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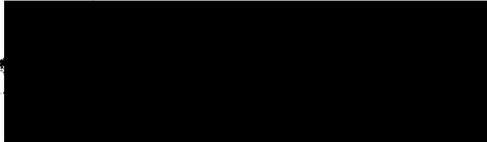
U.S. Department of Homeland Security
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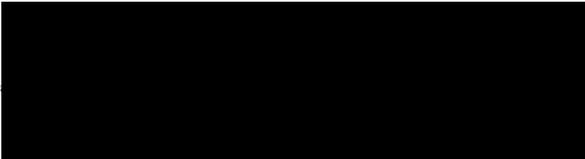


File: SRC 01 122 50908 Office: TEXAS SERVICE CENTER Date: APR 28 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

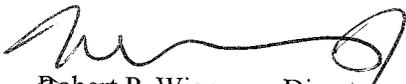
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a corporation organized in the State of Texas that manages, owns, and operates a gas station/convenience store, seeks to employ the beneficiary as its vice president. The petitioner claims that it is the affiliate of Western Medical & General Store, a retail establishment located in Bombay, India, and seeks to employ the beneficiary as its vice president for a three-year period.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, the petitioner contends that the director failed to consider the reasonable needs of the petitioner in rendering the decision. In support of this contention, the petitioner submits a brief and 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 primary 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, counsel submitted a letter from the U.S. petitioner, dated February 19, 2001, outlining the beneficiary's intended duties while employed in the United States. The petitioner described his duties as follows:

[The beneficiary] will be employed as the Vice 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; overseeing preparation of sales and inventory reports; reviewing [and] 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 June 8, 2001, the director requested additional evidence. Specifically, the director requested more specific information with regard to (1) the ownership and control of the foreign entity; (2) evidence that the U.S. entity maintains a business premises, since the copy of its commercial lease expired on April 30, 2000; (3) the viability of the foreign entity; (4) the organizational structure of the U.S. and foreign entities; and (5) the titles and the duties of all employees of the U.S. entity.

In a response dated July 23, 2001, the petitioner submitted documentation in response to the director's request; however, the petitioner failed to provide any explanatory information with regard to said documentation. With regard to the organizational structure of the U.S. entity, the petitioner, through counsel, provided an organizational chart, which showed that the petitioner employed a president, a manager, an assistant manager, and one sales person, in addition to the beneficiary's proposed position of vice president and a vacant sales person position. The petitioner also provided a description of the job duties for the manager, assistant manager and sales person.

On January 9, 2002, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the overall size and scope of the business, as set forth in the organizational chart, suggested that the beneficiary would not be **primarily** engaged in managerial or executive tasks. The director concluded that based on the evidence presented, it was likely that the beneficiary would be required to engage in the day-to-day operations of the business.

On appeal, the petitioner asserts that the director's decision failed to take into account the reasonable needs of the petitioner in light of its overall purpose and stage of development. In addition, counsel for the petitioner asserts that [CIS] is abusing its authority by stating that the beneficiary will be performing duties that do not constitute managerial or executive status, particularly when the petitioner has already outlined the beneficiary's specific high-level duties. Finally, counsel asserts that the petitioner intends to purchase a second retail location which will require the services of three additional employees. Consequently, counsel contends, the result of this purchase will ensure that the beneficiary performs solely managerial or executive tasks.

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.*

Prior to adjudication of the petition, the petitioner suggested that the beneficiary would be employed in a capacity that was primarily executive in nature, since he would be acting as vice president. In support of these contentions, the petitioner submitted a brief statement in its letter dated February 19, 2001 (restated above). The petitioner, however, never clarifies whether the beneficiary is claiming to 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. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. In this case, the petitioner provides a description of duties that incorporates managerial duties (" hiring and firing managers," "supervising subordinate staff,") as well as executive duties ("receiving minimum supervision," "exercising wide discretion and latitude in performance of duties"). 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In this case, the petitioner merely claims that the beneficiary will be employed in a managerial or executive capacity, but fails to specifically describe his day-to-day duties. 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Here, the petitioner claims that the beneficiary's duties are exclusively managerial or executive. However, the petitioner has provided no evidence to explain how the reasonable needs of the business will be met with the identified staff. Generally, a combination gas station/convenience store is open seven days a week, and often open for 24 hours. Although not specifically confirmed or denied by the petitioner in this matter, the AAO will assume for analytical purposes that multiple shifts, in excess of a standard nine o'clock to five o'clock shift, must be staffed in order to keep this business running and in competition with similar businesses. According to the petitioner's vague description of its employees and their positions, the business has a managerial/executive staff of four persons, and only one sales person. However, the most current Employer's Quarterly Report for the quarter ending December 31, 2000 confirms that only the manager was employed by the petitioner at the time of filing. The manager apparently maintains records of underground petroleum tanks, and prepares work schedules and payrolls for subordinate employees. Consequently, without any evidence to the contrary, it is reasonable to conclude that the beneficiary would be required to perform many of the daily activities to keep this business running, since the record contains no evidence that the sales person or other subordinates were definitely employed at the time of filing to specifically deal with the day-to-day tasks of the operation. An average full-time workweek is 40 hours per week. It is unlikely, therefore, that the beneficiary and the manager named on the organizational chart worked more than eight hours per day, and even more unlikely that they worked seven days per week. In addition, there is no mention of any employee who is designated to work as a stock clerk or gas station attendant. Since the record contains insufficient evidence to support the assertion that the beneficiary is primarily employed in an executive capacity, the AAO cannot conclude that the beneficiary will be employed in a primarily executive or

managerial capacity. 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. 593, 604 (Comm. 1988).

On appeal, counsel alleges that the director failed to take into consideration the reasonable needs of the petitioner's business. As required by section 101(a)(44)(C) of the Act, 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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. As discussed above, the petitioner has not articulated why its need to employ the beneficiary as vice president is reasonable in light of the petitioner's overall purpose and stage of development. Instead, counsel on appeal merely states that it is necessary. 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).

In fact, the documentary evidence submitted, specifically the petitioner's Employer's Quarterly Reports for the years 1999 and 2000, shows that the company never employed more than two employees in the two years preceding the filing of this petition. Again, the petitioner has not clearly articulated why it requires the beneficiary's services in an apparently newly created executive position when it had clearly been operating with only two to three employees (including its president), nor does it explain how such a company can support two primarily executive positions.

Furthermore, with respect to the beneficiary's proposed subordinate staff, the AAO notes that it is not clear that the petitioner actually employed the individuals designated on the organizational chart as its assistant manager and sales person at the time the petition was filed. The petition was filed in March 2001 and was accompanied by the petitioner's most recent Employer's Quarterly Report submitted to the Texas Workforce Commission, for the fourth quarter of 2000. The Quarterly Report showed that the petitioner employed only two people – the manager and one other employee whose name does not appear on the organizational chart. On the I-129 Petition, the petitioner indicated that it had only three employees, presumably its president, whose role within the company and source of compensation are unclear, and the two employees named on the quarterly report. Since the company's organizational chart was submitted several months after the petition was filed, it is possible that the additional employees were hired after the petition was filed. However, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits

competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Nonetheless, the petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

Based on the petitioner's minimal representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as a member of a three person management/executive staff when only an assistant manager and one sales person are delegated with the responsibility of running the gas station/convenience store. 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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, the petitioner relies on the petitioner's intent to purchase a new retail location as a basis upon which to approve the petition. This contention is unacceptable, because 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. at 249. For this additional reason, the petition may not be approved.

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.