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U.S. Citizenship  
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Services

87

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File: WAC 03 223 54671 Office: CALIFORNIA SERVICE CENTER Date: MAR 08 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)

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, California Service Center, denied the petition for a nonimmigrant visa and denied a subsequent motion to reopen and/or reconsider. 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 and chief executive officer 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 Arizona that claims to be engaged in the operation of a gas station and convenience store. It claims that it is the affiliate of Flamingo International, located in Bombay, India. The beneficiary was granted two one-year periods of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

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 director denied counsel's motion to reopen, noting that the motion failed to set forth new facts and was not supported by affidavits or documentary evidence. The motion to reconsider was likewise denied based on the director's conclusion that the reasons for reconsideration were not set forth and were not supported by pertinent precedent decisions.

Counsel for the petitioner simultaneously filed an appeal to the AAO of the director's initial decision to deny the petition. On appeal, counsel for the petitioner asserts that the director's decision constituted a gross misrepresentation or misunderstanding of the requirements for an executive, and in support of this assertion, counsel submits a brief and additional 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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in the present 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.

With the petition, counsel for the petitioner submitted a letter of support dated July 29, 2003. The letter explained that the petitioner's original business purpose, to operate a retail grocery establishment, was subsequently replaced by mini-markets and gas stations. Counsel also explained that, since the beneficiary's visa was granted, he had acquired two gas stations from [REDACTED] one in June of 2002 and the second in March of 2003. Counsel further stated that the petitioner currently employed seven people and would hire an additional two employees after August 1, 2003.

With regard to the beneficiary's duties, counsel stated:

[The beneficiary] indeed meets the criteria of an executive rather than that of the hands-on worker. His responsibilities are to explore opportunities for expansion as well as assuring that the existing businesses are well-run and profitable. [The beneficiary] is responsible for cash flow projections, implementing the policy of the limited partnership, budgeting, supervising the purchase of supplies and hiring, supervising and firing employees. In the time that [the beneficiary] has been at the helm, profit margins have increased to 25% and the entire operation has been made more attractive and customer-friendly.

On September 20, 2003, the director requested additional evidence. Specifically, the director requested more specific information with regard to the duties of the beneficiary and his subordinates, including an organizational chart outlining the staffing of the organization and a statement providing an overview of the duties of all other employees along with their titles and rank. The director also requested evidence of wages paid to the petitioner's employees.

In a response dated November 3, 2003, counsel for the petitioner submitted a letter addressing the director's queries. With regard to the number of employees, counsel stated that "[the beneficiary] has built the U.S. business from nothing to an operation which includes two gas stations and no less than 6 direct hire

employees.” With regard to the organizational structure of the business, a chart was submitted, and counsel explained that the business had two managers, each of whom were under the beneficiary’s supervision. The organizational chart demonstrated that the beneficiary was at the top of the petitioner’s organizational hierarchy, and oversaw the two managers, each of whom were delegated to one of the two stores. The following staffing was demonstrated at each station:

KT’s Union 76:

██████████, who oversaw:

- ██████████ Customer Sales Representative (Full-Time)
- ██████████ er Sales Representative (Part-Time)
- ██████████ r Sales Representative (Part-Time)

Kevi’s 76:

██████████, Manager, who oversaw:

- ██████████ Customer Sales Representative (Full Time)
- ██████████, Customer Sales Representative (Part Time)
- ██████████ Purchasing Agent

The petitioner further indicated that all employees possessed a high school diploma or GED, and that several were taking college level courses. The petitioner, through counsel, further noted that the responsibilities of the managers and their subordinates included making sure that the gas stations were maintained, that customers were treated with respect, that washrooms were kept clean, that cash receipts were accounted for, that commercial accounts were properly charged, and that supply levels were maintained.

On December 3, 2003, the director denied the petition. The director determined that the beneficiary was not employed in a primarily managerial or executive capacity. Specifically, the director noted that the beneficiary was not overseeing a subordinate staff of professional, supervisory or managerial employees, and thus was not a managerial employee.

On appeal, counsel for the petitioner asserts that the beneficiary’s position was that of an executive, and that an executive, by definition, was not required to supervise employees. Counsel further asserts that had they claimed that the beneficiary was performing in a managerial capacity, it was clear that he was not functioning as a first line supervisor. Finally, counsel submits a letter from ██████████, Wholesale Territory Supervisor of ██████████, who outlines in brief his working relationship with the beneficiary.

