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File: WAC 04 053 51964 Office: CALIFORNIA SERVICE CENTER Date: **NOV 28 2005**

IN RE: Petitioner:
Beneficiary:



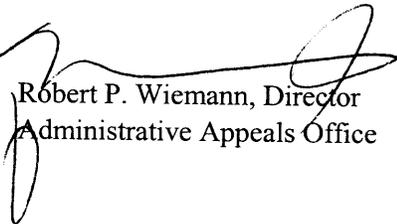
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, California 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 general manager an L-1A 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 limited liability company organized in the State of Arizona that operates a convenience store. The petitioner claims that it is an affiliate of [REDACTED] and Sons, located in Gujarat, 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 his status for a two-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary has been or will be employed 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 director placed undue emphasis on the size of the petitioning company and the number of subordinate employees managed by the beneficiary, and contends that the petitioner provided sufficient evidence to establish that he would be employed in a qualifying managerial or executive capacity. Counsel further contends that the beneficiary's duties are characteristic of a functional manager/executive. Counsel submits a brief and additional evidence in support of the appeal.

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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in this matter is whether the beneficiary will be employed by the United States entity in a 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 a December 15, 2003 letter appended to the initial petition, the petitioner described the beneficiary's duties as follows:

As General Manager for North America, [the beneficiary] will hire and thereafter train with upper level professional employees.

As General Manager for North America, [the beneficiary] will be required to supervise the collection of data of U.S. competitors, which will advise the petitioner's management as to the availability of prospective U.S. clients, as well as the viability of potential marketplaces. In this regard, the General Manager for North America will have the discretion to engage the services of U.S. based marketing analysts.

As General Manager for North America, [the beneficiary] will direct staffing, training and performance evaluations to develop and control business expansion strategies. [The beneficiary] will coordinate the staff by establishing sale territories, quotas and goals, and advice [sic] dealers, distributors and clients concerning sales and advertising techniques. As General Manager for North America, [the beneficiary] will assign an aggressive marketing to subordinate sales managers.

The petitioner indicated on Form I-129 that it had one employee at the time the petition was filed.

On February 7, 2004, the director requested additional evidence to establish that the beneficiary would be performing the duties of a manager or executive with the petitioning company. Specifically, the director instructed the petitioner to submit: (1) the total number of employees at the U.S. location where the beneficiary will be employed; (2) its organizational chart depicting the beneficiary's position and identifying

all subordinate positions, including job titles, job duties, educational level and annual salaries for all employees working under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties in the United States; (4) copies of the U.S. company's Arizona quarterly wage reports for the last four quarters that were accepted by the State of Arizona; (5) copies of IRS Forms 941, U.S. Quarterly Federal Tax Return, for the last four quarters, and (6) copies of the U.S. company's payroll summary, Forms W-2 and Form W-3, evidencing wages paid to employees.

In response, counsel submitted a letter dated April 30, 2004. Counsel stated that the petitioner does not have any employees but plans to hire three employees "this year." In response to the director's request for a detailed description of the beneficiary's duties in the United States, counsel stated:

[The beneficiary] is the General Manager for [the petitioner]. He does not report to anyone. He will direct employees, training and performance evaluations to develop and control business expansion strategies. He will coordinate the employees by establishing sales territories, quotas and goals and advice [sic] dealers, distributors and clients concerning sales and advertising techniques.

In addition, the petitioner submitted an April 23, 2004 letter in which it indicated the beneficiary is "preparing to hire" a cashier, a part-time stocker and a part-time driver, and that he will "oversee three employees and the daily operation[s] of the business." The petitioner also stated that it utilizes the services of an accountant and provided a letter from the accountant briefly describing the services he provides as an independent contractor. The petitioner's organizational chart depicts the beneficiary over a cashier, a part-time stocker, a part-time driver and the accountant.

The director denied the petition on July 11, 2004, concluding that the petitioner did not establish that the beneficiary will be functioning in a managerial or executive capacity. The director observed that as the petitioner's sole employee, the beneficiary "must be performing all business activities of the petitioning organization, including non-qualifying day-to-day activities of the company's operations." Accordingly, the director concluded that the beneficiary's duties are not primarily managerial or executive. Finally, the director acknowledged the petitioner's claim that it intended to hire additional employees in the near future, but noted that the petitioner must establish eligibility at the time of filing.

