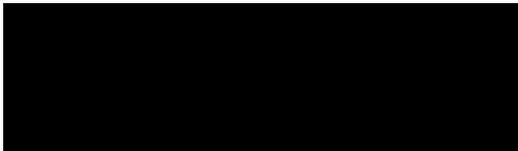


**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



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

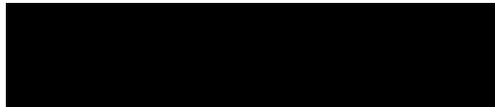
PUBLIC COPY



D 7

File: SRC-03-213-50889 Office: TEXAS SERVICE CENTER Date: JUN 13 2003

IN RE: Petitioner:
Beneficiary:



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 filed this nonimmigrant petition seeking to extend the employment of its President / Director 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 Texas that operates a convenience store. The petitioner claims that it is the subsidiary of [REDACTED] Service Station, located in Karachi, Pakistan. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that: (1) it has been doing business in the United States for the previous year; and (2) the beneficiary was employed abroad in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner has submitted sufficient evidence to show that it has been doing business for the previous year, and that the beneficiary was employed abroad in a primarily managerial or executive capacity. In support of these assertions, counsel submits a statement on Form I-290B and previously submitted 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 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 first issue in the present matter is whether the petitioner has established that it has been doing business for the previous year, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

[T]he 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.

In the initial petition filed on July 29, 2003, the petitioner did not clearly describe its business operations. On Form I-129 the petitioner stated that its type of business is "Wholesale." The petitioner submitted an organizational chart that provides that it employs the beneficiary as president, a vice president, a retail manager, a business manager, and a store manager. The petitioner's 2002 IRS Form 1120, U.S. Corporate Income Tax Return, reflects that the petitioner is engaged in the wholesale trade of durable goods. The petitioner provided a lease that specifies that the property in question is to be used for a "gas station with grocery."

On October 27, 2003, the director requested additional evidence. In part, the director instructed the petitioner to "[s]ubmit evidence of the business conducted by the petitioner during the past year, such as sales contracts, invoices, bills of lading, shipping receipts, orders, US Customs Forms 301, 7501, 7525-V, etc." The director

further requested "[e]vidence of the current staffing level in the United States" including "position titles and duties of all employees."

In a response dated January 14, 2004, in part the petitioner submitted copies of bank statements and invoices for goods and services it purchased. The petitioner submitted a document that lists its employees and briefly describes their duties, including a president, a vice president, assistant sales manager, a business development manager, assistant, and sales clerk. The duties of the sales clerk reference a store.

On April 6, 2004, the director denied the petition. In part, the director determined that the petitioner failed to submit sufficient documentation to establish that it has been doing business in the United States for the previous year.

On appeal, counsel for the petitioner asserts that the petitioner has submitted numerous documents to show that it has been doing business for the previous year, including its 2002 IRS Form 1120, U.S. Corporate Income Tax Return, quarterly reports, and financial statements. Counsel notes that more documentation was provided in response to the director's request for evidence. The petitioner provides no new documentation of its business activity on appeal.

Upon review, the petitioner has failed to establish that it has been doing business for the previous year. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B). In fact, at no point in this proceeding has the petitioner clearly and directly explained its business activities. 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)). The documentation submitted with the initial petition suggests that the petitioner operates a retail convenience store, yet on Form I-129 the petitioner merely provided that it is a wholesale business. The initial evidence was insufficient to show that the petitioner was engaged in "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(ii)(H).

In response to the director's request for evidence, the petitioner provided copies of bank statements and invoices for goods and services it purchased. However, all of these documents are dated after the date of filing 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). As these documents reflect the petitioner's business activity that occurred after the date of filing, they are not probative of the petitioner's eligibility as of the filing date. Accordingly, they are given no weight in this proceeding.

Counsel claims that the petitioner's tax documents, quarterly filings, and internal financial statement serve as evidence that the petitioner has been doing business. Yet, these documents do not identify the sources of the income reported, nor do they breakdown the petitioner's activities on a monthly basis such to show "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(ii)(H). The director clearly requested evidence of the petitioner's day-to-day business activities such as invoices, shipping receipts, and orders. However, as noted above, the petitioner failed to provide additional documentation of its

operations during the year prior to filing the petition. On appeal, the petitioner declined to submit additional documentation. Again, 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. at 165. 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 Obaighena*, 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).

Based on the foregoing, the petitioner has failed to establish that it has been doing business for the previous year. See 8 C.F.R. § 214.2(l)(14)(ii)(B). For this reason, the appeal will be dismissed.

The second issue in the present matter is whether the beneficiary was employed by the foreign 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, the petitioner did not provide a clear account of the beneficiary's duties abroad. The petitioner submitted an organizational chart for the foreign entity that reflects that the company employed five individuals, including a president, the beneficiary as vice president, a cashier, and two auto mechanics. The petitioner provided receipts for fuel purchased by the foreign entity.

In the director's request for additional evidence, she requested explanation of the beneficiary's duties abroad as follows:

A definitive statement describing the foreign employment of the beneficiary, including:

- Position title.
- List all duties.
- Percentage of time spent on each duty.
- Number of subordinate managers/supervisors or other employees who report directly to the beneficiary.
- A brief description of their job titles and duties; give their educational background; if the beneficiary does not supervise other employees, specify what essential function within the organization he manages.
- Specific dates his employment began and ended in each position with your company.
- Indicate the qualifications required for the position.
- Indicate the level of authority held by the beneficiary.
- Indicate whether or not the beneficiary functions at a senior level within the corporation.
- Specify his position within the organizational hierarchy.
- Indicate who provides the product sales/services or produces the product of the business.

