**U.S. Department of Homeland Security**
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U.S. Citizenship
and Immigration
Services

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[redacted]

MAY 04 2005

File: SRC-03-199-53751 Office: TEXAS 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 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 is a corporation organized in the State of Texas that operates a convenience store. The petitioner claims that it is the affiliate of [redacted], located in Hyderabad, Pakistan. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will 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 asserts that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel further asserts that the director placed undue emphasis on the petitioner's small staff size, and failed to fully consider the beneficiary's duties. In support of these assertions, counsel submits a brief.

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 management or executive capacity; and

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

The issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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.

In the initial petition filed on July 14, 2003, in an attachment to Form I-129 the petitioner described the beneficiary's job duties as follows:

> The Beneficiary will continue to be employed as the President of the Petitioner, and will be responsible for performing the following duties for the Petitioner; such duties to include: hiring and firing managers; supervising subordinate employees; reviewing an [sic] analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaign developed by subordinate managers.
>
> In the performance of his duties, the Beneficiary will receive minimum supervision from the Board of Directors, and the Beneficiary will exercise wide discretion and latitude in the performance of his duties.

On October 24, 2003, the director requested additional evidence. In part, the director requested an indication of the number of employees working for the petitioner and a description of their duties.

In a response dated January 12, 2004, in part the petitioner submitted: (1) a copy of its IRS Form 940, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2003; (2) a copy of its Texas State Form C-3 quarterly filing for the fourth quarter of 2003; and (3) a letter naming the petitioner's employees and describing their duties. The letter repeated the previously submitted job description for the beneficiary, and discussed additional employees as follows:

> [redacted] **Store Manager**
> Duties include: locating vendors; resolving issues relating to defective or unacceptable goods with vendors; purchase inventory; supervise subordinate employees; preparing employee

work schedule; preparing and maintaining inventory report; prepare sales report; preparing budget and expense reports; maintain records of underground petroleum storage tanks in accordance with state and federal environmental laws; reconcile all accounts and prepare daily sales report.

**[redacted]Assistant Manager/Cashier**
Duties include: Assist in preparing employee work schedule; maintain/order inventory; preparing maintaining inventory report; prepare sales report; and assist in preparing budget and expense reports; reconcile all accounts and assist in preparing daily sales report; and operate cash register and credit card machine.

**[redacted] Cashier**
Duties include: operate cash register/credit card machine; maintain business premises; and reconcile daily cash with sales receipts.

**[redacted]Cashier**
Duties include: operate cash register/credit card machine; maintain business premises; and reconcile daily cash with sales receipts.

On February 5, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated the following:

> The petitioner has not submitted sufficient documentation in demonstrating that the [beneficiary] will perform duties which primarily require the [beneficiary] to plan, organize, direct and control the organization's major functions by working through other managerial or professional employees in the United States. A position will qualify as managerial or executive only if the duties are primarily managerial or executive in nature. First-line supervision of nonprofessional and non-managerial personnel does not establish eligibility. Further, a qualifying position does not include an employee who performs the tasks necessary to produce the product and/or to provide the service(s) of the organization.
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> * * *
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> The petitioning business has one (1) mini mart store and five (5) employees. When a company has a limited number of employees, it becomes questionable as to whether the operator of the business will be engaged primarily in managerial or executive duties.
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> * * *
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> [I]t is apparent, in this situation, that the daily functions associated with running the business would be performed by the [beneficiary], and that these duties would not be totally devoted to purely managerial or executive functions.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel further asserts that the director placed undue emphasis on the petitioner's small staff size, and cites three matters to support that "L-1 statutes and regulations were not intended to limit managers or executives to persons who supervise a large number of persons or large enterprise." Counsel states that the director "has also failed to take into account that the Beneficiary will be responsible for reviewing and seeking additional retail locations and that this important duty will not be delegated to any subordinate manager . . . ." Counsel further described the beneficiary's duties as follows:

> As the President of the Petitioner, the Beneficiary is responsible for not only overseeing the management of the retail location, but also reviewing additional retail locations. The Beneficiary's position will be solely executive or managerial and does not include doing day-to-day work of the business.
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> * * *
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> The Beneficiary . . . will continue to be responsible for such duties, including; responsible for hiring and firing managers; Ten percent (10%) of the time supervising subordinate employees, including at least one manager, who will supervises [sic] and oversees subordinate employees; Fifteen percent (15%) overseeing preparation of sales and marketing reports; Fifteen percent (15%) reviewing and analyzing sales data; Fifteen percent (15%) establishing and implementing policies to manage and achieve marketing goals; Ten percent (10%) review and [sic] financial reports; Ten percent (10%) reviewing budgets and expense reports prepared by subordinate employees; Fifteen percent (15%) managing the company; and Ten percent (10%) overseeing marketing campaigns developed by subordinate managers.
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> * * *
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> By overseeing preparation of sales and marketing reports, and reviewing an [sic] analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; the Beneficiary will primarily be responsible for managing the Marketing "department, function or component" of the Petitioner as he will devote more than Forty Percent (40%) of time to these activities. Furthermore, by reviewing financial reports, and reviewing budgets and expense reports prepared by subordinate employees; managing the company, and overseeing marketing campaign [sic] developed by subordinate managers, as well as reviewing additional retail locations, the Beneficiary will primarily supervise and control other managerial or professional employees, including the Store Manager. The Beneficiary is responsible for seeking additional business locations for the Petitioner, thus the Beneficiary directs the major component or function of the Petitioner's efforts to expand its operations. The Beneficiary does not have time to perform day-to-day activities.
>
> The Beneficiary has and will have the authority to recommend personnel actions, such as promotions, hiring, and firing of personnel supervised by him, and he has and will continue to

> have wide authority and discretion over the marketing department and major component and function of the Petitioner.

