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U.S. Citizenship  
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Services

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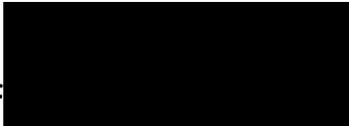


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File: SRC 02 246 54977 Office: TEXAS SERVICE CENTER

Date: APR 01 2005

IN RE: Petitioner:  
Beneficiary:



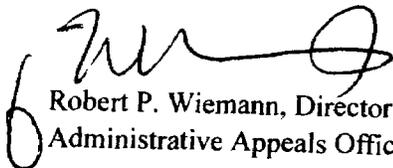
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 under the laws of the State of Texas and is a "convenience store," engaged in the retail sale of food and beverage products. The petitioner claims that it is the affiliate of [REDACTED], located in Hyderabad, India. 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 demonstrate that (1) the beneficiary would be employed in the United States in a primarily managerial or executive capacity and (2) the company was well enough established to support an executive or managerial position.

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 company is established and that its operations and staffing continue to grow. In support of this assertion, the petitioner submits 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.

The regulation at 8 C.F.R. § 214.2(I)(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 (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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.

The first 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, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] is the executive responsible for overseeing the development of Universal Oil Company's U.S. affiliate. He is responsible for managing the day to day operations of Tillu Inc. [The beneficiary] supervises all financial and administrative operations for the company, over which he exercises complete discretionary authority. His duties include supervising the development and implementation of the company's marketing strategies as well as the recruitment and training of the staff of the U.S. office.

On August 23, 2002, the director requested additional evidence. Specifically, the director requested the following: (1) photographs of the U.S. entity's premises; (2) an organizational chart for the U.S. entity, including the names, titles, employment status (fulltime or part-time), and start dates for each employee; (3) additional evidence that the beneficiary is to be employed in an executive or managerial position, including information on subordinates and their job titles and duties or the essential function the beneficiary will manage; and (4) evidence that the foreign entity has been doing business for the past year, including corporate tax returns, financial statements, invoices, bills of sale, bills of lading, shipping receipts, etc.

In response, counsel for the petitioner submitted: (1) a letter dated November 12, 2002; (2) the requested photographs; (3) an organizational chart for both the U.S. and foreign entity; and (4) tax documents, financial statements and invoices for the foreign entity. In its letter dated November 12, 2002, counsel provided the following additional details on the job duties of the beneficiary:

The [b]eneficiary serves as [p]resident of [REDACTED] U.S. subsidiary of [REDACTED]. *The duties performed by the beneficiary are executive.* As a top executive, [the beneficiary] is tasked with exploring the overall investment climate of the U.S. market. His

time is devoted to negotiating investments, establishing diversified business interests and overseeing the staff he has selected to actually perform the daily operations. [The beneficiary] has ultimate responsibility for the continued success of this business.

In addition, in response to the request for information on the subordinates of the beneficiary, counsel states that "[The petitioner] currently employs one full-time cashier and one part-time clerk. [The beneficiary's] staff perform the daily operating duties of the business including sale of merchandise, response to customer inquiries and inventory. [The beneficiary] oversees the issues relating to the payroll, hiring and firing."

On November 22, 2002, the director denied the petition. The director determined that, due to the structure of the company, the beneficiary would have to perform the day-to-day, non-managerial and non-executive duties required to run the company. Therefore, absent clear evidence by the petitioner that the beneficiary will be primarily managing the day-to-day operations instead of carrying them out, the director concluded that the beneficiary was not and will not be employed primarily in a managerial or executive capacity for the U.S. company.

On appeal, counsel for the petitioner does not directly address the issue of whether the beneficiary will be primarily employed in a managerial or executive capacity. Instead, counsel simply asserts that the U.S. entity is now established, its operations and staff continue to increase, and "the beneficiary provides overall supervision over the employees."

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(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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On review, the petitioner has provided only vague and nonspecific descriptions of the beneficiary's duties that fail to demonstrate what the beneficiary does on a day-to-day basis. For instance, the petitioner states in its August 9, 2002 cover letter that the beneficiary's job duties include "managing the day to day operations of [the petitioner]," "supervis[ing] all financial and administrative operations for the company," "supervising the development and implementation of the company's marketing strategies," and "[supervising] the recruitment and training of the staff." On appeal, the petitioner describes the beneficiary's job duties as including "exploring the overall investment climate," "negotiating investments, establishing diversified business interests, and overseeing the staff he has selected." The petitioner did not, however, provide: (1) what specific day-to-day operations the beneficiary will manage; (2) evidence, including job titles and duties, of the professional personnel he has hired and supervised to handle the financial operations as well as the marketing strategies for the company; or (3) how the other duties described are managerial or executive as defined in the Act. *See* Section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). 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).

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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d Cir. 1990).

