



U.S. Citizenship  
and Immigration  
Services

D7

[REDACTED]

DATE: **OCT 18 2012** Office: TEXAS 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:

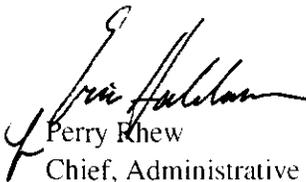
[REDACTED]

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, Texas Service Center, denied the nonimmigrant visa petition on October 1, 2010 and certified his decision to the Administrative Appeals Office (AAO) pursuant to 8 C.F.R. § 103.4(a)(5).<sup>1</sup> The AAO will affirm the director's decision and deny the petition.

The petitioner, a Georgia corporation established in 2002, seeks to classify 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 describes its business as a retail business, namely, a gas station/convenience store. It claims to be a subsidiary of [REDACTED] located in Mumbai, India. The petitioner seeks to extend the beneficiary's employment as its General Manager for an additional three years. The petitioner claims that it has employed the beneficiary in a managerial capacity under section 101(a)(44)(A) of the Act since May 2004.

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 evidentiary requirements for this classification are set forth at 8 C.F.R. § 214.2(l)(3).

Upon review of the petition and the evidence, and for the reasons discussed herein, the AAO will affirm the director's findings that the petitioner failed to establish the following: 1) that the beneficiary is, and will be, employed in a primarily managerial capacity as defined at section 101(a)(44)(A) of the Act; 2) that the petitioner has a qualifying relationship with the foreign entity, [REDACTED] and 3) that the beneficiary was previously employed in a managerial or executive capacity with the foreign entity. Further the AAO will affirm the director's determination that the petitioner failed to submit requested evidence, which precluded the director from pursuing a material line of inquiry.

The first issue to be addressed is the nature of the beneficiary's employment in the United States for the petitioner. 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.*

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). If the petitioner claims that the beneficiary will manage an essential function of the organization, its description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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

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<sup>1</sup> The Director, Texas Service Center, originally denied the petition on May 31, 2005. The director re-opened the matter on service motion and issued a Notice of Intent to Deny to the petitioner and current counsel on December 17, 2010.

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* *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The AAO finds that the evidence in the record overwhelmingly supports the conclusion that the beneficiary is not, and has not been, employed in a primarily managerial capacity as defined at section 101(a)(44)(A) of the Act, either as a function manager or as a personnel manager.

According to the information stated on Form I-129, the beneficiary's job duties, as General Manager, are to oversee "all operations and expansions," and to "continue to be responsible for personnel, payroll, expansion, and marketing." The petitioner claimed on Form I-129 to employ 3-4 employees at the time of filing the petition on March 5, 2005. As the information on the Form I-129 was overly vague, the director issued a request for evidence (RFE) instructing the petitioner to submit evidence and clarification of the beneficiary's job duties.

In a letter dated May 5, 2005, former counsel for the petitioner stated:

The beneficiary is responsible for establishing policies and procedures for the U.S. subsidiary, as well as for all personnel decisions. He also supervises all accounts, contract negotiations, and supplier contact. The estimated breakdown of his activities is: Contract/Expansion-related work – 25%; Policy-Making – 30%; General Management – 45%. He delegates the daily business duties to the [REDACTED], who oversees the daily operations of the retail store. . . [REDACTED] is a [REDACTED] and provides front-end service to customers.

Fortunately, [the beneficiary] is not called upon to perform any nonmanagerial functions in the day-to-day running of the company. In the course of his daily duties, he oversees finances and other managerial functions, but has no contact with customers at the retail business. The nature of the business being operated does not require him to perform any front-end customer service or similar functions.

In contrast, in a letter dated January 15, 2011 submitted in response to the notice of intent to deny, the petitioner described the beneficiary's duties as follows:

This is to confirm that [the beneficiary] has been in our employ from May 2004 til [sic] present date. He is a General Manager, in charge of various activities that also, require him to render services to the partners in the company. When [the beneficiary] joined us,

he was selected to be the personal assistant to the director but later, was found to be more competent for the post of the general manager. . . .

