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U.S. Citizenship
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Services

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FILE: SRC 03 199 50423 Office: TEXAS SERVICE CENTER Date: FEB 16 2005

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

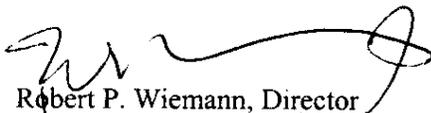
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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 in the State of Florida that is engaged in the retail sale and wholesale distribution of sundries and novelty items. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Ahmedabad, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's employment for an additional two years.

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

On appeal, counsel claims that the beneficiary would be employed in the United States in an executive capacity. Counsel also contends, in the alternative, that the beneficiary would be employed by the petitioning organization as a functional manager, as the beneficiary "has final responsibility for such functions as the selection and control of vendors, sales and marketing, and business development." Counsel submits a brief and documentary evidence in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the instant proceeding is whether the beneficiary would 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), 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 filed the nonimmigrant petition on July 11, 2003 noting that as the company's president, the beneficiary would be responsible for directing the management of the corporation, ensuring the successful operation of the business, establishing the company's goals and policies, and implementing strategies to improve productivity and reduce operational costs. In an appended letter from the petitioner, dated July 8, 2003, the vice-president of the petitioning organization provided the following additional job description for the beneficiary:

As President, [the beneficiary] is responsible for directing the overall management and administration of our company. In doing so, he establishes goals and policies relating to investments, structure organization, distributions of assignments, creation of new projects and plan development; implements strategies to improve productivity and reduce the company's operational cost; and directs the hiring and training of personnel. [The beneficiary] also investigates potential markets and establishes client [and] vendor relationships to increase our business operations in the United States. In fact, [the beneficiary's] extensive experience and business background has played a key and integral role in the successful start-up of our business operations. As such, we firmly believe that his guidance and services are essential for our continued growth and future success.

The director issued a request for evidence on July 18, 2003 asking that the petitioner provide the names and job duties of its personnel. Counsel responded in a letter dated September 10, 2003 and provided a list of the job duties performed by the petitioner's three employees: president, vice-president/general manager, and sales associate. The petitioner explained that the beneficiary's responsibilities would include the following tasks:

Directs the overall management and administration of the company; establishes goals and policies relating to investments, structure organization, distribution of assignments, creation of new projects and plan development; implements strategies to increase productivity and reduce operational costs; investigates investment opportunities and expansion of business operations; researches potential markets and establishes client [and] vendor relationships; initiates and participates in sales meetings, and negotiates deals and contracts; oversees all financial and accounting operations; reviews reports and budget to ensure efficient operation; directs the hiring, firing, training and performance evaluation of employees.

As President, [the beneficiary] holds the most senior position and highest level of authority within the company.

In a decision dated September 17, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Following a review of the petitioner's quarterly and annual tax returns, the director noted that "[d]uring the second quarter of 2003, only \$8,300 was paid in total salaries and wages." The director stated that the petitioner did not establish that the beneficiary would manage or direct the management of a department, subdivision, function or component of the organization, or that the beneficiary would supervise and control the work of other supervisory, managerial or professional employees who would relieve him from performing the services of the business. The director concluded that the beneficiary would not be engaged in primarily executive job duties "as the business has not expanded to the point where the services of a full-time, bona fide president would be required." The director stated "[r]einforcing this position is that it would not be the norm for a corporation to have two-thirds of its workforce employed in a mostly executive and/or managerial position." Consequently, the director denied the petition.

In an appeal filed on October 15, 2003, counsel claims that the beneficiary would be employed in an executive capacity because "he is the final decision-maker concerning all the business goals of his U.S. three enterprises for which he is seeking to hire managers."¹ Counsel states that as the senior-level individual of the three organizations, the beneficiary has "decision-making executive responsibilities," has "final sign off responsibilities for tax issues, salary issues, purchasing, planning, vendor selection and vendor management," and has directed all aspects of the start-up of the businesses.

Counsel also asserts that in the alternative, the beneficiary would be employed primarily as a functional manager because "he manages several essential functions of the business at the most senior level and exercises full discretion over these functions." Counsel states "[a]s the most senior person in the company, [the beneficiary] has final responsibility for such functions as the selection and control of vendors, sales and marketing, and business development," and for such activities as purchasing, sales, and vendor management. Counsel states that the beneficiary also has full responsibility for the recruitment and supervision of managerial employees employed in the three U.S. organizations, and exercises the executive duties of negotiating the purchase of assets for the business and developing the goals for the development of the businesses. Counsel contends that the petitioner's manager, under the direction of the beneficiary, oversees the business operations, while the beneficiary engages in the marketing and business development of the company. Counsel explains that the petitioner intends to hire full-time managers for the other two organizations.