It should also be noted that, even though the petitioner claims that the beneficiary supervises the petitioner's financial operations and marketing strategies, it does not provide evidence of anyone on its staff to actually perform the financial and marketing functions. Specifically, based on the evidence of record before the director, it appears that the petitioner only had two employees, a clerk and a cashier. Although the petitioner claims to have employed a part-time accountant, it did not submit evidence that the accountant was ever on the payroll of the U.S. entity until appeal. Even if the evidence submitted on appeal showed that the accountant was hired prior to the date the petition was filed, which it does not, 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, either the beneficiary himself is performing the financial and marketing functions, or he does not actually supervise the financial and marketing functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the financial and marketing functions, the AAO notes that 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

It is recognized that even if the beneficiary is responsible for performing the financial and marketing operations of the company, provided the majority of his duties remained managerial or executive, he could still qualify as a manager or executive under the act. However, the petitioner not only fails to provide detailed job duties for the sponsored position but also fails to specifically document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial or non-executive. As indicated above, the petitioner lists duties of the beneficiary, which could be deemed as possibly being executive or managerial, but fails to quantify the time the beneficiary spends on them. This failure is important because some of the beneficiary's apparent tasks, such as financial operations, marketing, and investment negotiations, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot further determine whether the beneficiary is primarily performing 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).

Moreover, although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are

professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is supervising a staff of non-professional, non-supervisory, and non-managerial employees (a clerk and a cashier), the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

The second issue in this proceeding is whether the business will support an executive or managerial position.

As previously discussed, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. On appeal, however, counsel indicates that the petitioner plans to hire additional employees in the future. Again, 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).

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. It should also be noted for the record that the beneficiary appears to have been in the United States in B-1 nonimmigrant visitor status from October 1, 2000 until his change of status on August 14, 2001 to L-1A classification. The beneficiary apparently used this time to set up the U.S. entity and begin its operations. Even with this additional time, the petitioner was still not sufficiently operational by August 2002, when the petition was filed. There is no provision in CIS regulations that allows for an extension of the one-year period, which in this case was almost a two-year period of time. 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 reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Beyond the decision of the director, it should be noted for the record that the 2001 tax return (Form 1120S) for the U.S. entity claims a deduction of \$20,000.00 for compensation or dividends paid to the beneficiary. While this appears to be income instead of dividends for tax purposes and while this matches the beneficiary's proffered wage of \$20,000.00, it raises the question of unlawful employment during the time the beneficiary was in B-1 status. In particular, the petitioner has indicated that the beneficiary's \$20,000.00 wage is paid on an annual basis, which one would assume is paid in equal installments throughout the year. However, for 2001 the beneficiary was only authorized to work for the petitioner starting from August 14, 2001 and, thus, it appears the beneficiary received income from the petitioner during the time he was in B-1 status. Even if the beneficiary claims the compensation was not income but was dividends or even a reimbursement for contributions made to the petitioner, it will then raise the issue of whether the petitioner actually employed the beneficiary when he was in L-1A status. In either case, there could be additional grounds for the denial of the petition to extend the L-1A status of the beneficiary due to a violation of or failure to maintain status.

In addition, with regard to the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S), it should be noted that to qualify as a subchapter S corporation a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident

alien shareholders. *See* Internal Revenue Code, § 1361(b)(1), 26 U.S.C. § 1361(b)(1). A corporation is not eligible to elect S corporation status if any shareholder is a non-resident alien. *Id.* In this case the evidence presented shows the sole shareholder of the U.S. entity to be the beneficiary. While § 7701(b)(1)(A)(iii) of the Internal Revenue Code did provide the beneficiary with the option of electing to be a resident alien at the time the U.S. entity was incorporated on November 13, 2000, no evidence has been presented, such as the beneficiary's individual 2001 tax return, to prove that he was a resident alien for tax purposes at the time the U.S. entity was formed. Absent this evidence, it appears that the petitioner may not have properly elected S Corporation status, which would raise serious questions regarding the consistency and the credibility of the facts asserted. As previously indicated, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Beyond the decision of the director, the record is not persuasive in demonstrating that the petitioner has secured sufficient physical premises to commence "doing business" in the United States. Specifically, the director requested in its letter dated August 23, 2002 that the petitioner submit photographs of the premises of the U.S. entity, which included its address as well as a business sign. In response, however, the petitioner submitted photographs showing what appears to be a paper print out of the U.S. entity's name and address, which is being held to the building by a person hiding behind the roofline. In this situation, the CIS must question the purported permanency of the enterprise where the petitioner fails to even invest in a more permanent business sign. As the appeal will be dismissed, this issue need not be examined further.

Finally, it should also be noted for the record that the petition in this case was filed on August 14, 2002, one day after the expiration of the L-1A status of the beneficiary. According to 8 C.F.R. § 214.2(l)(14)(i), "[a] petition extension may be filed only if the validity of the original petition has not expired." For this reason, the director may not grant the requested extension of stay.

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.