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

U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: SRC 02 270 50170 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
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:

[redacted]

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

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 § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Texas that is engaged as a clothing importer and wholesaler. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Karachi, Pakistan. The petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the beneficiary would not be employed by the U.S. entity in a primarily executive capacity.

On appeal, counsel claims that Citizenship and Immigration Services (CIS) "misapplied" the provisions of section 101(a)(15)(L) of the Immigration and Nationality Act (the Act) when determining that the petitioning organization should support the beneficiary as an executive after the petitioner's four months of operation rather than one year. Counsel contends that the beneficiary is employed in a primarily executive capacity, and submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.
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> (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.
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> (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 management or executive capacity; and

(e) Evidence of the financial status of the United States operation.

The issue in the present proceeding is whether the beneficiary would be employed by the U.S. entity in a primarily 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-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) 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;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) 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-

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an undated letter submitted with the nonimmigrant petition, the petitioner explained that as president of the U.S. organization, the beneficiary would be responsible for shipping goods to customers, taking orders, attending exhibitions, appointing sales personnel, and "looking after" the company's management and day-to-day affairs.

In a request for evidence, dated September 9, 2002, the director noted the need for further information, and requested that the petitioner submit the following evidence: (1) a copy of Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the year 2001; (2) a description of the petitioner's current staffing levels, including a detailed description of the employees' job duties, titles, qualifications, and work schedules; (3) a description of the "specific nature of the beneficiary's duties," including an allocation of the time spent on each job duty; (4) the foreign company's business plan for the petitioning organization, detailing the business to be conducted in the U.S., and the petitioner's sales, profit, loss, and expense projections; (5) copies of minutes from the foreign company's meetings which address the developmental progress of the U.S. company; and (6) a copy of the U.S. business's floor plan, and photographs of the inside and outside premises.

In response, the petitioner submitted a letter in which the beneficiary's U.S. job duties during the previous year were outlined as: setting the goals and policies of the organization; organizing the business' operations; analyzing alternate business opportunities; formulating business strategies; hiring and training managerial employees; directing the management of the company to meet long- and short-term objectives; preparing annual budgets; sourcing merchandise; negotiating contract terms with overseas manufacturers; building a network of independent sales representatives; establishing contacts with wholesalers and chain stores; servicing major accounts; and controlling the financial activities of the company. The petitioner also provided the following description for the beneficiary's job responsibilities over the next two years:

> Due to the recent increase in sales volume, [the beneficiary's] immediate tasks will be development of the company's human resources, physical facility management, and the implementation of the [m]anagement information system to control and direct the company's growth. He will supervise the work of the import [m]anager, [s]ales [m]anager, account [m]anager and secretary. He will continue to establish the goals and policies of the company, hire and fire employees, negotiate major contracts and exercise wide latitude in discretionary decision-making.

In a second letter also submitted by the petitioning organization, the vice-president explained that the petitioner's operations, specifically, shipping, warehousing, and distribution, did not require the full-time employment of employees, and therefore, the petitioner used contractors who specialize in such operations. The vice-president stated that, as a result, the petitioner did not issue any Forms W-2, Wage and Tax Statement, during the first year of operation.

The petitioner submitted its 2001 corporate tax return, which reflected salaries and wages in the amount of $9,000 for the tax year beginning July 1, 2001 through December 31, 2001. The petitioner also submitted its federal and state employer's quarterly tax returns for the period ending June 2002. The petitioner's state quarterly tax return for this period identified seven employees.

In a decision dated January 8, 2003, the director stated that the petitioner has not established that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization, or that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the operations of the business. The director therefore concluded that the U.S. business had not grown to a point where the beneficiary would be engaged in primarily executive duties. The director stated the majority of the beneficiary's time would likely be spent performing non-executive, day-to-day operations of the business. Accordingly, the director denied the petition.

Counsel for the petitioner subsequently filed an appeal on February 10, 2003 stating that CIS misapplied section 101(a)(15)(L) of the Act "in that [CIS] construed an approximately four months of operation of the company as one full year of operation." Counsel provides the following explanation:

> Upon arriving in the United States on February 15th 2001, the [beneficiary] established the Texas Corporation and in [sic] February 23rd, 2001 and [sic] placed orders for goods from South Asia which usually takes 3 to 4 months for the goods to arrive in the US. The above time allowed the [beneficiary] approximately 4 months (four months) for the marketing and sales of the goods during the calendar year 2001. The [petitioner] filed tax returns showing an income of US$116,000 and employment of two full time employees during this period.

Counsel states that during these four months of operation, the beneficiary "prudently controlled expenses of the corporation," and employed a varying number of temporary workers. Counsel explains that in 2002 the U.S. demand for textiles was low, and therefore, the beneficiary, "as a seasoned and prudent executive," diversified the corporation's investment and purchased 49% of both a delicatessen and a motel. Counsel states that the petitioner presently employs eighty-nine individuals in these businesses, and explains that the beneficiary utilized the motel to also display the petitioner's textiles. Counsel contends that the beneficiary "has been exercising powers of an executive in diversifying business activities to discharge this corporate responsibility and provide substantial employment in the U.S." Counsel submits on appeal copies of Forms W-2 and tax forms related to the deli and the motel.

