

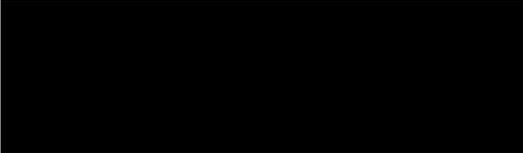
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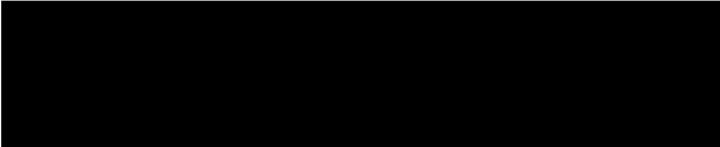
D7

File: SRC 04 018 50566 Office: TEXAS SERVICE CENTER Date: **JUN 20 2007**

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, 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 AAO will dismiss the appeal.

The petitioner seeks to extend the temporary employment of the beneficiary as its president 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 U.S. petitioner, a limited liability company organized in the State of Georgia, claims to be engaged in the management of a convenience store. It claims to be the affiliate of Gems International, located in Kalol, India. 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. On appeal, counsel for the petitioner asserts that the beneficiary is in fact qualified for the benefit sought.

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.

In addition, 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 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.

In a letter dated October 22, 2003, the petitioner explained that it was established for the purpose of purchasing or leasing an on-going enterprise, namely a convenience store or a gas station. The petitioner further stated that in June 2003, it leased a gas station named Racetrac Petroleum. Pursuant to the management agreement involved, the petitioner receives \$15,000 per month as a management fee. The petitioner further stated that it has an "average" of four employees on staff.

In the L Supplement for Form I-129, the petitioner provided the following overview of the beneficiary's duties as president of the U.S. company:

[The beneficiary] will be involved in day-to-day operational management; finance and accounting; marketing of the gas station store; and employment and training. [The beneficiary] will also be actively looking at other opportunities to invest in to expand the operations of [the petitioner].

On December 15, 2003, the director requested additional evidence. The director noted that the nature of operating a convenience stores and gas station required several employees to cover all shifts, and that there appeared to be little work primarily at an executive level. As a result, the director requested evidence pertaining to all of the petitioner's employees, as well as an overview of their positions and by whom if anyone these employees were supervised. The director also requested a copy of the petitioner's work schedule for these employees as well as payroll records to corroborate the schedule.

The petitioner submitted a response dated March 10, 2004. In the response, the petitioner explained that it was conducting business "as a management organization, managing business functions and personnel management for independent businesses. In addition to the gas station acquired in June 2003, the petitioner indicated that it recently entered into a new management relationship with Talladega Hospitality, Inc., and indicated that as of March 15, 2004, the petitioner, under the beneficiary as president, would be managing an additional five employees at a Super 8 Motel. The petitioner noted that with this addition, the total number of employees under the beneficiary's supervision would be seven.

Regarding the staffing of the petitioner and the work schedules of its employees, the petitioner provided an employee list that denoted the nature and extent of the duties of each employee. The petitioner stated that the gas station, acquired in June 2003, currently employed two persons under the beneficiary's supervision: [REDACTED] Store Manager; and [REDACTED] Stocking Clerk. Five additional employees were

listed as employees of the motel; however, no payroll records were available since the new relationship with the motel only came into effect in March 2004. Finally, although specifically requested by the director, no additional job description or discussion of the beneficiary's duties was submitted to supplement the record.

On March 31, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. More specifically, the director concluded that the claim that the beneficiary was employed in a qualifying capacity while there were only two other employees on staff to operate the gas station/convenience store was not credible and was unsupported by the evidence submitted in the record.

On appeal, counsel for the petitioner attempts to refute the director's basis for the denial by contending that the beneficiary is in fact employed in a managerial or executive capacity, and argues that the size of the petitioner's business and number of staff members should not be detrimental to the petitioner. The AAO, however, disagrees with counsel's assertions.

