filed hoping that [CIS] understands the circumstances underlying the oversight." While CIS understands the situation, it must be noted that neither the Act nor the regulations vests CIS with the authority or discretion to treat the instant petition as timely filed. The regulation at 8 C.F.R. § 214.2(l)(14)(i) clearly states that the instant petition extension may only be filed if the validity of the previous petition has not expired. Even if CIS had the discretion to consider the petition extension as timely filed, the AAO concludes that the exercise of this discretion would not have been justified in this matter since the petitioner could always have filed a petition for new employment, and the beneficiary could have departed the United States and applied for the appropriate visa abroad if such a petition had been approvable.

214.2(l)(3)(iii) and (iv). 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) and (iv). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary abroad and indicate whether such duties were either in an executive or managerial capacity. *Id.* In this matter, the record is devoid of convincing evidence establishing the beneficiary duties abroad. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description does not establish that the beneficiary actually performed qualifying duties. Accordingly, the petition may not be approved for this additional reason.

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 for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

Finally, based on the reasons for the denial of the instant petition, a review of the prior L-1 nonimmigrant petitions (SRC 01 218 55426 and SRC 02 230 52900), and the immigrant petition (SRC 03 160 50618), all approved on behalf of the beneficiary, is warranted to determine if they were also approved in error. Therefore, the director shall review these prior petitions approved on behalf of the beneficiary for possible revocation in accordance with 8 C.F.R. § 214.2(l)(9) and 8 C.F.R. § 205.2.

**ORDER:** The appeal is dismissed.

**FURTHER ORDERED:** The director shall review the prior L-1 nonimmigrant petitions, and the immigration petition, approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(l)(9) and 8 C.F.R. § 205.2.