He edits and proofreads all of our correspondences and contracts with our buyers, suppliers, vendor and preferred clientele. Through the course of his employment with us as our most valued employee, he dealt with and maintained all of our clientele, vendor, suppliers and buyer portfolios. . . . At times, he even attended our calls and the calls of our clients in order to take instructions from them for special orders. He helps manage all of our staff both within the office and in the stores . . . . He also, routinely examines and audits the paper trail, such as packaging slips, invoices, bills of lading, requisitions, orders, receipts and acknowledgments received from clients, shipping and receiving departments within every company that deals with us. . . .

The petitioner's descriptions of the beneficiary's job duties, alone, supports the director's finding that the beneficiary performs primarily non-qualifying, non-managerial duties for the petitioner. Duties such as editing and proofreading correspondences and contracts, dealing with customers, vendors, suppliers and buyers, attending calls from customers to take special orders, and examining packaging slips, invoices, and receipts, are not the type of high-level duties that qualify as managerial pursuant to section 101(a)(44)(A) of the Act. From these job duties, it is apparent that the beneficiary is, and has been, primarily performing the daily, non-qualifying duties of the U.S. operation.

The petitioner categorically stated that the beneficiary is engaged in management of "all operations and expansions" and "continues to be responsible for personnel," but provided no details regarding his actual managerial 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 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).

Furthermore, the petitioner provided contradictory claims regarding the beneficiary's duties. In counsel's letter dated May 5, 2005, counsel claimed that the beneficiary "has no contact with customers at the retail business." However, in the letter dated January 15, 2011, the petitioner described several duties in which the beneficiary directly interacts with the petitioner's customers (i.e., "clients" or "clientele").

The petitioner's claim in its January 15, 2011 letter - that the beneficiary first served as the director's "personal assistant" in May 2004 and then was promoted to "General Manager"- is especially significant. According to Form I-129, the petitioner claimed to have employed the beneficiary in L-1A status since May 2004. USCIS records confirm that the beneficiary was initially granted L-1A status from May 2, 2004 to May 1, 2005. If it is true that the beneficiary was first employed as a "personal assistant" and was later promoted to General Manager, then the record reflects that the beneficiary was not eligible for initial L-1A classification granted to him in May 2004, and the director should review the initial petition for possible revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

Moreover, while given the opportunity to resolve the inconsistency concerning the petitioner's personnel size at the time of filing, the petitioner has failed to submit any further evidence to address this anomaly. The

Form I-129 stated that the petitioner has "3-4" employees, but the petitioner never clarified whether it had three or four employees at the time it filed the petition. According to the petitioner's letter dated May 5, 2005, the petitioner listed only three current employees: the beneficiary as General Manager, the petitioner's owner [REDACTED] as [REDACTED] and the petitioner's other [REDACTED]. However, the petitioner submitted only one Form W-2, Wage and Tax Statement, for Noor Jan from 2004, and copies of three unreliable handwritten receipts to [REDACTED] in 2005 from an unidentified payor. The petitioner failed to establish its employment of any other individuals with objective, reliable evidence. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The fact that the petitioner had a limited staff of three, possibly four employees, including the beneficiary, at the time the petition was filed further supports the director's conclusion that the petitioner's staff was unable to relieve the beneficiary from having to primarily perform non-qualifying job duties.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, 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. *Id.* at 591. For the foregoing reasons, the AAO will affirm the director's determination that the petitioner failed to establish that it would employ the beneficiary in qualifying managerial or executive capacity. The petition will be denied for this reason.