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 definitions of executive and managerial capacity have two separate requirements. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The description of duties provided on the L Supplement to Form I-129 is brief and extremely generalized. Though the director requested additional information about the beneficiary's duties to establish that he is employed in a qualifying capacity, the petitioner failed to provide any additional details. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO, therefore, must evaluate the beneficiary's position based on the brief description of duties provided in addition to the statements pertaining to the beneficiary's subordinate staff members. For convenience, the description of duties is repeated below:

[The beneficiary] will be involved in day-to-day operational management; finance and accounting; marketing of the gas station store; and employment and training. [The beneficiary will also be actively looking at other opportunities to invest in to expand the operations of [the petitioner].

General statements such as those included above do little to clarify the exact nature of the beneficiary's duties. 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); *Ayyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Reciting the beneficiary's vague job

responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Additionally, in response to the request for evidence, the petitioner relied upon the claim that the beneficiary oversees seven subordinate staff members at two businesses as evidence of his managerial or executive capacity. Upon review, however, this claim is invalid, since the second business, a Super 8 Motel, was not acquired until March 2004. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. The petitioner in this matter was filed on October 23, 2003. Therefore, since the petitioner had not yet entered into the agreement with Talladega Hospitality, Inc., the management of the hotel and the five employees working therein will not be considered in evaluating the beneficiary's employment capacity. 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).

At the time of the filing of the petition, the record indicates that the petitioner employed a store manager and a stocking clerk. The employment of these persons is verified by quarterly tax returns for the last two quarters of 2003. However, the statement regarding their duties indicates that the store manager supervises the cashier; however, no evidence of the employment of a cashier has been submitted. As a result, the petitioner urges the AAO to accept its claim that the gas station/convenience store is fully operated by the store manager and the stocking clerk, without any assistance in the day-to-day duties from the beneficiary.

On appeal, counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Even though the petitioner claims that the beneficiary directs and manages the organization, it has not established that it employs a cashier, which is an essential position for the operation of the claimed business. Thus, the beneficiary himself must be performing this non-qualifying duty. Furthermore, an enterprise such as a gas station and convenience store is normally open seven days a week for extended hours. It is unclear, therefore, however two employees can manage all the daily operational and administrative tasks, particularly since there is no cashier on staff. Furthermore, the total wages paid to the stocking clerk each quarter (\$1,800) suggest that this employee works part-time, thereby once again undermining the claim that the entire operation is managed by these two persons without assistance from the beneficiary. In either case, the AAO is left to question the validity of the petitioner's claim and the beneficiary's claimed duties. 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).

If the beneficiary is performing non-qualifying functions such as acting as cashier or generally working in the store, the AAO notes that 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. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Furthermore, the extremely vague description of his duties is simply insufficient to allow the AAO to draw any legitimate conclusions with regard to the true nature of the beneficiary's position in the U.S. entity.

The record as presently constituted, therefore, is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner relies on its acquisition of a second business in March of 2004 as evidence of the beneficiary's employment in a qualifying capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C), however, 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the evidence presented, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted a number of invoices for goods purchased which suggests that it has been selling its goods on a regular basis. However, the earliest invoice documenting the acquisition of these goods dates back to September 2003. The petition granting the beneficiary L-1A status to open a new office was approved in October of 2002. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from October 2002 to September 2003, despite the acquisition of the gas station in June 2003. For this additional reason the petition may not be approved.

Additionally, a question to be further examined is whether the petitioner and the foreign organization are still qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation 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.

The record in this matter contains a number of invoices reflecting business activity of the foreign entity. However, the most recent invoices submitted are from March 2003, and the record does not contain any documentation of business dealings thereafter. Therefore, it does not appear that the foreign entity is still doing business as required by 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). For this additional reason, the petition may not be approved.

Finally, the petitioner indicates that the beneficiary is the sole owner of both the U.S. and foreign companies.¹ 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.

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). 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 id.*

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.

¹ Although the membership certificate in the record indicates that the beneficiary is the petitioner's sole owner, the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, indicates that the beneficiary actually owns 99% of the petitioner. For purposes of this analysis, the beneficiary still appears to be the majority owner of the petitioner.

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ORDER: The appeal is dismissed.