On appeal, counsel for the petitioner asserts that the director's decision "represents incorrect and inappropriate presumption . . . that small companies do not have executives or managers." Counsel emphasizes that there is no "predetermined number of workers that a company must employ" in order to claim a need for a general manager. Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, (N.D. Ga. 1988) and several unpublished AAO decisions to stand for the proposition that the size of a petitioning organization is not a determining factor in analyzing whether a beneficiary will be employed in a managerial or executive capacity.

Counsel further asserts that because the petitioner is a small organization, the beneficiary's duties must necessarily be broad in nature. Counsel indicates that the petitioner hired two employees in May 2004, and provides a new job description for the beneficiary that takes into account his supervisory duties. Counsel claims that the beneficiary is accountable for managing and maintaining the "functionality" of the petitioner,

and states that the new duties listed “far exceed the responsibilities and accountability of a mere ‘front-line’ supervisor’ and are truly characteristic of a functional manager/executive.” Counsel states that supervision of employees will be only incidental to the beneficiary’s primary duty of managing the functionality and ensuring the success of the company.

Counsel objects to the director’s reference to *Matter of Church Scientology International*, 19 I&N Dec. 583 (Comm. 1988), noting that the decision pre-dates the Immigration Act of 1990 and the introduction of the concept of a “function manager.” Counsel states that the beneficiary qualifies as an executive because he manages a function of the organization, establishes policies and goals, exercises wide latitude in decision making, and, as the owner of the petitioning company, does not receive direction from any higher-level personnel.

Finally, counsel refers to the U.S. Department of Labor’s *Occupational Outlook Handbook* and *Dictionary of Occupational Titles*, noting that these publications provide position descriptions for general managers, top executives and retail store managers which are consistent with the job description provided for the beneficiary.

In support of the appeal, the petitioner submits, in part, Forms I-9, Employment Eligibility Verification, and Forms W-4, Employee’s Withholding Allowance Certificate, for two new employees. The documents were all signed on August 25, 2004.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or 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). 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.*

On review, the petitioner has provided a vague, non-specific and largely speculative description of the beneficiary’s duties that fails to demonstrate what the beneficiary does on a day-to-day basis and furthermore appears implausible in the context of the petitioner’s business as an operator of a small convenience store. For example, the petitioner indicated that the beneficiary “will hire and thereafter train with upper level professional employees,” “coordinate staff by establishing sale territories, quotas and goals,” and “assign an aggressive marketing to subordinate sales managers.” Given that the petitioner did not employ any employees other than the beneficiary at the time of filing, much less upper level professionals or sales managers, these duties are speculative at best and provide no insight into the beneficiary’s day-to-day tasks at the time of filing. Moreover, the petitioner has not indicated any intention to operate a type of business that would mandate the hiring of sales managers or the establishment of sales territories or quotas.

The petitioner further indicated that the beneficiary would “supervise the collection of data on U.S. competitors,” “advise the petitioner’s management as to the availability of prospective U.S. clients,” “engage the services of marketing analysts,” “control business expansion strategies,” and “[advise] dealers, distributors and clients concerning sales and advertising techniques.” However, the petitioner did not clarify who actually

performs sales and marketing duties, maintains relationships with vendors and suppliers, or any other duties associated with operating the petitioner's business, if not the beneficiary. Overall, the job description provided is vague and appears incongruous in light of the petitioner's description of its business operations. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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). The AAO cannot determine from the beneficiary's job description what duties the beneficiary performs, much less conclude that his duties are primarily managerial or executive; the AAO will not accept a vague job description and speculate as to the related managerial and executive job duties. Merely claiming that the beneficiary owns and manages the petitioning company or has a managerial or executive job title is insufficient to establish eligibility.

Although counsel provides a new job description on appeal, the description appears to reflect the beneficiary's duties subsequent to the hiring of two new employees in August 2004 and is thus not probative of the beneficiary's eligibility at the date of filing. 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).

