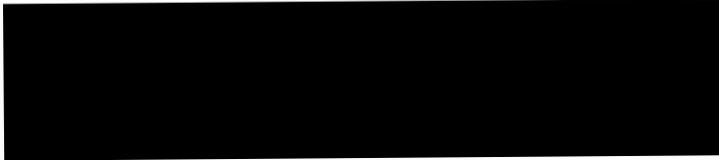




U.S. Citizenship
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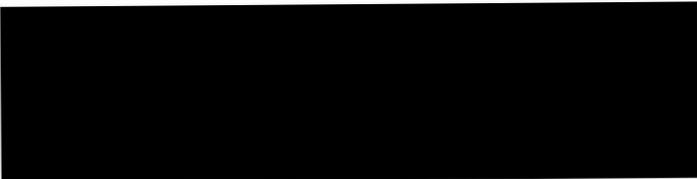
FILE: SRC 04 185 50793 Office: TEXAS SERVICE CENTER Date: JUL 12 2006

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, Chief
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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its executive manager 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, a Florida corporation, claims to be the subsidiary of [REDACTED] located in Karachi, Pakistan. The petitioner is engaged in the import and resale of computer parts, equipment and software. 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 the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was not supported by the facts and evidence, and that contrary to the director's findings, the beneficiary was in fact employed in a primarily managerial or executive capacity.

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)(14)(ii) 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 managerial or executive capacity; and

- (e) Evidence of the financial status of the United States operation.

The primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), 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.

On the L supplement to the I-129 petition, the petitioner described the beneficiary's duties as follows:

As executive manager, [the beneficiary] is responsible for supervising and directing the U.S. affiliate of [the foreign entity]. He has implemented operational and administrative policies

and has hired subordinate personnel to carry out the necessary duties. [H]e retains supervisory authority over these employees, and has the authority to hire and fire employees as becomes necessary. In addition, [the beneficiary] is responsible for the financial development of the U.S. affiliate and must ensure company profitability and secure optimum efficiency and economy of operations. To fulfill this duty, he analyzes budget requests and authorizes proper allocation of capital for marketing, merchandise, operational and personnel expenditures. Specifically, the U.S. affiliate specializes in importing computer components, equipment, hardware and software for retail and wholesale in the United States. The enterprise also provides maintenance and technical support for clients and customers. [The beneficiary] directs and coordinates the commercialization and sale of these products and services offered by the enterprise. He is responsible for developing a market for these products and services and ensuring that his enterprise is competitive within the computer and electronics industry. Finally, [the beneficiary] is in charge of the enterprise's U.S. and international relations and he has developed business partnerships and associates to promote the expansion of the U.S. affiliate.

Additionally, the petitioner provided a copy of its quarterly payroll report for the period from January 1, 2004 to June 15, 2004. The report showed that the petitioner employed a total of three employees, namely, the beneficiary [REDACTED], software technician, and [REDACTED] customer service.

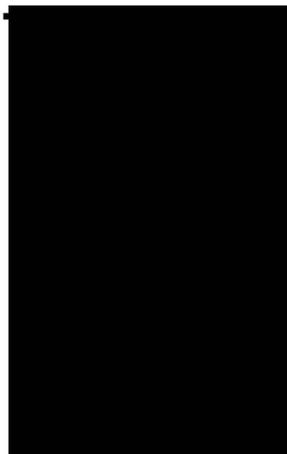
On August 5, 2004, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit a more detailed description of the beneficiary's duties, as well as a list of all subordinates of the beneficiary, with a description of each person's position title, their duties, and their educational backgrounds.

In a response dated September 30, 2004, the petitioner, through counsel, responded to the director's request. Counsel stated that in addition to the computer services operation identified on the petition, the petitioner has since acquired a Subway restaurant franchise. Counsel continued by advising that the organizational chart submitted with the response reflected the duality of the petitioner's operations. Specifically, counsel advised that the computer services aspect of the business was staffed by the three employees named in the original petition, and that the newly acquired Subway franchise was staffed as follows:

3 Directors:

1 Manager:

6 Sales Associates:





Counsel also provided the following updated description of duties in response to the director's request:

As the Executive Manager of [the petitioner], [the beneficiary] has been responsible for establishing, planning and directing the U.S. affiliate's operational and organizational objectives. During the first quarter after the company's incorporation in June 2003, [the beneficiary] was mainly involved in the start up stage of the company, including creation of objectives, goals and plans, conducting market research and financial analysis, and recruiting and training new subordinate personnel. [The beneficiary], as the Executive Manager, has established primary corporate policies and goals to be achieved by subordinate managerial personnel, which he hires, trains, and dismisses at his full discretion. He has analyzed budget requests to authorize proper allocation and expenditure of the corporate funds for marketing, merchandise, operational expenses, and human resource needs. He has also directed, coordinated, and overseen the commercialization and distribution of the products and services offered by the company. During this past year, the company has grown as a commercial entrepreneur exploring different commercial activities requiring at the present time 12 employees.

Throughout the first year of operations, [the beneficiary] has spent 40% of his time establishing and planning the company's operational and organizational policies and objectives, leading the company to a more mature stage; 30% of the time has been spent by [the beneficiary] recruiting and training the new required personnel, both managerial and non-professional; and the remaining 30% of the time, [the beneficiary] [makes] the market and financial analyses required, as well as entering contracts with suppliers and distributors. [The beneficiary] has made all the professional, commercial, and marketing contacts in the industry entering in to [sic] stable business relationships in the United States. In this sense, please find enclosed a letter describing the new project of "Subway" recently bought by [the petitioner].

