

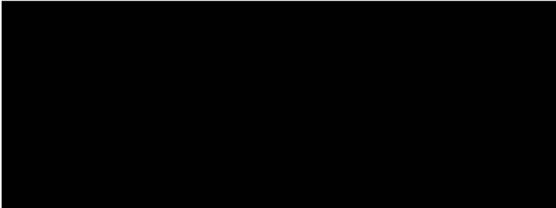
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090

U.S. Citizenship  
and Immigration  
Services

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File: WAC 08 089 51302 Office: CALIFORNIA SERVICE CENTER Date:

**JUL 28 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California 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 employ the beneficiary 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, an Ohio corporation, intends to operate a retail store. It claims to be an affiliate of M/s Pradipkumar Mangaldas Patel, located in Ahmedabad, India. The petitioner seeks to employ the beneficiary as owner/manager of its new office in the United States for a three-year period.<sup>1</sup>

The director denied the petition concluding that the petitioner failed to establish: (1) that the petitioner is doing business as defined in the regulations; and (2) that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity within one year.

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 asserts that the director misapplied the regulations governing new office petitions and contends that the petitioner has fully complied with the requirements set forth at 8 C.F.R. § 214.2(l)(3)(v). Counsel submits a brief and documentary evidence in support of the appeal.

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

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<sup>1</sup> Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

The petitioner filed the nonimmigrant petition on February 7, 2008. The petitioner submitted evidence that it was established in the State of Ohio in December 2007, and evidence that the company had signed an asset purchase agreement to acquire an existing convenience store located in Cincinnati, Ohio. The petitioner did not submit a description of the beneficiary's proposed duties as manager or a business plan outlining the intended organizational structure and financial goals of the new office.

The director issued a request for additional evidence (RFE) on March 24, 2008. The director requested additional information to establish that the beneficiary will be employed by the U.S. company in a managerial

or executive capacity, including a more detailed description of the beneficiary's proposed duties, and the percentage of time to be spent in each of the listed duties. The director also requested a detailed organizational chart for the United States company clearly identifying and describing the types of positions the beneficiary would be supervising.

In response to the RFE, the petitioner submitted the following job description for the beneficiary's proposed position:

[The beneficiary] will be doing research to find out how the sales of the company be [sic] increased. He will be developing a strategy for marketing and advertising in the local and national market. He will be looking for new products especially ethnic products which can be introduced in the market and at the same time the profits be increased. [The beneficiary] will strive to make it a[n] international market and look for expanding the horizon.

[The beneficiary] will prepare the budget which is consumer and supplier friendly and the consumer gets the most benefit out of it, which will increase the goodwill in the market. Will hire the best available people in the market so that they can handle the business in a professional manner. He will make sure that the customer satisfaction is the first priority of the people working with the company.

In addition he will be responsible for duties including but not limited to the following till the business comes to a point where he will solely perform the higher managerial duties.

To run the business efficiently and profitably.

To have sufficient number of workers working and supervise them.

To hire new people whenever the need is.

To fire the unproductive workers if needed.

To control inventory in a productive way.

Develop local marketing and advertising strategies.

Perform all management responsibilities.

Open/close store handle customer service complaints.

Control all money and prepare daily reports.

Complete paperwork for inventory, purchasing, accounting, and end of month reports.

To bring the business to a point where it can be managed by a manager hired to do that.

The petitioner did not submit the requested proposed organizational chart for the U.S. company or otherwise discuss its hiring plans. The petitioner submitted an affidavit from [REDACTED], owner of Anal Corporation, which currently operates the convenience store whose assets the petitioner intends to purchase. [REDACTED] indicates that he is the sole employee of the store, and that he receives assistance in operating the business from family members as needed.

[REDACTED] also stated that the petitioner has paid him \$10,000 earnest money in cash which has not been deposited. The petitioner submitted evidence that it has \$40,000 in a checking account, which would constitute the remaining balance of the purchase cost for the store's assets. According to the purchase agreement, the petitioner agreed to pay \$50,000 *plus* the cost of the petitioner's inventory at the time of gaining possession.