Counsel correctly observed that CIS may not base a determination of the beneficiary's eligibility for managerial or executive capacity solely on the size of the petitioning company. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner was a one-year-old retailer operating a convenience store. The petitioner operates a retail store that is likely open for business at least eight hours a day, six days a week. The petitioner clearly requires employees to perform a number of non-managerial tasks, such as review and order inventory, receive deliveries, stock merchandise on shelves, answer customer questions regarding its products, operate a cash register, reconcile daily sales, balance a checkbook, pay monthly bills, and perform other routine operational tasks. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a general manager who performs primarily managerial and executive duties. Rather, at the time the petition was filed, the beneficiary, as the only employee, would have been required to perform all of the routine administrative and operational duties

inherent in operating a convenience store. Although the petitioner and counsel assert that the beneficiary's duties are primarily executive or managerial, it is clear from the record that the reasonable needs of the petitioner would require that the beneficiary work in the store performing non-qualifying duties on a full-time, or near full-time basis. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 583, 604 (Comm. 1988).

The AAO acknowledges counsel's objections to the director's reliance on *Matter of Church Scientology International*. However, the *Matter of Church Scientology International* decision remains a valid precedent decision that is binding on all CIS officers in the enforcement of the Act. See 8 C.F.R. § 103.3(c). Specifically, in *Matter of Church Scientology*, the AAO examined the claimed managerial capacity of a member of the Church of Scientology. After citing to the regulations and noting that the beneficiary's duties must be primarily at the managerial or executive levels, the AAO stated: "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. at 604. The AAO continued to examine the specific job duties and concluded that the beneficiary appeared to function as a staff officer or specialist and not as a manager or executive.

Additionally, counsel observes that Congress omitted the language that discussed individuals who produce a product or provide a service from the Immigration Act of 1990 and asserts that this is a clear indicator that such individuals are not precluded from qualifying as multinational managers or executives. However, the AAO will not draw this conclusion based solely on an omission. Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support his argument. Accordingly, counsel's unsupported assertions are not persuasive on this point.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second the petitioner must show that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940, F.2d 1533 (Table) 1991 WL 144470 (9th Cir. July 30, 1991). The AAO does not dispute that the beneficiary does indeed exercise discretion over the petitioner's business operations. However, it can be assumed, and has not been shown otherwise, that the beneficiary has been performing many or all of the routine operational tasks necessary to operate a retail store. Furthermore, it is evident that such duties would, by necessity, be his primary duties. The petitioner's store could not operate if its only employee did not work in the store on a full-time basis. The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

On appeal, counsel argues that the beneficiary qualifies as a function manager or executive because he is responsible for the "functionality" of the petitioning company. 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) of the Act, 8 U.S.C. § 1101(a)(44)(A). In such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. The addition of the concept of a "function manager" by the Immigration Act of 1990 simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish management capacity. The statutory requirement that a beneficiary "primarily" perform in a managerial or executive capacity continues to be valid. Moreover, federal courts continue to give deference to CIS's interpretation of the Immigration Act of 1990 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. See *Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL 576839 at *5 (9th Cir. 1995 (unpublished)(citing to *Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); see also, *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C.Cir. 1991). In this matter, the petitioner has not provided evidence to establish that the beneficiary primarily manages an essential function. Counsel's unsubstantiated statement that the beneficiary's "primary duty is to manage. . .the functionality of the company" is not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel cites *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 *Mars Jewelers, Inc. v. INS*. It is noted that the decision cited by counsel relates to an immigrant visa petition, and not the extension of a "new office" nonimmigrant visa petition. 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). Additionally, 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. As counsel has not discussed the facts of the cited matter, it will not be considered in this proceeding.

Counsel further refers to an unpublished decision in which 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 unpublished decision. 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.

Finally, the AAO acknowledges counsel's argument that the beneficiary's job duties closely resemble those described for "general managers and top executives" and "retail store managers" in the U.S. Department of Labor's *Occupational Outlook Handbook* and *Dictionary of Occupational Titles*. Generic job descriptions found in Department of Labor publications have no bearing on an assessment of this beneficiary's duties within the context of the petitioner's business, and the petitioner cannot satisfy its burden of proof by paraphrasing such descriptions; the regulations require the petitioner to submit a detailed description of the beneficiary's duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial or executive in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to expand its operations in the future, and submits evidence on appeal that it hired additional employees subsequent to the denial of the petition. However, as discussed above, 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., supra*. Furthermore, as noted above, 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 reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the appeal will be dismissed.

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.