U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 253 50645 Office: TEXAS SERVICE CENTER Date: JUN 23 2004

IN RE: Petitioner: [redacted]
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)

ON 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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Acting 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 was established in 2001 and indicates that it is an affiliate of Jodrell News, which is located in the United Kingdom. It claims to be engaged in the business of running chain convenience stores and gas stations. The petitioner now seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for an additional two years at an annual salary of $65,000. The acting director denied the petition based on her determination that the beneficiary would not be employed in a managerial or executive capacity. On appeal, the petitioner disputes the basis for the denial and puts forth statements to support its claims.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means 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), provides:

> The term "executive capacity" means 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;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner stated that the beneficiary's responsibilities would be "control and development of corporation and staff." In a separate statement, the petitioner specified that since the purchase of the first gas station and convenience store, the beneficiary "has spent the ensuing months monitoring the overall operation and its staff." The petitioner stated at that time that it was in the process of recruiting two store managers, one to run each of its stores, but indicated that until such hires take place the beneficiary would be the one monitoring both stores and their respective assistant managers. The petitioner further stated that once the desired store managers are hired, the beneficiary "will concentrate on development and reviewing further services for each store . . . ."

On September 27, 2002, CIS issued a request for additional evidence asking the petitioner to provide a copy of its organizational chart naming all of its employees, their position titles, and the duration of their employment with the company.

The petitioner complied with the director's request by submitting its organizational chart, which indicates that the petitioner was operating two convenience stores. One of the stores employed an assistant manager and one counter staff employee, and was still in the process of recruiting a manager. The other store employed a manager, who was hired over two months after the petition was filed, an assistant manager, and two part-time counter staff employees. According to the chart, the petitioner was still in the process of recruiting a full-time counter staff employee for the store that had only part-time counter staff.

After reviewing the information submitted by the petitioner, the acting director denied the petition, concluding that the beneficiary would not be functioning in a managerial or executive capacity because he would be directly supervising employees who could not be considered managerial or professional.

On appeal, the petitioner asserts that the director improperly denied the petition solely on the basis of the petitioner's staffing levels without giving proper consideration to the reasonable needs of the company. The petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, 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. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In the instant case, the acting director also considered the nature of the petitioner's business, as well as the information provided in the petitioner's organizational chart in determining that the company's employees at the time the petition was filed primarily consisted of cashiers and clerks. Although the petitioner indicates that a store manager was ultimately hired for one of its stores, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus, the additional employee that was hired after the filing of the petition cannot be taken into account in determining the petitioner's eligibility for the visa classification sought in the instant case. Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. Although the petitioner claims that the beneficiary was unable to obtain a visa to enter the United States until December of 2001, three months after the petition was approved, it has not submitted any evidence to substantiate such claimed hardship. 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). Thus, regardless of whatever hardships the petitioner may have endured in the initial stage of setting up its operation, the record indicates that the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

In addition, 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). In the instant case, the petitioner states that the beneficiary has been "planning, researching, developing and acquiring additional stores" and denies the acting director's conclusion that the beneficiary has acted as a first line supervisor. However, the record contains a number of statements from the petitioner stating that the beneficiary directly oversees the existing staff in the two stores because no one from the existing staff was qualified to assume the role of manager. Since the first manager was hired two months after the petition was filed, the acting director properly concluded that one year after the approval of the initial petition to open a new office the beneficiary was still managing a staff of clerks and cashiers, none of whom can be deemed professional or managerial.

The petitioner places great emphasis on the beneficiary's high degree of authority and states that only someone in a managerial or executive capacity would have such discretionary power. However, possessing discretionary authority does not automatically preclude an individual from performing non-qualifying tasks. In the instant case, the record suggests that the beneficiary essentially had no choice but to supervise non-managerial and non-qualifying personnel due to lack of other qualified employees to assume that responsibility. Merely stating that the beneficiary is not involved in supervising low-level employees without providing evidence to support that assertion is insufficient to establish the beneficiary primarily performs qualifying duties. *See Matter of Treasure Craft of California, supra.* The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act.

Furthermore, the record indicates that the petitioner's initial petition to open a new office was approved and was valid from September 1, 2001 to August 31, 2002. However, the record indicates that the petitioner had no actual business operation or premises on which to conduct its business as of the date that petition was filed or even by the time that petition was approved. Rather, the record contains bills of sale for each of the petitioner's two convenience stores, one purchased in February of 2002 and the other purchased in March of 2002. Even if the AAO disregards the approval date of the initial petition and takes into consideration only the beneficiary's December 31, 2001 date of arrival, the fact remains that the petitioner had no business to speak of until February 11, 2002, 42 days after the beneficiary's arrival to the United States, when its first convenience store was purchased. While the beneficiary may have been planning to purchase a convenience store upon his arrival in the United States and to then commence doing business, neither the regulations nor the Act allow any time after a petition's approval during which the petitioner may make preparations in order to commence doing business. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B).

On review, the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.