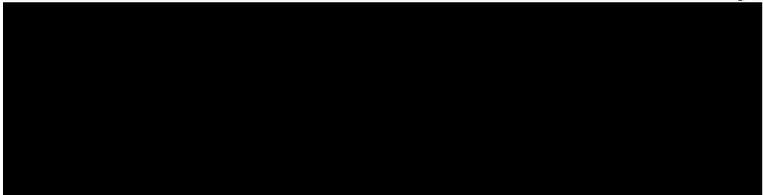


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FILE: EAC 03 091 53193 Office: VERMONT SERVICE CENTER

Date: JUN 13 2005

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)

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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Shakeel Tools & Hardware Store, a sole proprietorship located in Pakistan, claims to be an affiliate of the U.S. entity. The U.S. entity was incorporated in the State of New York in 2000 and is engaged in the retail sale of commercial goods. Accordingly, on January 30, 2003, the foreign entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for two years. The beneficiary was previously granted a one-year period of stay to open the new office in the United States, from June 14, 2001 to June 14, 2002. The petitioner filed an I-129 Petition to extend the beneficiary's status on April 30, 2002. The director denied the petition (EAC0217852944), and the petitioner subsequently filed the instant petition. The petitioner seeks to employ the beneficiary as the U.S. entity's president at a yearly salary of \$35,000.

On February 27, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, the petitioner's counsel submits a brief and claims that that the beneficiary "clearly manages the organization" and that "[h]e is the sole executive / manager for the company."

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.

The regulations at 8 C.F.R. § 214.2(l)(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 (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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) requires 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 (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 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 the Form I-129, the petitioner described the beneficiary's proposed U.S. duties as: "Responsible for overall direction and management of US company. He will continue to supervise, procure and market all aspects of the company. He will continue to have broad discretionary power to establish policy and delegate authority as is necessary in the course of business." In addition, in a January 9, 2003 letter, the beneficiary's U.S. duties were described as the following:

The beneficiary is responsible for directing the administration and the expansion of the U.S. operation. He has hired additional employees and is responsible for their supervision as well as the supervision of the employees in Karachi. . . . [The beneficiary] managed and directed the operations of the store including, but not limited to, management of employees, negotiation with vendors, overseeing the implementation of New York lottery sales, negotiations with mall management and supervision of sales. In addition, [the beneficiary] located and procured funding, established relationships with banks and vendors, worked with governmental agencies, and provided management for successful operation the store in the Walden Galleria Mall. The beneficiary developed the strategic plans for the store by researching a suitable real estate acquisition and negotiating an agreement for a suitable design for the store. . . . The beneficiary supervised the implementation of the policy plans of the organization. . . . [The beneficiary] reviews financial reports and sales reports to determine which supplies need to be reordered so as to direct stocking of the store by the employees.

\* \* \*

As president, [the beneficiary] will continue to be the key manager/executive of our U.S. operation. He will continue to have broad discretionary power to establish policy and delegate authority and duties as necessary in the course of business. The responsibilities continue to be executive in nature. He will continue to direct, manage, supervise, procure and market all aspects of the company and to negotiate financially the lines of credit with banks and other lending institutions.

On February 5, 2003, the director requested additional evidence. Specifically, the director requested a copy of the U.S. company's organizational chart, the U.S. entity's employees' positions and

educational backgrounds. The director also requested a breakdown of the number of hours devoted to the employees' job duties on a weekly basis.

In response, the petitioner submitted a copy of the U.S. entity's organizational chart listing a store manager and three store clerks. The petitioner described the store manager's duties and claimed that the store manager is currently attending the local university and that the store clerks are all high school graduates. The petitioner also provided a more detailed description of the beneficiary's proposed U.S. duties. It claimed that the beneficiary's time was spent 100 percent on the operations of the business and "60% of his time, or approximately 24 hours a week supervising the work of the store manager and the subordinate employees through the store manager as well as the overall operations of the business." The petitioner stated that the beneficiary is "constantly involved in reviewing the functions of the business to ensure that the finances are meeting the established goals and the policies of the organization" and that this function comprised 30 percent of his time or approximately 12 hours per week. The petitioner claimed that the remaining 10 percent of the beneficiary's time is devoted to "public relations" and "establishing new product and merchandise sources."