Upon review, counsel'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(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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant matter, the petitioner does not clarify whether it claims the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Counsel refers to the statutory definitions of both managerial capacity and executive capacity, thus, it appears that counsel intends to represent that the beneficiary will be primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

The descriptions of the beneficiary's duties submitted by the petitioner are brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, counsel states that the beneficiary will spend 15 percent of his time "overseeing [the] preparation of sales and marketing reports" and 15 percent of his time " establishing and implementing policies to manage and achieve marketing goals." Counsel later states that "the Beneficiary will primarily be responsible for managing the Marketing 'department, function or component' of the Petitioner as he will devote more than Forty Percent (40%) of time to these activities." Counsel then indicates that the beneficiary will spend 10 percent of his time "overseeing marketing campaigns developed by subordinate managers." Yet, the petitioner has not described its marketing department or provided sufficient explanation of the marketing efforts undertaken by its convenience store such that one can adequately understand these duties. Counsel provides that the beneficiary will spend 15 percent of his time "managing the company," yet this statement is clearly too broad to provide an understanding of what actual tasks the beneficiary will perform. Specifics are 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). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

Counsel indicates that the beneficiary will spend 10 percent of his time "reviewing budgets and expense reports prepared by subordinate employees." Among the descriptions of the duties of the beneficiary's alleged subordinates, the store manager is charged with "preparing budget and expense reports." The assistant manager/cashier is charged with "assist[ing] in preparing budget and expense reports." Yet, the petitioner has

provided no independent documentation that it in fact employs a store manager. Counsel provides that the store manager is [redacted] In response to the director's request for evidence, the petitioner provided copies of checks made out to its employees. Yet, the evidence of record does not contain a copy of a check to [redacted] 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 petitioner submitted its Texas State Form C-3 quarterly report for the fourth quarter of 2003 which indicates that [redacted] was an employee of the petitioner during that period. Yet, the quarterly report covers a period after the petition was filed. 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). As the State quarterly report documents activity after the petition was filed, it is not probative of whether [redacted] was an employee of the petitioner as of the date of filing. The petitioner did provide a copy of a check for the assistant manager/cashier. Yet, as this employee only assists with preparing budget and expense reports, it is unclear who has primary responsibility for this task. Absent evidence of a store manager, it is assumed that the beneficiary performs this task himself. Thus, counsel's assertion that the beneficiary reviews budgets and expense reports prepared by subordinate employees is not supported by evidence in the record, and this stated duty is unclear.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. As discussed above, at least 65 percent of the beneficiary's time has not been adequately described such that the beneficiary's duties can be classified as primarily managerial or executive in nature.

Counsel asserts that the beneficiary supervises subordinate employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The petitioner did not provide the level of education required to perform the duties of its employees. Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals. As discussed above, the petitioner has not provided documentation to support that it employs a store manager. Of the employees who have been documented, including an assistant manager/cashier and two cashiers, none have been shown to supervise subordinate staff members or manage a

clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell* or *Mars Jewelers, Inc. v. INS*. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii).

Regarding *Mars Jewelers, Inc. v. INS*, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Counsel further refers to an unpublished decision involving an employee of the Irish Dairy Board. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. As counsel has not discussed the facts of any of the cited matters, they will not be considered in this proceeding.

Counsel asserts that the director "failed to take into account that the Beneficiary will be responsible for reviewing and seeking additional retail locations." However, the petitioner has provided no explanation or documentation of the beneficiary's efforts to establish new retail locations. 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. at 190. Further, the fact that the petitioner intends to expand its business in the future is not probative of its eligibility as of the filing date. 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).

The director stated that the beneficiary's "duties would not be totally devoted to purely managerial or executive functions." The AAO notes that it is permissible for the beneficiary to perform some non-

qualifying tasks, so long as his duties are primarily managerial or executive in nature. *See* 8 C.F.R. § 214.2(l)(3)(ii). Yet, as discussed above, the petitioner has failed to establish that the majority of the beneficiary's time will be devoted to managerial or executive duties.

The regulation at 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. In the instant matter, the petitioner has not established that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). 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 petitioner's articles of incorporation reflect that it was incorporated on June 24, 2002. While the petitioner provided documentation to show that it purchased a convenience store on June 10, 2003, it has not shown that it was engaged in "the regular, systematic, and continuous provision of goods and/or services" prior to that date. *See* 8 C.F.R. § 214.2(l)(ii)(H). The petitioner submitted copies of its bank statements, yet all cover activity from June 2003 or later. The copies of paychecks issued to the petitioner's employees are dated July 1, 2003. Thus, while the petitioner has shown that it was doing business during the two months prior to filing the present petition, the evidence of record does not support that the petitioner has been doing business "for the previous year." *See* 8 C.F.R. § 214.2(l)(14)(ii)(B). For this additional reason, the appeal will be dismissed.

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.