U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

JAN 28 2005

FILE EAC 99 109 50402 Office: VERMONT SERVICE CENTER Date:

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)

IN 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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on motion to reopen. The motion will be granted. The previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as a 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 New York that is operating as a retailer of kerosene and petroleum products. The petitioner claims that it is an affiliate of the beneficiary's foreign employer, located in Hyderabad, India. The petitioner now seeks to employ the beneficiary for three years.

The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily executive or managerial capacity.

On appeal, counsel asserted that the petitioner had submitted sufficient documentation to establish that the beneficiary has been performing and will continue to perform functions that are primarily executive in nature.

On June 17, 2002, the AAO dismissed the appeal determining that the record did not support a finding that the beneficiary had been or would be employed primarily in a qualifying managerial or executive capacity.

On motion, counsel for the petitioner asserts the AAO's decision contains inconsistencies. Counsel asserts that the decision "largely ignored the start-up nature of the business." Counsel claims the "decision ignores the regulations as they pertain to functional manager." Counsel asserts that the AAO misconstrued evidence provided in support of the nature of the beneficiary's job duties. Additionally, counsel claims that the AAO "erroneously indicated that the beneficiary is a small operation incapable of support [sic] the beneficiary."

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 meet certain criteria. 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. Furthermore, 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.

Furthermore, 8 C.F.R. § 214.2(l)(14)(ii) states that 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;
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> (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;
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> (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;
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> (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 United States petitioner was incorporated in 1998. The petitioner sells kerosene and petroleum products. The petitioner seeks to extend the employment of the beneficiary as its president. The petitioner filed the original request to employ the beneficiary in February 1998. The petition was approved and the beneficiary was accorded L-1 status in May 1998. The petition requesting the extension of the beneficiary as an L-1 intracompany transferee was filed February 1999. At the time of filing, the petitioner employed the beneficiary and one other employee. On March 8, 1999, the director requested additional information to establish the beneficiary has been and will be employed in a managerial or executive capacity in the United States firm. On or about May 27, 1999, the petitioner responded to the request for additional information. On July 7, 1999, the director determined that the record did not demonstrate that the beneficiary has been or will be employed in a primarily executive or managerial capacity and denied the petition. The petitioner appealed the decision of the director. On June 17, 2002, the AAO dismissed the appeal determining that the record did not support a finding that the beneficiary had been or would be employed primarily in a qualifying managerial or executive capacity.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily 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;
>
> 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.

Counsel asserts that the AAO decision "largely ignored the start-up nature of the business." As cited by counsel, the decision by the AAO states "the petitioner has not provided [Citizenship & Immigration Services (CIS)] with a comprehensive description of the beneficiary's duties once the petitioning business moves beyond the start-up stage . . . ." Counsel asserts "[t]he regulation[s] do not require such a showing but merely that the petitioner within one year, will support a managerial or executive position." However, as stated above, a visa petition, which involved the opening of a new office, may be extended when accompanied by a statement of duties performed by the beneficiary for the previous year and the duties of the beneficiary will perform under the extended petition. If CIS finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, CIS shall request the missing initial evidence, and may request additional evidence. 8 C.F.R. § 103.2 (b) (8).

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Counsel asserts on motion that the AAO's

decision ignores the regulations as they pertain to "functional manager." Counsel asserts that functional managers and executives often must deal directly with customers and outside contractors. Counsel states that it should be sufficient that most of the beneficiary's duties are executive in nature, as set forth in the appeal. Counsel asserts that the petitioner has met its burden that the beneficiary is an L-1A executive.

It is noted that counsel discusses both a function manager and an executive in relation to the beneficiary's job duties. Neither counsel nor the petitioner clarifies whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. It appears that the beneficiary may be claiming to be employed as both a manager and an executive. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the petitioner is representing that the beneficiary is both an executive and a manager.

On motion, counsel claims "the evidence submitted with the application and follow up documentation clearly shows the beneficiary has total discretion in the hiring of all personnel and outside contractors as well as all sales agents."

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner owns and manages a gas station and convenience store. The fact that an individual operates a business does not necessarily establish eligibility for classification in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act.

The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. Furthermore, the petitioner's evidence is not persuasive in establishing that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees who would relieve him from performing non-qualifying duties. The evidence is not persuasive in establishing that the beneficiary has been or will be managing an essential function of the organization. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Neither counsel nor the petitioner has identified the essential function that the beneficiary manages.

Nor has the petitioner established that the beneficiary acts in an executive capacity by directing the management of the organization or a major component or function of the organization. The description of the beneficiary's

primary duties indicates that they are not in a qualifying managerial or executive capacity. For this reason, the decision of the AAO will be affirmed and 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 previous decision of the AAO is affirmed. The petition is denied.