On February 27, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity. The director noted that it appeared that the beneficiary would be engaged in the non-managerial, day-to-day operations involved in fabricating a product or providing a service.

On appeal, the petitioner's counsel submits a brief and claims that that the beneficiary "clearly manages the organization" and that "[h]e is the sole executive / manager for the company." Counsel also describes the beneficiary's duties and the store employees' duties.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). In this matter, the petitioner claims that the beneficiary is "the sole executive / manager for the company." However, the petitioner did 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 demonstrate what the beneficiary will be performing on a day-to-day basis. For example, the petitioner described the beneficiary's duties as "directing the administration and the expansion of the U.S. operation," "overseeing the implementation of New York lottery sales," and "reviewing the functions of the business." Based upon the petitioner's vague description, it is unclear what managerial and executive duties the beneficiary will primarily perform. 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, counsel claims that the beneficiary is responsible for the supervision of the employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his 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. 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 subordinate employee. In the instant matter, the petitioner has not, in fact, established that a bachelors degree is actually necessary, for example, to perform the work of the store clerks, who are among the beneficiary’s subordinates.

Moreover, based on the record it appears the beneficiary that he will be functioning at most as a first-line supervisor. Counsel claims that the beneficiary will supervise a store manager and three store clerks. However, 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). Counsel further claims that the beneficiary “had the authority to hire and fire all employees of the company as well as retaining or dismissing independent contractors.” Although counsel states on appeal that the petitioner had contractual employees, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner’s business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. 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 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). The petitioner stated that the beneficiary will be “constantly involved in reviewing the functions of the business to ensure that the finances are meeting the established goals and the policies of the organization” and that “this function comprised 30 percent of his time or approximately 12 hours per week.” However, 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. 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. Although the petitioner claimed that the beneficiary will spend 30 percent of his time involved in reviewing the functions of the business, the petitioner did not clearly explain what function the beneficiary will be primarily performing rather it appears that the beneficiary will be performing the services or tasks of the business rather than managing a specific function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. 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.

A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. The petitioner operates a convenience store in a shopping mall that is open for business for 76 hours per week. For the fourth quarter of 2002, the petitioner paid wages of \$755 to its store manager, \$242 to one store clerk, and \$1,386 to another store clerk. Based on the wages paid, it is clear that the beneficiary's subordinates work very few hours. By necessity, the beneficiary would frequently need to perform the duties of the store clerks and store manager in order to keep the business operating. 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 Soffici*, 22 I&N Dec. at 165.

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. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. 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).

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

Beyond the decision of the director, the AAO finds that the beneficiary has not been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated, to establish L-1 eligibility under section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L), the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *Id.* On review, the petitioner submitted a limited and vague description of the beneficiary's foreign duties. For example, the petitioner described the beneficiary's foreign duties as "overall organization, management and administration of businesses, and business development." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. 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 additional reason, the petition may not be approved.

Another issue in this proceeding, also not raised by the director, is whether the employment offered to the beneficiary is temporary. The record indicates that the beneficiary is the sole owner of both the U.S. and foreign entities. However, the stock certificate indicated that the 200 shares of common stock were issued to the beneficiary rather than the foreign entity. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(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 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 his services in the United States. For this additional reason, the petition may not be approved.

A third remaining issue in this proceeding beyond the findings in the previous decision, is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. In a January 29, 2003 letter, the petitioner stated that the foreign entity was a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984).

Finally, it is noted that the petitioner indicated under penalty of perjury in Part 4 of the Form I-129 petition that the beneficiary had never been denied the requested classification. This petition was filed on January 30, 2003. As noted in the recitation of the procedural history of this matter,

the beneficiary's previous L-1 petition (EAC0217852944) was denied by the director on or about January 9, 2003. The regulations at 8 C.F.R. § 214.2(l)(2)(i) state that “[f]ailure to make a full disclosure of previous petitions filed may result in a denial of the petition.” As the petitioner indicated on the form that the beneficiary had never been denied the requested classification, and the petitioner failed to fully disclose the previously filed petitions, this petition will be denied as a matter of discretion pursuant to 8 C.F.R. § 214.2(l)(2)(i).

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.