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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D7

[REDACTED]

DATE: JUL 23 2012 Office: VERMONT SERVICE CENTER FILE: [REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition on September 15, 2011. On October 14, 2011, counsel filed a form I-290B, Notice of Appeal or Motion, with the AAO. Counsel selected Part 2, Box B, indicating that a brief would be submitted to the AAO within 30 days. On March 21, 2012, the AAO dismissed the appeal after erroneously determining that no brief was submitted by the petitioner. Upon review, a brief was timely filed, and the matter will be reopened on service motion. 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 beneficiary's employment as a 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 Texas corporation, states that it operates an investment business. It claims to be a subsidiary of [REDACTED] located in Ahmedabad, India. The petitioner has employed the beneficiary in L-1A status since December 2007 and now seeks to extend his status so that he may continue to serve in the position of Director/Manager of Operations.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will 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 asserts that the director made material errors of fact when making his decision. Counsel for the petitioner submits a brief and additional evidence in support of the appeal.

I. The Law

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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 13, 2010. The petitioner indicated on the petition that it operates an investment business with eight employees and gross annual income of \$98,910.00. In a letter dated December 6, 2010, the petitioner stated that the beneficiary performs the following duties as Director/Manager of Operations:

- Formulating and implementing all corporate policies and goals, both executive and managerial;
- Concentrate on the long-range goals of the company and direct the company to the successful attainment of those goals;
- Direct and Coordinate all marketing needs;
- Hire, fire and train all employees;
- Manage and oversee all daily business operations;
- Make daily legal and financial decisions for the company.

The petitioner indicated that it acquired a wholly owned subsidiary, [REDACTED] as well as 50% of the shares of [REDACTED] as of September 2010 and January 2010 respectively. The petitioner also indicated it was part of a joint venture, [REDACTED]

The director issued a request for additional evidence ("RFE") on January 25, 2011 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a list of the United States employees including position description and educational credentials for each; (2) a comprehensive description of the beneficiary's duties and how those duties are managerial or executive in nature; and (3) a copy of all IRS Forms W-2s and W-3s issued by the United States entity in 2009.

In a response dated February 28, 2011, counsel for the petitioner described the beneficiary's duties generally to include: responsibility for all day-to-day operations; supervising various store management, cashiers, and employees; and establishing the goals and policies of the business. Counsel for the petitioner further detailed the beneficiary's duties as follows:

- Direct and manage overall legal and financial decisions of the business
- Control all areas of operations and management of the business
- Facilitate the growth of sales and marketing in order to promote the growth of the business
- Provide leadership and direction to the administrative and managerial staff
- Provide financial and administrative reports including budget status of financial plans, updates on new initiatives, revenue growth and capital improvements
- Manage and outsource bookkeeping duties as appropriate; AP/AR. Payroll, banking and cash reconciliation, monthly, quarterly and yearly tax filing and computer record keeping
- Oversee the hiring and firing and training all employees
- Maintain and update job descriptions and scope of staff positions
- Regularly assess the long range goals of the organization
- Set and monitor income growth targets as a part of strategic planning and annual resource budgeting
- Establish and communicate appropriately solid business justifications for financial decisions, new positions and policy changes

In response to the director's request to explain how the job duties are either executive or managerial in nature, the petitioner stated that "[u]nder the circumstances you will clearly note that the beneficiary will be acting in a managerial capacity."

Counsel for the petitioner provided brief job descriptions for employees for three companies. Counsel stated that [REDACTED] employed four people in the following positions: kitchen manager, delivery manager and cashier, head sales cashier, and store manager. [REDACTED] employed three people in the following positions: customer service manager; clerk; and product designer/repairer. Finally, counsel provided two job descriptions for [REDACTED] for a store inventory clerk and a cashier.

The director denied the petition on September 15, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition. The director determined that there was inconsistent evidence on the record regarding the number of company employees. Furthermore, the director found that "the record does not currently show what the beneficiary has done or will do which would qualify him as a manager or an executive" other than the beneficiary's position title.

On appeal, counsel asserts that all of the beneficiary's duties are managerial or executive in nature. Counsel asserts that the beneficiary "clearly oversees high-level functions for the business, including overseeing the development of new businesses." Counsel states that there have been additional developments to the subsidiaries owned by the petitioner since the Form I-129 was originally filed and that the petitioner is "looking to add additional subsidiaries."

Counsel clarifies that the petitioner sold its interest in [REDACTED] prior to the I-129 filing date, in November of 2010. Counsel for the petitioner states that in March of 2011, after the filing date, the petitioner acquired an interest in a full-service restaurant called [REDACTED]. Counsel asserts that the petitioner retains its ownership in [REDACTED] and [REDACTED].

In a letter dated November 10, 2011, counsel states that the beneficiary's job duties include the following: daily review of sale reports/activity for each separate business; monitoring the stock for [REDACTED] and authorizing the purchase of new stock; meeting with the petitioner's marketing manager; meeting with the petitioner's accounting manager; meeting with the manager of [REDACTED] to assess stock, staffing, and other issues; meeting with business contacts regarding development of new business; and meeting with the manager at [REDACTED] to discuss inventory levels, new stock, and strategic planning.