The second issue to be addressed is the nature of the beneficiary's employment abroad. The AAO affirms the director's determination that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a managerial capacity. The description of the beneficiary's employment abroad is severely lacking in any detailed information about the beneficiary's specific tasks. The only document the petitioner provided regarding the beneficiary's duties in the foreign entity was an undated letter from [REDACTED] stating the following: "[The beneficiary] has been [REDACTED] since early 2000. Under his brilliant management, he has helped make [REDACTED] one of India's leading companies in the field." This letter provided no details regarding the beneficiary's actual daily duties. While the petitioner submitted the foreign entity's organizational chart listing the beneficiary as "Business Manager," the beneficiary's title alone, without a detailed description of his duties, is insufficient to demonstrate the nature of his employment. An individual will not be deemed a manager under section 101(a)(44)(A) simply because he has a title of "manager."

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. The actual duties themselves reveal the true nature of the employment. *Id.* The AAO will affirm the director's decision to deny the petition for this additional reason.

The third issue to be addressed is whether the petitioner established that it has a qualifying relationship with the foreign entity, [REDACTED]. 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. employer

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).

After conducting a comprehensive review of the petitioner's submissions, the AAO finds that the director properly concluded that the petitioner failed to provide credible and reliable evidence to establish that it has a qualifying relationship with the foreign entity.

According to Form I-129, the petitioner claims to be a subsidiary of ██████████ located in India. The petitioner claims that it is "owned 25% by Noor Jan, 25% by ██████████ and 50% by ██████████. As primary evidence of its ownership, the petitioner submitted its stock certificates nos. 1, 2, and 4. Stock certificate no. 1 reflects that ██████████ was issued 375 shares on October 1, 2002. Stock certificate no. 2 reflects that ██████████ was issued 125 shares on October 1, 2002. Stock certificate no. 4 reflects that ██████████ was issued 500 shares on November 17, 2003.

The petitioner's stock certificates are not credible proof of the petitioner's claimed ownership. Notably, stock certificate no. 3 has not been provided for review, and the petitioner failed to submit a stock ledger transfer or any explanation to account for its absence. In the Notice of Intent to Deny dated December 17, 2010, the director specifically instructed the petitioner to submit, *inter alia*, copies of its stock ledger, a copy of all stock certificates issued, and an explanation for any gap in the sequence of stock certificates issued. The petitioner failed to comply with this request. The 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 petitioner's stock certificates nos. 1 and 2 are *prima facie* invalid. Stock certificates nos. 1 and 2 were both issued on October 1, 2002. However, the petitioner did not file its Articles of Incorporation until October 3, 2002. The petitioner failed to explain how it could have issued stock prior to the beginning of its corporate existence. *See* O.C.G.A. § 14-2-203(a) ("Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed."). Considering that stock nos. 1 and 2 appear to have been invalidly issued, and the petitioner failed to submit stock certificate no. 3 or account for its stock transfers, the AAO does not accept stock no. 4 as credible evidence of the foreign entity's ownership interest in the petitioner.

Moreover, the petitioner's stock certificates show a different ratio of ownership than what is claimed on Form I-129. According to Form I-129, the petitioner "is owned 25% by ██████████ 25% by ██████████ and 50% by ██████████. However, the stock certificates show that ██████████ owns 375 shares, equal to 37.5%, and that ██████████ owns 125 shares, equal to 12.5%.

In addition, the petitioner's 2003 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, contradicts its claim that it is 50% owned by the foreign entity. The petitioner's 2003 Form 1120S, reflects that there are only two shareholders: ██████████ who owns 50%, and ██████████ who owns the other 50%. The petitioner's 2003 tax return shows no ownership by the foreign entity, ██████████. Based on the petitioner's 2003 tax return and the other contradictory evidence submitted regarding the petitioner's ownership, the petitioner failed to establish that it is a subsidiary of the foreign entity.

As the director properly observed, the petitioner filed its 2003 tax return as an S corporation. However, the Internal Revenue Code generally requires that S corporations have stockholders who are individual persons

and who are not nonresident aliens. *See* Internal Revenue Code § 1361(b)(1999). This requirement is inconsistent with any ownership interest by the foreign entity. Although counsel for the petitioner asserts that the petitioner's S-election "was in error," the petitioner provides no proof that it has amended its tax returns.