Counsel also rejects the director's finding that the beneficiary would spend the majority of his time performing the daily operations of the business. Counsel acknowledges that the beneficiary was previously involved in the day-to-day operations of the business, but notes that this involvement is necessary when starting a new business. Counsel claims that "the recruitment of additional staff clearly demonstrate[s] a

¹ Counsel explains in the appeal that in addition to his employment in the petitioning organization, the beneficiary established two additional businesses in the United States. The record demonstrates that each business is owned by the beneficiary and three individual shareholders, and that the petitioning organization does not have an ownership interest in either organization.

direction towards expansion . . .," which ". . . requires the kind of strong management and leadership that [the beneficiary] is providing."

Counsel also notes on appeal that the beneficiary's difficulty in qualifying as an intracompany transferee has been "the result of the interplay between real-world, realistic business planning and development, and satisfying the requirements of L-1 regulations." Counsel cites the following two difficulties encountered by the beneficiary: (1) achieving substantial business expansion to qualify for an extension of the nonimmigrant petition after doing business for only one year; and (2) taking a cautious approach as a businessman prior to dedicating more resources in the business endeavor. Counsel states that the petitioner was not given an adequate opportunity to demonstrate its expansion after only one year of operations.

On review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(1)(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. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in Citizenship and Immigration Services (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.

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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

In the instant matter, the petitioner has not provided a sufficient description of the specific managerial and executive job duties to be performed by the beneficiary while employed by the petitioning organization. For example, the petitioner claims that the beneficiary directs the company's overall management and administration, ensures the company's overall success, establishes goals, and implements strategies to improve productivity. However, the petitioner does not identify the specific tasks associated with each of the beneficiary's responsibilities. Additionally, counsel's claim on appeal that the beneficiary is an executive because he is the final decision-maker on the business goals of the three U.S. businesses also fails to define the beneficiary's specific executive job duties. Counsel is required to substantiate his claim that "[i]t is a simple reality that a business does not run by itself" with a detailed description of how the beneficiary's responsibility of running and managing the company would satisfy the requirements of either managerial capacity or executive capacity. 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). The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO notes that counsel repeatedly bases his claim of the beneficiary's employment in a managerial and executive capacity on the job duties performed by the beneficiary in connection with three U.S. businesses: the petitioning organization and two separate corporations. Counsel's reference to the beneficiary's job duties in a company other than the petitioning organization is misplaced. The instant petition pertains only to the tasks performed by the beneficiary while employed by the petitioner. As the two additional organizations were formed in October 2003, approximately three months after the instant petition was filed, the beneficiary's job duties in these companies will not be considered.² 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).

The fact that the beneficiary is claimed to work in two additional United States companies also raises doubt whether the beneficiary would be primarily performing in a qualifying capacity for the petitioning organization under the extended petition. 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 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). As noted above, because the record lacks specific detail regarding the job duties performed by the beneficiary, the AAO is unable to determine whether the majority of the beneficiary's time is devoted to employment in a qualifying capacity in the petitioning organization. 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).

Counsel's claim that the beneficiary qualifies as a functional manager of the petitioning organization is unsupported by the record. 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)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. The term "essential" is defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, the petitioner must establish that the function is inherent and indispensable to the business rather than a low-level collateral task that is superfluous to the company's essential operations. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function.

In this matter, counsel has not provided evidence that the beneficiary manages an essential function. It appears that counsel attempts to establish the "essential" nature of a function by stating that the beneficiary is

² The record does not indicate whether the beneficiary has been approved for concurrent employment in the other two United States organizations although it is evident that he is receiving a salary from at least one of these companies. The AAO notes that absent approval the beneficiary is not authorized to work in either corporation and may therefore be in violation of his nonimmigrant status.

the "most senior person in the company," and "has final responsibility" over functions of the business which relate to immediate and tangible results for the company. Counsel lists the essential functions as purchasing, sales, vendor management, and marketing and business development. Other than naming these functions, counsel has not specifically described the essential nature of the each, nor has he defined the tasks involved with managing each essential function. Counsel has also neglected to identify the portion of time devoted to each by the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, as the record indicates that the beneficiary is responsible for researching potential markets, negotiating contracts, establishing client-vendor relationships, and participating in sales meetings, it is reasonable to conclude that the beneficiary is not managing these functions but rather performing the operations for the business. 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).

The AAO notes counsel's claim on appeal that the petitioner was not provided with an adequate opportunity to achieve "substantial business expansion" prior to the filing of the extension. While counsel views this as a "difficulty," the regulations clearly outline the amount of time provided to a new office to become fully operational and support a managerial or executive position. See 8 C.F.R. § 214.2(l)(3)(v)(C). 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. As correctly noted by the director, the record demonstrates that the beneficiary would be responsible for performing the daily operations of the business. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record reflects that the U.S. entity did not secure a commercial lease until May 1, 2003, nearly ten months after the approval of the original new office petition. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. See 8 C.F.R. § 214.2(l)(9)(iii). For this additional reason, the petition may not be approved.

An additional issue not addressed by the director is whether the petitioner has been doing business for the previous year as required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B). The regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). Here, the petitioner has not reported on its corporate tax return any sales or salaries paid during the year 2002. In fact, the petitioner does not report any sales until January 2003, approximately seven months after the approval of the prior petition. The petitioner has failed to demonstrate

that it has been doing business in the United States for the year prior to the filing of this petition. The petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.