In response, the petitioner submitted a document titled "Employee List of Foreign Company" that lists 20 positions and the names of individuals that purportedly fill them. In part the position titles include two national sales managers and various sales positions, an MIS executive, two typists, and accounting employees. The petitioner described the beneficiary's duties abroad as follows:

[The beneficiary] was General Manager of the company. He was responsible for all strategic and direction setting decisions of the company. He formulated strategies, policies and procedures. He oversaw the responsibility for advertising and promotional campaigns. He also looked after institutional sales including sales to government agencies. As General Manager, he supervised and fired all of the managerial personnel in our company. He ensured business expansion and growth by introducing new product lines.

The petitioner stated that the beneficiary's subordinates included a National Sales Manager (Government), National Sales Manager Sales (NR Division), Marketing Services Manager, and National Sales Manager (Retail Division).

In denying the petition, the director determined that the petitioner did not establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. The director noted that the organizational chart submitted with the initial petition shows that the beneficiary supervised only three nonprofessional employees, including a cashier and two auto mechanics. The director found that the evidence of record shows that the beneficiary "merely handled the day-to-day operations of the organization."

On appeal, counsel asserts that the beneficiary was employed abroad in a primarily managerial or executive capacity. Counsel states that the petitioner submitted a list of employees to show that the foreign entity employs 20 individuals. Counsel claims that the organizational chart submitted with the initial petition "was for only one section of the company." Counsel refers to the beneficiary's foreign job description submitted in response to the request for evidence, and asserts that it shows that the beneficiary supervised four managers. Counsel claims that the director erroneously required the beneficiary to supervise professionals. Counsel asserts that the beneficiary was not a first-line supervisor, and thus he was not required to supervise professionals in order to qualify as an executive or managerial employee.

Upon review, counsel's assertions are not persuasive. As provided above, the petitioner must submit "[e]vidence that the [beneficiary'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." 8 C.F.R. § 214.2(l)(3)(iv). The petitioner's description of the beneficiary's foreign job duties must clearly describe the duties performed and indicate whether such duties were either in an executive, managerial, or specialized knowledge capacity. *Id.* The petitioner failed to adequately describe the beneficiary's foreign duties or the foreign entity's business operations in the initial petition. Yet, the organizational chart submitted for the foreign entity clearly shows that the company employed five individuals including the beneficiary. The chart further reflects that the beneficiary had supervisory responsibility over three subordinates, including a cashier and two mechanics. The only independent evidence submitted of the foreign entity's daily business activity consists of receipts for the foreign entity's purchase of gasoline. Accordingly, the aforementioned evidence suggests that the foreign entity operates as a small gas station and automobile service garage.

The petitioner provided inconsistent evidence in response to the director's request for evidence. The list of 20 employees submitted to the director does not include any of the employees that appear on the initial organizational chart. Nor does it include the previously named positions of cashier or mechanic. The positions stated in the new list bear no relation to the foreign entity's operation as a gas station and automobile service garage. In fact, the list does not name the foreign entity, or include any reference to the petitioner or the beneficiary. The petitioner has provided no independent evidence to support that the individuals named are actual employees of the foreign entity. 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. at 165.

The petitioner provided a description of the beneficiary's duties abroad in response to the director's request for evidence. Yet, the duties listed bear no relation to the operation of a gas station and automobile service garage. In listing the beneficiary's subordinates, the petitioner stated that the beneficiary supervised four managers as opposed to a cashier and two mechanics as presented in the initial organizational chart.

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). Counsel and the petitioner have failed to explain these material inconsistencies regarding the foreign entity's operations, the beneficiary's foreign duties, and the beneficiary's subordinates abroad. On Form I-290B, counsel simply asserts that the organizational chart submitted with the initial petition "was for only one section of the company." This explanation is insufficient, as the evidence of record contains no documentation to support that the foreign entity engages in activity beyond purchasing gasoline. Once again, 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. at 165. 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).

Based on the foregoing, the foreign job description for the beneficiary and the list of the foreign entity's employees are not deemed reliable evidence. The petitioner has failed to establish with sufficient documentation that they are a true account of the beneficiary's duties and the foreign entity's operations. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, 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. at 591.

As correctly noted by the director, the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. The vague evidence presented in the initial petition shows that he worked as a first-line supervisor in a gas station and automobile service shop, with supervisory authority over a cashier and two mechanics. 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). The petitioner failed to describe the duties of the cashier and two mechanics such to establish that they were supervisory, professional, or managerial employees. See § 101(a)(44)(A)(ii) of the Act.

Thus, the petitioner failed to show that the majority of the beneficiary's time was not devoted to non-qualifying duties. Based on the foregoing, the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(iv). For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity as required by the regulation at 8 C.F.R. § 214.2(l)(3)(ii). The petitioner failed to submit a sufficiently detailed description of the beneficiary's duties or other documentation that clearly reflects what his daily tasks will be in the United States. 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 actual duties themselves reveal the true nature of the employment. *Id.* Again, 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. at 165. For this 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.