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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship
and Immigration
Services**

D7

DATE: **JUL 16 2012** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, Vermont Service Center. The Administrative Appeals Office (AAO) summarily dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The matter will be reopened but the director's decision will be undisturbed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 states that it is "engaged in commercial investments in chain of fast food restaurants." The petitioner seeks to employ the beneficiary as its president - CEO. The beneficiary was initially granted a one-year period of stay in L-1A status to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of President-CEO.

On December 19, 2011, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a position that is primarily executive or managerial in nature.

On January 23, 2012, counsel for the petitioner submitted the Form I-290B to appeal the denial of the underlying petition. Counsel marked the box at part two of the Form I-290B to indicate that a brief and/or evidence would be sent within 30 days. No brief or additional evidence was received by the AAO, thus the AAO summarily dismissed the appeal on April 11, 2012.

On May 4, 2012, counsel filed a Form I-290B and identified it as a motion to reopen and a motion to reconsider. On motion, counsel contends that he filed the appeal on January 23, 2012 and requested 30 days to submit a brief and/or additional documentation. On appeal, counsel presents evidence that the appeal was properly received by the Phoenix lockbox by February 21, 2012. This evidence establishes that the appeal brief was submitted in the 30-day time period. The AAO will withdraw its previous decision and review the merits of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave

authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (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 nonimmigrant petition was filed on August 29, 2011. The Form I-129 indicates that the beneficiary will continue to be employed in the position of President-CEO. The petitioner claimed to have three employees. In the support letter dated August 19, 2011, the petitioner stated that "we have successfully implemented investments plans in one retail convenience store in Alabama and we [are] planning on opening other stores in Alabama and Georgia." The petitioner also provided a job description for the proposed position and, in part, stated that the beneficiary is "in charge of all financial and marketing operations and management of the company." In response to the director's request for evidence, the petitioner provided the percentage of time the beneficiary will spend on each duty as follow:

- 1) Time spent on Management Decisions (25%)
- 2) Time for Organizational Development (10%)
- 3) Supervising day to day operations (25%)
- 4) Financial Representations (15%)
- 5) Representing the company (15%)
- 6) Business Negotiations (10%)

The petitioner also listed the current employees, including the operations manager, two assistant managers, an "outsourced" accountant, and five clerks and cashiers that are provided by a staffing services company. The petitioner also submitted Form 941, Quarterly Wage Reports, for the second and third quarters of 2011 that indicate the petitioner employed 4 individuals.

On appeal, counsel for the petitioner stated that the "operations manager, assistant managers and the cashiers and clerks run the store," and the beneficiary is "relieved from the non-managerial duties of operating the store on a daily basis."

The director denied the petition on December 19, 2011 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

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

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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the petitioner has not established whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The beneficiary's proposed job description includes vague duties such as "major decision making for Petitioner relating to financing, marketing, personnel administration, etc."; "develop expansion plans"; "possesses all rights to execute all the managerial decisions of the Company"; and "supervision of the company's day-to-day 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

In addition, the job duties required of the beneficiary include non-qualifying duties such as "enter into contracts on behalf of the company," "enters into contract with vendors to provide merchandise," "negotiates with clients and purchasers," "prepare bids," "plan and direct sales programs to promote new market," "set sales and product cost targets for managers and monitor progress," and "prepare publicity and promotional campaigns." The petitioner did not identify any employees who actually assisted the beneficiary in contracting, negotiating with clients and purchasers, bidding, planning sales programs, setting sales targets, and preparing publicity campaigns, thus indicating that the beneficiary carries out these operational functions, which are outside the parameters of what would be deemed as being within a managerial or executive capacity.

The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how his time will be divided among managerial and non-managerial duties. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on duties, the petitioner has not articulated whether each duty is managerial or executive.

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, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The regulations, however, provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS 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 USCIS 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. The petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In addition, the petitioner stated that it employs a staff accountant that is "outsourced" and five cashiers and clerks that are provided by a staffing company. The petitioner did not provide any evidence that the petitioner pays a staff accountant as an independent contractor or the cashiers and clerks. The petitioner did not provide tax documents, payments or contracts that indicate that the petitioner will utilize an independent contractor for accounting services, or a staffing company to provide cashiers and clerks. The petitioner did provide invoices from [REDACTED] for payment of staffing provided to the petitioner but the petitioner did not provide a contract or other evidence to indicate that the staffing company did in fact provide cashiers and clerks. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

An analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary is employed in a managerial or executive capacity. The Form I-129 stated that the petitioner employs three individuals. The job duties of the other two employees are not clear but it appears that the other two employees will have to work as cashiers and stockers as the petitioner runs a convenience store. Convenience stores are usually open seven days a week for several hours and the petitioner never explained who would be running the day-to-day operations of the convenience store. As the beneficiary is one of only three employees of the U.S. company, it appears that the beneficiary will be performing all of the various operational tasks inherent in operating a business on a daily basis, such as acquiring products, negotiating contracts, preparing budgets and financial statements, researching the market, marketing and sales, budgeting, bookkeeping, and paying bills. Based on the record, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as the president and two other employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The beneficiary's job description was not sufficient to establish that he would be employed in a primarily managerial or executive capacity, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.