While it is clear that the petitioner did not wish for the beneficiary to be considered under the managerial capacity, the AAO will review the record for compliance under both capacities to afford the petitioner the broadest sense of review for the benefit sought. 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.*

In this matter, the petitioner has failed to provide an acceptable description of the beneficiary's proposed duties. Instead, it merely provided a vague overview of the general nature of his duties. Although the petitioner responded to the director's request for additional information about the petitioner's other employees, including their position titles and duties, this response did little to shed light on the beneficiary's actual role in the organization. As such, the record contains little information with regard to the exact nature of the beneficiary's duties.

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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Counsel for the petitioner stated simply that the beneficiary's time is spent on exploring expansion opportunities and hiring, supervising, and firing employees. As a result, counsel concluded that the beneficiary "indeed meets the criteria of an executive." 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. at 1108, *aff'd*, 905 F. 2d 41; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In this matter, counsel's specific assertions on appeal that the beneficiary is an executive and is not required to supervise personnel is correct. However, it was still claimed that a major part of the beneficiary's duties included overseeing staff. 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 for the purpose of determining whether he meets the alternative requirements for a managerial capacity position.<sup>1</sup> See § 101(a)(44)(A)(ii) of the Act.

Although the petitioner did claim that the beneficiary's subordinates possessed high school diplomas or the equivalent, it did not provide the level of education required to perform the duties of its managers and customer service representatives. Although the petitioner indicates that some of these persons are taking college courses, there is no evidence that an advanced degree is necessary to perform the duties of these positions. Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. While the organizational chart indicates that a manager oversees sales representatives and a purchasing agent, the collective description of their duties provided in response to the request for evidence makes no distinction between the duties of the managers or the sales representatives. As no independent evidence or discussion of their duties has been provided to set them apart from the other employees, the AAO cannot find that they are managerial or

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<sup>1</sup> To the extent that the director's comments indicated that an executive capacity position requires a staff of professionals to relieve a beneficiary from performing non-qualifying duties, these comments will be withdrawn. A subordinate professional staff is only required to qualify under the managerial capacity and only in the event that the beneficiary is a first-line supervisor of non-supervisory or non-managerial employees. § 101(a)(44)(A)iv), 8 U.S.C. § 1101(a)(44)(A)(iv).

supervisory employees other than in name. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The description of the beneficiary's duties, coupled with the vague description of the other employees, the nature of the business, and the limited full-time staff suggest that in order to ensure smooth operation of the two businesses, the beneficiary will likely spend the majority of his time engaging in non-qualifying duties. Absent evidence to the contrary, the AAO is unable to conclude that the beneficiary is primarily employed in a managerial or executive capacity. 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).

In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition may not be approved.

While not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States.

In this matter, the petitioner claims that it acquired two gas stations in the United States in June 2002 and March 2003, respectively. In addition, it claims that in order to acquire the initial interest, it was required to enter into a joint venture with [REDACTED]. A copy of this agreement is submitted for the record; however, it indicates that the petitioner's membership interest totals only 49 percent.

Although documentation in the form of corporate tax returns and quarterly wage reports indicates that the petitioner directly pays wages to its employees, all evidence of business transactions, including bank and credit card records, monthly reports, and invoices are in the name of [REDACTED]. There is no documentary evidence that the petitioner is actually conducting business in a systematic and continuous matter, as required by the regulations. Furthermore, the fact that the petitioner holds only a minority interest in K [REDACTED] negates the possibility that the petitioner is conducting business through a legitimate subsidiary operation in the United States. For this additional reason, the petition may not be approved.

Additionally, the minimal documentation of the petitioner's ownership raises the question of whether a qualifying relationship in fact exists between the parties as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). The

petitioner submits copies of four stock certificates, indicating that four persons own equal shares in the petitioner. This evidence, on its face, is persuasive, since the four shareholders are also the four partners who own and operate the foreign entity. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner has failed to establish the critical element of ownership with documentary evidence in this matter, and thereby fails to show that a qualifying relationship exists between the parties. For this additional reason, the petition may not be approved.

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 director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.