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U.S. Citizenship
and Immigration
Services

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FILE: SRC 02 274 51167 Office: TEXAS SERVICE CENTER Date: JUN 10 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, A. Essak & Sons, Inc., endeavors to classify the beneficiary as a nonimmigrant 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 an affiliate of [REDACTED] located in Pakistan. The petitioner is engaged in the import and export business. The initial petition was approved 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 president. The petitioner was incorporated in the State of Texas on June 5, 2001.

On November 14, 2002, the director denied the petition and determined that the petitioner failed to establish that the beneficiary has been and will be primarily performing duties in an executive or managerial capacity.

On appeal, the petitioner refutes the director's decision and states that the beneficiary will "purely perform managerial or executive duties for the [p]etitioner."

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(l)(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 (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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act 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 (1)(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 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.

On September 24, 2002, the petitioner filed Form I-129. In an attachment to Form I-129, the petitioner stated:

The [b]eneficiary is currently employed by [the petitioner] as an executive or manager.

* * *

The [b]eneficiary will continue to be employed as [p]resident of the petitioner, and will continue to be responsible for performing the following duties; [sic] 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 [b]eneficiary will receive minimum supervision from the Board of Directors. Beneficiary will exercise wide discretion and latitude in the performance of his duties.

On November 14, 2002, the director denied the petition and determined that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The director also found that the beneficiary was paid \$6000 per year while the remaining employees were paid \$4000 per year.

On appeal, counsel claims that the director failed to “take into account the reasonable need[s] of the [p]etitioner in light of the overall purpose and stage of development. Counsel also states, “the beneficiary did not enter the United States as an L-1 until after March 2002; therefore, he was only paid \$6000.” Finally, counsel claims that the beneficiary will be performing managerial or executive duties.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the description of the beneficiary’s U.S. job duties to determine whether the beneficiary is primarily acting in a managerial or executive capacity. 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 petitioner stated that the beneficiary “is currently employed by [the petitioner] as an

executive or manager.” However, the petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. The petitioner 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.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has provided a nonspecific description of the beneficiary’s duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary’s duties will include “establishing and implementing policies to manage and achieve marketing goals.” However, these duties are generalities that fail to enumerate any concrete policies that the beneficiary will establish and implement. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, the petitioner claims that the beneficiary’s U.S. duties include tasks such as “overseeing marketing campaign developed by subordinate managers” and “overseeing preparation of sales.” However, the record does not provide evidence regarding the beneficiary’s subordinate managers or their duties. It is unclear who will actually develop the marketing campaign that the beneficiary will oversee or who will prepare sales for the business. Therefore, although the petitioner claims that the beneficiary will oversee marketing and sales operations, it must be evident from the record that the beneficiary does not perform the tasks that he has been assigned to oversee. 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).

In addition, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For instance, the petitioner depicted the beneficiary as “exercise[ing] wide discretion and latitude in the performance of his duties.” 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.).

Moreover, on appeal, counsel claims that the director failed to “take into account the reasonable need[s] of the [p]etitioner in light of the overall purpose and stage of development. 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. 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. Again, 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. at 190.

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 beneficiary has not been and will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

The AAO notes discrepancies in the record concerning the foreign entity and the Employer's Quarterly Report. First, on Form I-129, the petitioner indicated that the petitioner is an affiliate of [REDACTED] Pakistan. However, the petitioner submitted documentation such as the foreign entity's articles of association and its certificate of incorporation indicating that the name of the foreign entity is AES Textiles Industries (Private) Limited rather than A. Essak & Sons. Although these two names may be used by the same company, there is no evidence in the record to support this conclusion. Second, the petitioner submitted its Employer's Quarterly Report showing that five employees were paid for the quarter ending June 30, 1992. However, the U.S. entity's articles of incorporation indicate that the petitioner was incorporated in the State of Texas on June 5, 2001. There are also three significant inconsistent dates on the Employer's Quarterly Report. The Report shows 06/30/92, 2-02, and 07/31/02. In addition, two of the three dates, 2-02, and 07/31/02, appear to have been altered. As a result, the AAO finds that there is conflicting information contained in this record that has not been resolved. 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). 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).

Although not addressed by the director, a remaining issue to be examined is whether the petitioner has established that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(1)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the record shows that the beneficiary is a major stockholder of the parent organization. In an attachment submitted with the petition, the petitioner stated that the U.S. entity is "majority

owned and controlled by the [beneficiary]." Additionally, on the petition, the petitioner indicated that the beneficiary's services would be required for three years. No evidence of this claim was provided. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of the position in the United States. Therefore, the petition may not be approved on this basis as well.

Moreover, the petition should also not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the foreign entity.

Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines the term "qualifying organization" as a "United States or foreign firm, corporation, or other legal entity" which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

In addition, 8 C.F.R. § 214.2(l)(1)(ii)(K) defines the term "subsidiary" as:

[A] firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

Further, 8 C.F.R. § 214.2(l)(1)(ii)(L) defines the term "affiliate" in part as:

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In its attachment to Form I-129, the petitioner claims that the foreign entity "is 100% owned and controlled by [the beneficiary]," which would appear to make it an affiliate of the U.S. entity. However, assuming A. Essak & Sons is also AES Textiles Industries (Pvt.) Ltd., the submitted

Memorandum of Association, dated January 30, 1992, indicates that the beneficiary only agreed "to take" one share of the foreign company. First, as [REDACTED] also agreed to take one share each, it would appear that the beneficiary owns at most one-third (33.3%) of the foreign company and not 100% as claimed. Second, the submitted Articles of Association indicate that the company is permitted to issue 150,000 ordinary shares, but no corporate minutes or other documents were submitted to evidence the total shares issued to date. Thus, while it would appear that only three shares have been issued, it is also possible that all 150,000 shares are currently outstanding, leaving the beneficiary with less than one percent ownership of the foreign company. Consequently, absent competent objective evidence pointing to where the truth lies, the AAO cannot conclude that the petitioner and the foreign entity are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

Finally, it should also be noted for the record that, while the petitioner did not technically request an extension of the beneficiary's L-1A status, given that the beneficiary's prior L-1 petition appears to have been approved to permit him to open or be employed in a new office (SRC-01-210-51509), the present petition should therefore be processed as and considered to be a new office extension. Thus, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner has also failed to show that the U.S. entity has been "doing business" for the year prior to the filing of the present petition on September 23, 2002. Specifically, the petitioner failed to provide a copy of a lease or title to evidence whether it ever secured the required physical premises to operate its business. See 8 C.F.R. § 214.2(l)(3)(v)(A). In addition, the invoices/bills of lading and bank statements included covered only four months out of the year, April May, June, and July of 2002. Moreover, while the petitioner did submit two additional months of bank statements on appeal, October and November of 2002, even if they demonstrated one full year of business activities, which they do not, they cover periods of time following the filing of the petition. 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 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, as indicated above, 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)(H). 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 failed to demonstrate that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position and, thus, the petition cannot 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 appeal will be dismissed.

ORDER: The appeal is dismissed.