The director denied the petition on October 17, 2008, concluding that the petitioner did not establish that the U.S. entity would support a managerial or executive position within one year of the petition being approved. The director noted that the evidence did not establish the proposed organizational structure of the U.S. entity, the size of the United States investment, or the financial ability of the entity to commence doing business in the United States.

On appeal, counsel for the petitioner asserts that the petitioner submitted all required evidence including evidence of the organization structure of the foreign company, the proposed investment documents, the financial ability of the foreign entity to remunerate the beneficiary and the financial ability of the U.S. company to commence doing business in the United States. Counsel emphasizes that the 2006 corporate tax return for Anal Corporation shows that the business is "already making money and there is a lot of scope to expand."

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary would be employed by the United States entity in a managerial or executive capacity within one year, or that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

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.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. As discussed above, the petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the petitioner's description of the beneficiary's proposed duties fails to establish that such duties would be primarily managerial or executive in nature within one year. For example, the petitioner's

description includes vague duties such as "to run the business efficiently and profitably," and to "perform all management responsibilities," which provide little insight into the specific managerial tasks the beneficiary would 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).

Furthermore, many of the duties attributed to the beneficiary do not clearly fall under the statutory definition of managerial or executive capacity. For example, the beneficiary would be responsible to control inventory, open and close the store, perform market research, handle customer service complaints, control money and prepare daily reports, and complete paperwork for inventory, purchasing and accounting, and there is no indication as to when or if these operational and administrative tasks would be delegated to subordinate staff. An employee who "primarily" performs the tasks necessary to produce a product or to provide services or other non-managerial duties is not considered to be "primarily" 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties would constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-managerial administrative or operational duties associated with operating a retail store. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties will be managerial in nature, and what proportion will be non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Therefore, the job description alone falls significantly short of establishing that his duties will be primarily managerial or executive in nature within one year of commencing operations.

The totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. With respect to the petitioner's staffing levels, the petitioner failed to provide a proposed organizational chart for the company and simply stated that the beneficiary will hire and supervise a "sufficient number of workers." The petitioner has provided no business, financial or hiring plan to demonstrate its plans for growth. Any 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). Absent information regarding the number and types of workers to be hired, the AAO cannot conclude that the beneficiary would be relieved from performing primarily non-managerial duties within one year.

Although the director noted the lack of evidence with respect to the company's proposed staffing in the notice of denial, the petitioner has not addressed the petitioner's proposed staffing levels on appeal. Instead, the petitioner emphasizes that the tax returns for the retail store's current owner demonstrate the store's potential for growth. The evidence submitted shows that the store has been operating since 2005 and had only one paid employee as of June 2008. The most recent tax return submitted, for 2006, shows net income of \$1,159. This minimal evidence does not in fact establish a reasonable expectation that the business will rapidly expand to the point where it requires a manager or executive to primarily perform the high-level duties contemplated by the statutory definitions.

A related issue also addressed by the director is whether the petitioner provided sufficient evidence of the size of the financial investment in the new United States office, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). Although the petitioner has provided evidence that the petitioner has \$40,000 in a bank account, and claims that it has paid \$10,000 in cash to the seller of the convenience store, the petitioner has not established that \$50,000 is sufficient to complete the purchase of the store, much less sufficient to cover all of its start-up expenses. According to the terms of the purchase agreement, the petitioner would be required to pay the seller \$50,000 plus an unidentified additional sum for the store's inventory. The petitioner has not established that it has the funds to pay for the cost of the inventory. Further, the petitioner has not outlined its anticipated capital requirements and start-up costs, and it is thus impossible to evaluate whether it anticipates any expenses beyond the purchase of the store itself.

