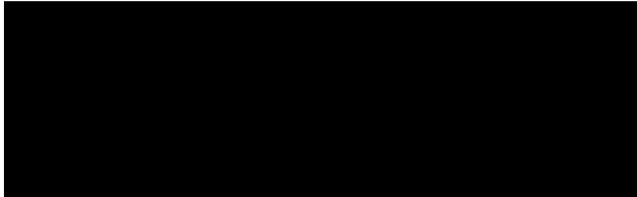




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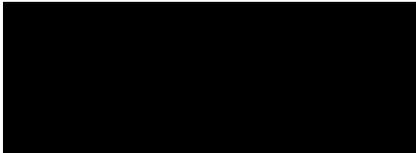
DA

FILE: LIN 03 030 53833 Office: NEBRASKA SERVICE CENTER Date: FEB 23 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 nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] endeavors to classify the beneficiary as a manager or executive 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 claims to be a branch of [REDACTED] located in India and is engaged in the business of acquiring investment and business opportunities. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's executive director. The petitioner was incorporated in the State of Kansas on March 29, 2001<sup>1</sup> and claims to have three employees.

On April 15, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner's counsel submitted a brief and claims, "the beneficiary was engaged in job duties primarily executive and managerial in nature."

To establish L-1 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 qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(i)(14)(3) state 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 (I)(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.

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<sup>1</sup> The AAO notes a discrepancy in the record concerning the petitioner's date of incorporation. Although the Certificate of Incorporation indicated that the petitioner was incorporated on March 29, 2001, the Form 1120, U.S. Corporation Income Tax Return for 2002 indicated that the petitioner was incorporated on 09/10/01. 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).

Further, pursuant to 8 C.F.R. § 214.2(l)(14)(ii), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires:

A visa petition under section 101(a)(15)(L) 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 proceeding is whether the beneficiary has been and will be primarily performing executive or managerial duties for the United States entity. 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.

Initially, the petitioner described the beneficiary’s proposed U.S. duties on the Form I-129 as “[f]ormulate, implement and revise as necessary corporate goals, policies, procedures and protocols. Establish, develop and direct day to day operations of corporation.”

Additionally, the petitioner submitted a supporting letter further describing the beneficiary’s proposed U.S. duties as:

- Establish policies and procedures for marketing, sales, inventory requisition, contract procurement and contract negotiation;
- Direct the hiring, firing, supervision and placement of employees;
- Develop, implement and revise as necessary company policies, procedures and business plans;
- Oversee and evaluate the implementation of company policies, procedures and plans and provide ongoing assessment as to the extent to which same are achieved;
- Formulate strategies to establish and develop the new enterprise and oversee the implementation of such strategies;
- Plan, develop and implement business expansion strategies for new enterprise, oversee staffing and investigate adding potential additional locations once the main establishment is in place;
- Research and develop plans to establish and expand regional sales, including company promotional and marketing schemes;

- Function as liaison between [the petitioner] and the parent company abroad;
- Investigate market factors to analyze and make decisions with regard to business investments and the import and export of goods;
- Direct, oversee and be solely responsible for the day-to-day operation, activities and development of [the petitioner]; and
- Maintain, evaluate, assess and revise current financial operations, budget, procedures, policies, accounts and other aspects of the enterprise on an on-going [sic] basis.

On December 18, 2002, the director requested additional evidence such as a description of the U.S. entity's staff, a detailed description of the employees' duties, and evidence of the wages paid to the employees.

In a March 7, 2003 letter, the petitioner responded to the director's request for additional evidence by describing the beneficiary's proposed U.S. duties as:

[T]he beneficiary purchased one convenience store and designed, developed, and implemented a unique operating system whereby the store was run in two shifts of eight hours each, with a manager and cashier on each shift.

[T]he job duties of the beneficiary include not only directing the sales, marketing and financial components of the organization, but also establishing corporate goals and policies. . . . [T]o devise and put into place a system of operation which would be used as a prototype in the operation of subsequently acquired convenience stores. Thus, the beneficiary having successfully designed, implemented and installed an efficient, productive and successful operating system in the first convenience store, a significant portion of the beneficiary's time has been devoted to planning and developing business expansion strategies and investigating the purchase of additional locations.

Additionally, the petitioner described the beneficiary's subordinate employees U.S. duties as:

██████████ General Manager 7:00 a.m. to 3:00 p.m.

Responsible for the day to day operations of business. Exercises complete discretion answerable only to the director of corporation. Manages, directs and supervises assistant manager and cashiers. Hire and fire as necessary. Organize and reconcile sales and expenditures, financial accounts, payroll, inventory, profit-loss statements.

██████████, Assistant Manager 3:00 p.m. to 11:00 p.m.

Responsible for the day to day operations during second eight hour shift. Assist the general manager in maintaining proper financial records, sales receipts, reconciliation of accounts, ordering and tracking inventory. Supervise and oversee performance of cashier.

██████████ 1st Shift Cashier 7:00 a.m. to 3:00 p.m.