While not directly addressed by the director, the petitioner failed to establish that it is still 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 a letter dated January 18, 2011 sent with the petitioner's response to the Notice of Intent to Deny, counsel for the petitioner states that "the store is no longer owned by the petitioner." Counsel also states that the "operation [is] long gone." Based on counsel's admission that the petitioner's operation is "long gone," the AAO questions whether the petitioner is an active business engaged in the regular, systematic, and continuous provision of goods or services as required by 8 C.F.R. § 214.2(l)(1)(ii)(G).<sup>2</sup>

Counsel claims that the petitioner now owns a "new store," [REDACTED], and requests that USCIS consider the beneficiary's employment with [REDACTED] in lieu of [REDACTED]. The AAO finds that counsel's claim is not credible, and will not grant the request to consider [REDACTED]. The petitioner failed to submit any evidence establishing that it purchased [REDACTED] as claimed. The only documents the petitioner submitted regarding [REDACTED] were its various business licenses and its 2009 tax return. Collectively, these documents establish that [REDACTED] was incorporated on March 27, 2009 and has a different ownership and corporate structure than the petitioner.<sup>3</sup> The evidence reflects that [REDACTED] is a separate and distinct legal entity from the petitioner. Therefore, its business activities cannot be attributed to the petitioner. As the petitioner admitted that its operation is "long gone" and failed to establish that it has acquired any new businesses in the United States, the petitioner failed to establish that it is still doing business in the United States. For this additional reason, the petition must be denied.<sup>4</sup>

In his brief submitted on certification, counsel for the petitioner emphasizes that the petitioner's Form I-140 petition on behalf of the beneficiary was initially approved in 2005, and should be given deference. Counsel

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<sup>2</sup> According to the Georgia Secretary of State's website, the petitioner is in "active/noncompliance" status. *See*: <http://corp.sos.state.ga.us/corp/soskb/Corp.asp?162770> (last accessed October 5, 2012). The Georgia Secretary of State website explains that an entity in "active/noncompliance" status is subject to administrative dissolution. Once an entity is administratively dissolved, the entity may not carry on any business except that necessary to wind up and liquidate its business and affairs. *See* OCGA 14-2-1405, 14-3-1406, a4-11-603.

<sup>3</sup> According to the Georgia Secretary of State's public website, [REDACTED] was incorporated on March 27, 2009. Its listed officers are: [REDACTED] as the [REDACTED] and the beneficiary as the Secretary. *See*: <http://corp.sos.state.ga.us/corp/soskb/Corp.asp?1542634> (last accessed October 5, 2012).

<sup>4</sup> Even if the petitioner overcame the grounds for denial set forth in the director's Notice of Certification, the petition's approval would be subject to revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii) based on the petitioner's admission that "the operation [is] long gone."

also relies on general descriptions regarding the convenience store industry from the National Association of Convenience Stores, and position descriptions for managers of large grocery stores from the Bureau of Labor Statistics. Counsel's assertions are unpersuasive.

The AAO will not give deference to the prior approval of the Form I-140 on behalf of the beneficiary. If the Form I-140 petition were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In addition, general descriptions regarding the convenience store industry or managerial positions for large supermarkets by the Bureau of Labor Statistics have no bearing on an assessment of the beneficiary's duties within the context of the petitioning company's business. The petitioner cannot satisfy its evidentiary burden by relying on such descriptions. The regulations require the petitioner to submit a detailed description of the beneficiary's actual duties within the context of the petitioner's business. 8 C.F.R. § 214.2(1)(3)(ii). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The final issue to be addressed is whether petitioner prevented the director from pursuing a material line of inquiry by failing to submit requested evidence. *See* 8 C.F.R. § 103.2(b)(14). Counsel for the petitioner does not address this issue on certification. Therefore, the AAO considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). The petition will be denied for this additional reason.

The AAO affirms the director's decision to deny petition for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 director's decision dated June 22, 2011 is affirmed. The petition is denied.