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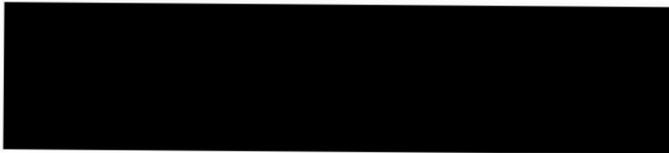
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File: SRC 03 150 54728 Office: TEXAS SERVICE CENTER Date: **OCT 23 2006**

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)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa and a subsequent appeal was dismissed. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion to reopen will be granted, but the motion to reconsider will be denied.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president and 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 subsidiary of [REDACTED] located in Lahore, Pakistan, and is engaged in the distribution of durable and **non-durable goods to retail** stores. In addition, the petitioner operates gas stations. 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 had been and will continue to be employed in the United States 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 contends that the director erroneously denied the petition by relying solely on the small number of employees that the petitioner retained, and concludes that the level of the beneficiary's duties in the United States "requires significant authority over generalized policies which constitutes to the conclusion that the beneficiary's duties are primarily managerial in nature."

The AAO dismissed the appeal, finding that the record was not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Specifically, the AAO based its conclusion on the fact that the reasonable needs of the petitioning company would not plausibly be met by the services of the beneficiary as president and three subordinate employees.

On motion, counsel for the petitioner asserts the following:

Rather than hash over the documents and facts already submitted, we would like to direct your attention to the crux of the matter.

The denial and the dismissal of the appeal were based largely on the appearance that [the petitioner] [d]id not have sufficient employees to warrant a person who primarily was engaged in managerial or executive duties.

The company has, in fact, recently employed four additional employees in addition to those already hired. Copies of their applications and I-9's are attached.

We would contend that the company has sufficient staffing that the services of a manager or executive are required. Therefore, we ask that this matter be re-opened and reconsidered at this time.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." In this matter, the petitioner has submitted new facts accompanied by new documentary evidence in support of these facts. Therefore, the motion is granted.

Counsel for the petitioner submits four Employment Eligibility Forms (Form I-9) for four different persons.<sup>1</sup> Only one, for [REDACTED] is dated as of March 9, 2005. The other forms are incomplete. Nevertheless, despite the fact that the forms are incomplete, this evidence is insufficient to overcome the basis for the denial and to conclude that the beneficiary is a qualified manager or executive based on the petitioner's allegations that it has hired new staff. 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 petition in this matter was filed on May 5, 2003. At the time of filing, the petitioner employed the beneficiary and three other employees. The director found, and the AAO concurred, that the staffing of the petitioner at the time of filing was insufficient to support the beneficiary in a primarily managerial or executive capacity. The fact that the petitioner has verified employment of four additional individuals two years after the petition was filed is simply insufficient to overcome the basis for the denial in this matter.

In addition to the motion to reopen, counsel simultaneously filed a motion to reconsider

The regulation at 8 C.F.R. § 103(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel's assertions in the motion to reconsider do not overcome the AAO's finding that the evidence in the record of proceeding is insufficient. Counsel cites no pertinent precedent decisions to establish that the decisions of the director or the AAO were based on an incorrect application of law or policy. Furthermore, counsel

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<sup>1</sup> This newly submitted evidence is insufficient to establish the beneficiary's eligibility in this case. However, counsel should note for future reference that any Citizenship and Immigration Services (CIS) Forms I-9 presented by a petitioner must be accompanied by other evidence to show that these employees have commenced work activities. Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. *See Matter of Ho*, 22 I&N Dec. 206, 212 (Assoc. Comm. 1998). In the absence of such evidence as pay stubs and payroll records, a petitioner cannot establish that the petitioner employs a subordinate staff that would relieve the beneficiary from performing non-qualifying duties.

provides no attestation that the evidence in the record at the time of the initial decision contributed to an incorrect or erroneous finding by the director.

Finally, the motion includes no additional evidence to supplement counsel's assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). **In addition, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.** See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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 decisions of the director and the AAO will be affirmed and the petition will be denied.

**ORDER:** The Motion to Reopen is granted. The Motion to Reconsider is denied. The AAO's decision of February 15, 2005 is affirmed. The petition is denied. The appeal is dismissed.