Responsible for assisting customers in the purchase of gasoline, groceries, and other items, maintaining proper sales records, answering the telephone, attending to customer inquiries, operating the cash register and other automated machinery, stocking shelves and monitoring inventory.

██████████ 2nd Shift Cashier 3:00 p.m. to 11:00 p.m.

Responsible for assisting customers in the purchase of gasoline, groceries, and other items, maintaining proper sales records, answering the telephone, attending to customer inquiries, operating the cash register and other automated machinery, stocking shelves and monitoring inventory.

On April 15, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The director noted that the evidence indicated that there were only three employees rather than the five employees that the petitioner described.

On appeal, counsel submits a brief and claims that the beneficiary's duties are "primarily executive and managerial." Counsel reiterates the beneficiary's proposed U.S. duties and states that "the beneficiary had the exclusive authority to make all major decisions on behalf of the corporation and exercised wide latitude in discretionary decision making, receiving no supervision from any other entity, shareholder, parent organization, or individual." In addition, counsel claims that: 1) "the denial of the petition appears to have been summarily issued based upon a single factor, such as the number of employees;" 2) "the attorney general shall take into account the reasonable needs of the organization, component or function in light of the overall purpose and stage of development of the organization, component or function;" and, 3) "[t]he size of the business or number of employees are not factors which are determinative, exclusive of its stage of development and nature of the organization."

The AAO notes that counsel claims, "[T]he beneficiary was engaged in job duties primarily executive and managerial in nature." However, counsel does not clarify 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 beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The beneficiary's described duties are broad and do not elaborate how the beneficiary will primarily perform managerial or executive duties. For example, the petitioner described the beneficiary's duties as "[d]evelop[ing], implement[ing] and revis[ing] as necessary company policies, procedures and business plans" and "[o]versee[ing] and evaluat[ing] the implementation of company policies, procedures and business plans." However, the petitioner failed to specify how the beneficiary will develop, implement, or oversee the company's policies. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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).

Further, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, on appeal, counsel states that the beneficiary "exercised wide latitude in discretionary decision making." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In addition, the petitioner described the beneficiary as being involved in "[r]esearch[ing] and develop[ing] plans to establish and expand regional sales, including company promotional and marketing schemes." Since the beneficiary will actually be involved in the development of plans to increase sales, he will be providing the services of the business rather than directing such activities. 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. The petitioner claimed that "the beneficiary [d]irect[s] the hiring, firing, supervision and placement of employees." These employees included a general manager, assistant manager, and two shift cashiers. However, it is unclear as to whom these managerial personnel actually manage or supervise as there is no evidence to establish that the petitioner employed the two shift cashiers. The AAO concurs with the director's findings that the petitioner submitted W-2 Wage and Tax Statements indicating that the petitioner employed only three employees rather than the claimed five employees in the March 7, 2003 letter in response to the director's request for additional evidence. 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). In addition,

if the two subordinate employees are managerial personnel this raises the question of who would be performing the lower level nonmanagerial or nonexecutive duties of the company. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” The term “profession” contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor’s degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant matter, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform financial duties of the assistant manager, whom are among the beneficiary’s subordinates.

Moreover, counsel correctly observes that a company’s size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to an L-1A manager or executive. 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, Citizenship and Immigration Services (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. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary’s performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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.

After careful consideration of the evidence, the AAO concludes that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the Indian entity. The petitioner claims that it is a wholly-owned branch of the foreign entity. In order to meet the definition of "qualifying organization," there must be a United States employer. See 8 C.F.R. 214.2(l)(1)(ii)(G)(2). Although the statute refers to an alien that seeks to enter the United States temporarily in order to render his or her services to "the same employer or a subsidiary or affiliate thereof," the phrase "same employer" refers to a "branch office" of a foreign entity that is authorized to do business in United States. The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). Since the petitioner submitted evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, *supra*. In this matter, the petitioner's Article IV of its articles of incorporation indicated that the "Corporation shall be authorized to issue 100,000 shares of common stock with a par value of (1.00) dollar each. The Corporation will not commence business until it has received for the issuance of its shares consideration of the value of at least one thousand (1,000.00) dollars." On the petitioner's 2002 U.S. Corporation Income Tax Return, Form 1120, Schedule L shows that the petitioner sold \$1000.00 worth of

common stock. However, the petitioner's stock certificate indicated that only 500 of the 1000 shares were sold to the foreign entity. Thus, this raises a question as to the ownership and control of the remaining 500 shares. Again, 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). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Further, if one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. Here, the petitioner claimed that the foreign entity is a "sole proprietorship owned by [REDACTED]". In this matter, the record fails to demonstrate that there is a high percentage of common ownership and common management between the two companies.

Another issue not addressed by the director is whether the foreign entity continues to be doing business abroad. In this matter, the petitioner stated that the company abroad is "a sole proprietorship owned by [REDACTED]". However, the petitioner has not submitted sufficient evidence to establish that the foreign sole proprietorship continues to do business, as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). A sole proprietorship is a business in which one person owns all of the assets and operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Edition). The lack of current evidence leads the AAO to conclude that the foreign sole proprietorship is no longer doing business. For this further reason, the petition may not be approved.

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 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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.