On review, the record does not demonstrate that the beneficiary would be employed by the U.S. operation in a primarily executive capacity. 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). As required in the regulations, the petitioner must submit a statement of the duties performed by the beneficiary during the previous year and those the beneficiary will perform under the extended petition, including a description of the petitioner's staff and the positions held by the employees when the beneficiary will be employed in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C) and (D).

The petitioner failed to provide a detailed statement of the beneficiary's proposed job duties sufficient to substantiate the petitioner's claim that the beneficiary would be employed in a primarily executive capacity. In response to the director's request for more specific information, the petitioner submitted two letters that

provided the same inadequate job descriptions: develop the company's human resources, manage the facility, and implement the company's information system in order to control and direct growth. The petitioner also provided a generalized statement that the beneficiary would "establish the goals and policies of the company, hire and fire employees, negotiate major contracts and exercise wide altitude in discretionary decision-making." 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.).

Additionally, the petitioner did not provide a statement of the staffing of the new operation, including the number of employees and types of positions occupied, as required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D). Although requested by the director, the petitioner merely stated that the beneficiary would supervise the import, sales, and account managers, and a secretary. No additional information was provided explaining these employees' job responsibilities or how their employment would support the beneficiary in a primarily executive capacity. In fact, the petitioner neglected to provide documentation confirming the employment of any additional employees, including the two full-time employees and temporary workers claimed by counsel on appeal to be employed by the petitioning organization. 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). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The limited job description provided by the petitioner also indicates that the beneficiary may be performing non-executive, daily operations of the company. The petitioner stated in the undated letter submitted with the nonimmigrant petition that the beneficiary is responsible for taking orders, shipping goods to customers, and attending exhibitions. These responsibilities are not characteristic of an individual employed in a primarily executive capacity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(C). Rather, it is reasonable to assume that the beneficiary is performing the functions necessary to operate the business. As previously noted, the petitioner has not accounted for the employment of any individuals who would relieve the beneficiary from performing these non-executive tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel's assertion on appeal that the petitioner presently employs eighty-nine individuals through its deli and motel has no merit. It is a well-established rule that the petitioner must demonstrate 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). Therefore, the AAO will not consider the petitioner's new information submitted on appeal. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998) (stating that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements).

The AAO will next address counsel's assertion on appeal that CIS misapplied the statutory requirements outlined in section 101(a)(15)(L) of the Act. Counsel claims on appeal that the beneficiary had only four months in 2001 during which to market and sell the petitioner's products. It is unclear, however, from the dates listed by counsel how the period of fours months was calculated. Regardless, it appears that counsel is

mistaken about the regulatory requirements and the relevant time periods. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) requires that within one year of approval of the petition for a new office, the new operation will support the beneficiary in a primarily managerial or executive capacity. Although the director approved the beneficiary's previous petition in March 2002 and backdated the period of stay to July 2001, the director backdated the period at the petitioner's request. If the director had used the actual date of approval as the start date for the beneficiary's L-1A classification, the beneficiary would have been out of status. Because the beneficiary was in the United States as a B-1 nonimmigrant and the company was established in February 2001, it is not unreasonable to assume that by July 2002 the petitioner would grow to a size sufficient to support the beneficiary's employment as an executive.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed in the United States in a primarily executive capacity. For this reason, the appeal will be dismissed.

A related issue not raised by the director is whether the petitioning organization has been doing business in the United States as a clothing importer and wholesaler for the requisite period of time. The regulation at 8 C.F.R. 212.2(l)(14)(ii) requires that the petitioner be doing business for the "previous year." Again, as the beneficiary was in the United States as a B-1 nonimmigrant and the company was established in February 2001, it is not unreasonable to expect the petitioner to show that it has been doing business for the previous year. The petitioner has not demonstrated that it has been doing business under its intended purpose of importing and selling textiles. Rather, it appears the petitioner changed its business plan to operating a deli and motel in order to satisfy the regulatory requirements.[1] Again, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 176. For this additional reason, the appeal will be dismissed.

An additional issue not addressed by the director is whether a requisite qualifying relationship exists between the foreign and U.S. entities as required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner notes on the nonimmigrant petition that the U.S. entity is a wholly owned subsidiary of the foreign corporation. However, the petitioner has not provided a stock certificate confirming this relationship. Moreover, Schedule K of the petitioner's 2001 corporate income tax return does not indicate that the petitioning organization's voting stock is owned by any U.S. or foreign individual, partnership, or corporation. 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). Again, the appeal will be dismissed for this additional reason.

An additional issue not addressed by the director is that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's original petition expired on July 30, 2002. However, the petition for an extension of the beneficiary's L-1A status was filed on September 17, 2002, almost two months following the expiration of the

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[1] The AAO notes that the record does not support counsel's assertion that the petitioning organization owns 49% of both the delicatessen and motel. Rather, each business' tax returns and stock certificates indicate that the beneficiary is actually the owner of 49% of each. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, the beneficiary is ineligible for an extension of stay 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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.