On October 21, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would be managing professional, supervisory, or managerial employees.

On appeal, counsel for the petitioner asserts that the beneficiary is in fact functioning in a primarily managerial or executive capacity by virtue of his position at the top of the petitioner's organizational hierarchy. Counsel further alleges that since several of the petitioner's employees are in fact managerial, professional, or supervisory, the beneficiary is consequently employed in a managerial capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(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 initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a generic description of the nature of his duties, and paraphrased the regulatory definitions. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including a more specific description of the beneficiary's duties. The petitioner responded to this request, and in addition to describing the beneficiary's duties in further detail, the petitioner explained that the beneficiary was now in charge of overseeing a Subway restaurant franchise in addition to the petitioner's computer services.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. First, the petitioner failed to specifically articulate the nature of the beneficiary's duties. For example, the response to the director's request for evidence indicates that the beneficiary's time has been divided between three main tasks, namely, "creation of objectives, goals and plans" for the petitioner (40%), "conducting market research and analysis" (30%), and "recruiting and training new subordinate personnel" (30%). 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). Although the petitioner provided a lengthy statement of the beneficiary's duties in the initial petition and again in response to the request for evidence, this description did not articulate what a specific day in the role of the beneficiary would consist of. Instead, the descriptions merely provided a brief synopsis of the beneficiary's managerial/executive duties, and failed to discuss or identify job-specific tasks or obligations the beneficiary was required to perform.

In this matter, the petitioner basically equates managerial and executive capacity with the beneficiary's title of executive manager, yet fails to provide solid examples of how this managerial or executive capacity is actually attained. 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. *Id.*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Although counsel on appeal does address both aspects of the petitioner's business and the beneficiary's role therein, these assertions lack specific detail or supporting evidence and thus fail to satisfy the regulatory requirements.

In addition, the petitioner failed to show that the beneficiary oversees a staff of professional, supervisory, or managerial employees. Although the beneficiary is not required to supervise personnel, if it is claimed, as it is in this case, 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. On appeal, counsel provides additional details regarding the beneficiary's subordinate employees and their educational backgrounds and duties for the first time. This new evidence is unacceptable on appeal. Since the director clearly requested a more specific description of the beneficiary's subordinates in the request for evidence in order to determine whether they were managerial, professional, and/or supervisory, the petitioner was put on notice of

required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit a more specific description of the duties and titles of the beneficiary's subordinates. The fact that the petitioner, through counsel, now submits educational and training information with regard to the beneficiary's subordinates does not afford the petitioner a second chance to prove the beneficiary's qualifications. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, as noted above, the petitioner provides virtually no detail or discussion of the beneficiary's actual duties prior to adjudication. Instead, the petitioner appears to rely on the beneficiary's title and his position at the top of the petitioner's organizational hierarchy as a means for concluding that the beneficiary is qualified for the benefit sought. As previously stated, 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. at 1103. Without specific documentation to support the petitioner's contentions, the assertions that the beneficiary is an executive manager and thus is acting primarily as a manager or executive are not acceptable. 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 petitioner submitted a payroll report for the first six months of 2004, indicating that in addition to the beneficiary, it employed two other persons during that period, namely, a software technician and a customer service representative. In response to the request for evidence and again on appeal, counsel for the petitioner relies on the petitioner's alleged acquisition of a Subway restaurant franchise as additional evidence of the beneficiary's managerial capacity within the petitioner. The basis is invalid for two reasons. First, there is no evidence in the record attesting to the actual acquisition of the Subway restaurant, aside from a one-page, undated and unsigned statement alleging that the petitioner has purchased a Subway franchise. Additionally, the employees who allegedly staff the Subway restaurant have not been documented as employees of the petitioner. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* Second, although the petitioner has provided no dates with regard to the Subway acquisition, it appears that this transaction took place after the expiration of the initial new office petition, since there was no mention of the petitioner's Subway franchise or its employees in the initial extension request filed in June 2004. 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional employees in the future as it expands its two businesses. However, 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 support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. Since the record lacks any credible evidence which describes in detail the nature of the beneficiary's duties, the AAO must conclude that the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" 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." In this matter, the petitioner claims that it is engaged in two businesses, namely, the import and resale of computer equipment and the operation of a Subway restaurant. In support of this contention, the petitioner submits invoices relating to the computer aspect of its business for the period from June 2004 and July 2004.

In this matter, the petition was granted approval for the opening of a new office from July 3, 2003 to July 3, 2004. The petitioner, however, has submitted no evidence or documentation demonstrating the petitioner's business dealings from July 2003 to May 2004. Additionally, there is no evidence in the record showing the petitioner's acquisition of the Subway restaurant franchise or any business conducted since its acquisition.

As previously stated, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position since it has failed to establish that it has been doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). For this additional reason, the petition may not be approved.

Beyond the findings in the previous decision, another remaining issue in this proceeding 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 provided any evidence to establish the ownership of the foreign entity. Since the qualifying relationship is based on the claim that the petitioner and foreign entity are affiliates by way of the beneficiary's common ownership of each, the lack of documentation showing the ownership structure of the foreign entity prohibits the AAO from concluding that this critical element has been satisfied. For this additional reason, the petition may not be approved.

In addition, the petitioner's claim, although not established, is that the beneficiary is the sole owner of both companies. 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.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.