A new organizational chart is presented by the petitioner on appeal. Two new positions were added to the petitioning entity since the filing of the petition, specifically, a marketing manager and an accounting manager. The organizational chart on appeal also shows two employees working for [REDACTED], three employees working for [REDACTED] and six employees working for [REDACTED].

In support of the appeal, the petitioner provides a business plan, evidence of ownership for all five entities, tax returns, quarterly reports, and lease agreements for all entities except the petitioner.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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 in either an executive or a managerial capacity. *Id.*

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). The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The petitioner's description of the beneficiary's duties in the initial petition, and in response to the RFE, fails to establish that the beneficiary would be engaged in primarily managerial or executive duties under the extended petition. While the AAO does not doubt that the beneficiary exercises discretionary authority over the U.S. company, the petitioner has not submitted a consistent or credible breakdown of how the beneficiary will allocate his time among specific responsibilities. At the time of filing the petition, the petitioner characterized the beneficiary's role as Director/Manager of Operations for the U.S. company. The petitioner indicated that the beneficiary's duties would include: formulating and implementing all corporate policies; directing and coordinating all marketing needs; hiring, firing, and training all employees; managing and overseeing daily business operations; and making legal and financial decisions for the company. The petitioner did not further explain the specific duties that the beneficiary would perform with relation to the investment business. This description offered little insight into the nature of the beneficiary's duties. 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).

While such responsibilities generally suggest that the beneficiary is responsible for oversight of the company, it provides little insight into how he would actually allocate his tasks on a day-to-day basis. 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 failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

While the petitioner has submitted a revised job description on appeal, the new job description diverges significantly from all prior descriptions provided, and references duties specifically related to the petitioner's investment entities. Specifically, the beneficiary will be assessing inventory and staffing levels, and

authorizing the purchase of new inventory, among other issues. These duties, therefore, do not relate to the investment activity of the petitioner, but to the actual operations of the entities themselves. 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'r 1978). On appeal, counsel for the petitioner states that the petitioner sold its interest in [REDACTED] in November of 2010, prior to the filing date. Also, the petitioner states on appeal that it acquired a new entity, [REDACTED]. This entity was not acquired until March of 2011, well after the filing date of the L-1 petition. Therefore, any duties related to the operation of these two entities do not establish eligibility for this petition.

Two of the entities are claimed by the petitioner to be owned at the time of filing, [REDACTED] and [REDACTED]. The record fails to establish, however, that [REDACTED] has a qualifying relationship to the foreign employer for L-1 purposes. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. entity are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

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.*, *supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The petitioner states that [REDACTED] is a 50% owned subsidiary of the petitioner as of the date of filing. On appeal, the petitioner presents the Articles of Incorporation and stock certificate issued to the petitioner. Assuming *arguendo* that the petitioner owns the 50% interest in the corporation, the petitioner failed to provide evidence that it maintains control of the corporation. Therefore, the record does not establish that the foreign employer and [REDACTED] are qualifying entities for L-1 purposes.

Therefore, the only qualifying subsidiary for L-1 purposes is [REDACTED]. While some of the beneficiary's job duties submitted on appeal relate to the qualifying subsidiary, as well as the investment

firm's activities, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties, or duties related to the operations of non-qualifying entities. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is related to the operations of the non-qualifying entities. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). Therefore, 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. *See* § 101(a)(44)(A)(ii) of the Act.

On appeal, the petitioner submits job descriptions and new positions on the organizational chart for a Marketing Manager and Accounting Manager. The petitioner states that these employees were hired after the filing date of the initial petition. Specifically, the Marketing Manager was hired in July and the Accounting Manager was hired in June of 2011. 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'r 1978).

In the initial filing, in response to the RFE, and on appeal, the petitioner stated that employees reporting to the beneficiary include employees of [REDACTED] and [REDACTED]. For the reasons discussed above, the petitioner has not established that these entities are qualifying entities for L-1 purposes. Any employees of these entities cannot be considered as the beneficiary's subordinates for the purpose of assessing whether this petition may be approved.

The petitioner states that [REDACTED] has two employees. Specifically, one employee whose "main duty is to keep the store stock up to date," as well as an employee responsible for "handling the cash register and proving customer service." To the extent that these employees are the beneficiary's subordinates,

the petitioner has not demonstrated that they are professional level positions as required by the Act. Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

The AAO notes 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). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS 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).

At the time of filing the petition, the petitioner was established for the purpose of operating an investment firm. The petitioner submits the 941 Employer's Quarterly Federal Tax Return for the fourth quarter of 2010 on appeal. This return shows the number of employees working for the petitioner as of the date of filing. The form shows that one employee was working for the petitioner in this quarter. The beneficiary, while charged with management of the company, was also the sole employee working for the U.S. company as of the date of filing. Thus, it is reasonable to conclude, and has not been shown otherwise, that he provides any services the company is retained to provide, and performs all other administrative and operational tasks associated with the operation of the business. The petitioner has not established that it had a reasonable need for the beneficiary to perform primarily managerial or executive tasks as of the date of filing.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his time on non-qualifying duties. Again, an employee who "primarily" performs the tasks necessary to produce a product or to provide services 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 Int'l*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. See section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.