Therefore, the AAO's review of this issue is severely restricted by the petitioner's failure to submit evidence or information regarding the proposed nature of the office, the anticipated scope of the entity, and its financial goals, as required by 8 C.F.R. § 214.2(l)(3)(v)(2). While a business plan is not explicitly required by the regulations, the petitioner has provided no explanation regarding the intended scope of the organization or its financial goals, no timeline for hiring additional employees, insufficient evidence of the size of the investment required for start-up operations, and no financial objectives or projections for the company's first year of business. 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)). The AAO cannot speculate as to when or how many employees might be hired or otherwise determine how many employees the company would support at the end of the first year of operations, or who would be performing the day-to-day, non-managerial functions of the retail store.

The AAO does not doubt that the beneficiary will have supervisory authority over the petitioner's business. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show 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). Overall, the vague job description provided for the beneficiary, the lack of detail regarding the petitioner's business plan and hiring plan for the first year of operations, considered with the lack of evidence of the size of the U.S. investment, prohibits a determination that the petitioner could realistically support a managerial or executive position within one year. For this reason, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner is doing business as defined in the regulations. "Doing Business" means 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. 8 C.F.R. § 214.2(l)(1)(ii)(H). The director based this conclusion "on the petitioner's failure to produce evidence showing the business is operational with all licenses and lease agreements under its name and control." The director noted that the petitioner has not finalized the purchase of the business it intends to operate.

On appeal, counsel for the petitioner emphasizes that the petitioner is a new office established just two months prior to the filing of the petition. Counsel asserts that the purchase of the convenience store and transfer of the lease and licenses is necessarily contingent upon the approval of the request for the

beneficiary's L-1A status. Counsel contends that the evidence submitted to establish that the petitioner is in the process of securing the business is sufficient to establish eligibility as a new office.

Upon review, the AAO will withdraw the director's decision with respect to this issue. The regulations governing new offices at 8 C.F.R. § 214.2(l)(3)(v) do not require the petitioner to establish that the U.S. entity is already doing business as defined in the regulations. Rather, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. Therefore, the denial of the petition on the ground that the petitioner is not doing business is inappropriate.

However, the director did raise a critical evidentiary deficiency in noting that the petitioner does not have a lease in its name. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires the petitioner to submit evidence that it has secured sufficient physical premises to house the new office as of the date of filing.

As noted above, the petitioner signed an asset purchase agreement on January 10, 2008 in which it agreed to purchase all furnishings, equipment, fixtures, telephone number, good will and inventory of a convenience store located in Cincinnati, Ohio, contingent upon approval of the beneficiary's visa petition and final approval for transfer of the seller's liquor license. As noted by the director, the bill of sale has not been executed. The purchase agreement makes no reference to the physical premises or the transfer of the lease.

The petitioner submitted a copy of the lease agreement Anal Corporation made with the former owner of the building, M & M Main Building, Inc., in June 2005, as well as evidence that the lease was assigned to the current owner, TCMH Holdings, LLC, in November 2007. In the RFE issued on March 24, 2008, the director requested additional evidence to establish that the petitioner has leased premises in the United States, in the form of a letter from the owner or property management company confirming that the U.S. company is currently maintaining the lease agreement.

In response, the petitioner submitted a letter dated May 21, 2008 from TCMH Holdings, addressed to the owner of Anal Corporation, which refers to a discussion the two parties had regarding the potential assignment of Anal's lease agreement. TCMH Holdings indicates that it would allow the assignment under certain conditions. However, there is no evidence that the seller and current lessee, Anal Corporation, had secured the approval of the owner of the property prior to the filing of this petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Furthermore, the letter from TCMH Holdings is vague, does not refer to the petitioner by name, and is insufficient to establish that the petitioning company has in fact secured the physical premises for its business. Accordingly, the AAO must conclude that the petitioner has not met the evidentiary requirement at 8 C.F.R. § 214.2(l)(3)(v)(A). 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). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in

making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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).

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.