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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: SRC 03 123 50276 Office: TEXAS SERVICE CENTER Date: JUN 16 2005

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:

[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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision shall be withdrawn and the matter remanded for entry of a new decision.

According to the documentary evidence contained in the record, the petitioner was incorporated February 14, 2003 and claims to be in the retail/wholesale business. The petitioner claims to be a subsidiary of M/S Little Italy, located in India. It seeks to employ the beneficiary temporarily in the United States as the president of its new office. The director determined that the petitioner failed to establish that the beneficiary had been employed by the foreign entity for one continuous year within the three years preceding the filing of the petition. The petition was filed on March 27, 2003.

On appeal, counsel disagrees with the director's decision and asserts that the evidence is sufficient to demonstrate that the beneficiary had been employed by the foreign entity for one continuous year within the three years preceding the filing of the new office petition.

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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the Unite States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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 with 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 serves 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(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary had been employed by the foreign entity for one continuous year within three years preceding the filing of the petition.

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;
>
> (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.

The petitioner initially described the beneficiary's duties with the foreign entity as:

> Prior to coming to the U.S. as H-4, the beneficiary was employed by the petitioner's subsidiary in India as its managing director. The beneficiary was responsible for supervising subordinate employees who prepare marketing and sales strategy; reviewing and analyzing data relating to market conditions and sales reports; establishing and implementing policies to manage and achieve marketing goals; reviewing and approving budgets prepared by controller and chartered accountants and directing management of the company.

The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary had been employed by a foreign entity for one continuous year within three years prior to filing the petition. The director subsequently requested that the petitioner submit "the official payroll records from M/S Little Italy showing that the beneficiary was employed for one continuous year between March 27, 2000 and March 27, 2003."

In response to the director's request for additional evidence, the petitioner submitted a letter dated April 12, 2003, from the foreign entity in which it is stated that the beneficiary had been employed by the foreign entity from June 1, 2000, to July 1, 2001 as manager. Counsel for the petitioner responded to the director's request for additional evidence by stating that the beneficiary had been employed by the foreign entity from June 1, 2000 to July 1, 2001. The petitioner submitted copies of the foreign entity's payroll records covering the period from June 2000 to April 2001.

The director denied the petition after determining that the evidence submitted demonstrated that the beneficiary was employed by the foreign entity from June 2000 to April 2001, and then entered the United States as an H-4 non-immigrant July 10, 2001. The director concluded that the beneficiary had not been employed full-time by a qualifying foreign entity for one continuous year within three years of the filing of the petition.

On appeal, counsel asserts that due to a simple oversight, the foreign entity's salary register for May 2001 and June 2001 was not included in the evidence submitted in response to the director's request for additional evidence. On appeal, the petitioner submits a copy of the foreign entity's salary register for June 2000 to July 2001.

The director's failure to adequately address the issue of the beneficiary's managerial or executive capacity at the foreign entity in her request for additional evidence, dated April 8, 2003, and in her Notice of Decision, dated May 12, 2003, warrants a withdrawal of her decision to deny the petition with respect to this issue. The purpose of the request for evidence is to elicit additional information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). As the director was vague in her request for additional evidence, the petitioner reasonably presumed that the evidence it had submitted was sufficient. The petitioner's presumption was reasonable, given the purpose of a request for evidence as described at 8 C.F.R. § 103.2(b)(8).

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the beneficiary's claimed managerial or executive capacity while employed by the foreign entity, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner claims to be in the wholesale and retail business. The petitioner submitted a copy of its sublease agreement, the lease agreement, and an assignment of lease. In this matter, the petitioner has not described its anticipated space requirements for its business. The main lease agreement states in part: "Use of Premises – Subtenant will only use the premises for a donut shop and for uses normally incident to that purpose." In addition, there is nothing in the record that shows that the beneficiary obtained the sub-landlord's prior written consent before assigning the sublease to the U.S. entity. Based on the record, it cannot be concluded that the petitioner has secured sufficient space to house the new office. Another issue to be addressed is whether the petitioner has submitted sufficient evidence to demonstrate that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In the instant matter, the petitioner submitted a copy of a stock certificate issued by the U.S. entity to the foreign entity in the amount of 1,000 shares. However, the stock certificate is undated and there has been no independent documentary evidence, such as a stock ledger, notice of purchase, meeting minutes, or canceled checks, submitted to authenticate the certificate. For these additional reasons, the petition may not be approved.

Although not directly addressed by the director, a remaining issue is whether there has been sufficient evidence submitted to demonstrate that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity as defined at section 101(a)(44) of the Act, or that the organization will be able to support such a position within one year of operation. The petitioner described the beneficiary's proposed duties as: responsible for hiring and firing managers, supervising subordinate employees, establishing and implementing policies and goals, reviewing financial reports, and managing the company.

The petitioner also stated that the beneficiary would exercise wide discretion and latitude in the performance of his duties and would receive minimum supervision from other company executives. 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.). For this additional reason, the petition may not be approved.

As always, 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. The petitioner has not sustained that burden.

**ORDER:** The director's decision of May 12, 2003 is withdrawn. The matter is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.