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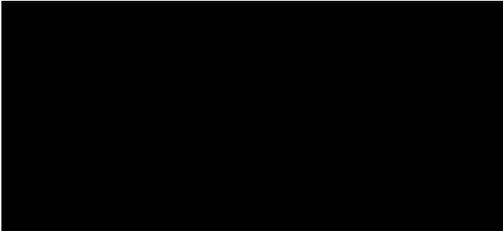
U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: EAC 02 105 51165 Office: VERMONT SERVICE CENTER

Date: **APR 12 2004**

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:

SELF REPRESENTED

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner [REDACTED] avers that it is a subsidiary of a Kenyan company, [REDACTED]. The petitioner plans to open a convenience and liquor store. The U.S. entity is incorporated in the State of New Jersey. The petitioner now seeks to hire the beneficiary as a new employee to open its U.S. office. Consequently, in February 2002, the U.S. entity petitioned to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) for one year. The petitioner seeks to employ the beneficiary's services as the U.S. entity's president at an annual salary of \$30,000.

The director determined, however, that the beneficiary would not perform managerial or executive duties upon his arrival in the United States or within one year of his arrival. Consequently, on August 20, 2002, the director denied the petition.

On appeal, the petitioner states that, while the petition was pending, the United States entity began operating a convenience store and hired a manager. The petitioner states that, due to this change, the beneficiary will only perform executive duties for duties for the convenience store. Also, the petitioner asserts that the beneficiary's duties abroad were managerial.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

Under 8 C.F.R. § 214.2(1)(3), 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 (1)(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.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), 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 involved executive or managerial authority of 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 paragraph (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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means 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), provides:

The term “executive capacity” means 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.

When examining the executive or managerial capacity of the beneficiary, the AAO looks first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner 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.*

Additionally, during the first year of operation, a beneficiary may perform some duties which are not normally managerial or executive. *See* 8 C.F.R. §§ 214.2(l)(3)(v)(C)(1), (2), and (3). However, the petitioner must demonstrate that the U.S. office will support the beneficiary’s managerial or executive position within one year of the petition’s approval.

In this instance, the petitioner submitted three essentially similar descriptions of the beneficiary’s proposed duties in the United States. These descriptions appear on the Form I-129, in a January 7, 2002 letter attached to Form I-129, and in a May 5, 2002 letter submitted in response to the director’s March 18, 2002 request for evidence. The May 5, 2002 letter provides a representative summary of the beneficiary’s proposed tasks during the first year of operation:

- Meet with professional Realtors instructing them on type of business being sought
- Will research the area of businesses for sale, reviewing population, traffic counts, homesteads, category of residents, business population, etc.
- Will review sellers [*sic*] details including latest Tax Return for accuracy of figures
- Will prepare financial forecasts and cash flows to show feasibility of purchase and report back to the parent company’s Board of Directors
- Will sign all legal paperwork on behalf of the US corporation and issue and sign the purchase check on behalf of the corporation

- Will advertise, interview and hire a suitable manager and subordinate staff, or will interview and assess current staff
- Will formulate company policies and procedures
- Will train the Manager on the expectation of the company and its policies and procedures
- Will train Manager on future financial aspects and reporting
- Will prepare a staff training manual for the Manager's use
- Will oversee the Manager in preparation of opening store under new management
- Will dictate as to profit margins to be set by Manager
- Will formulate a marketing strategy to be adhered to by the Manager
- Will review further services or products to enhance profitability and advise Manager
- As President will have ultimate responsibility for, and control of the business, its development and growth and its stability

The petitioner added: "Once the first store is functioning to [the beneficiary's] satisfaction, he will then concentrate on expansion, in that he will:"

- Research and formulate financial projections on new products and services
- Research and investigate a suitable location for a further store
- Carry out feasibility studies on each proposed new location

The duties proposed for operations beyond the first year appear to comprise only marketing and market research tasks. For example, the beneficiary will be researching and studying new products and services as well as locations for additional stores. Marketing duties, by definition, qualify as performing tasks necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the petitioner's descriptions above do not establish what proportion of the beneficiary's duties, after the first year, will be managerial and what proportion will be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Therefore, based on the current record, the AAO is unable to determine whether, after the first year of operation, the beneficiary's duties will be executive or managerial.

Additionally, the claimed duties are too broad and nonspecific to convey an understanding of the beneficiary's proposed duties during and after the first year of operation. For example, the petitioner characterized the beneficiary's potential tasks as researching areas for business locations, formulating

company policies and procedures, training a manager in company expectations, overseeing a manager in preparation for a store opening, and carrying out feasibility studies. The petitioner provided no quantifiable definitions for researching, training, or overseeing. Likewise, the petitioner failed to define “policies,” “procedures,” “feasibility studies,” or “company expectations.”

Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS, supra* (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, specifics are 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). In sum, the petitioner has not established that the beneficiary will perform managerial and executive duties during or after the first year of operation.

Beyond the decision of the director the AAO notes that the record contains an undated lease for a property at 967 East Lincoln Avenue, Piscatway, New Jersey. The last page of the lease states: “Lease subject to lessee visa approval.” Therefore, when the petition was filed, the U.S. entity had not secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). The failure to obtain sufficient premises requires a denial of the petition. For this additional reason, the AAO will dismiss the appeal.

Additionally, the AAO notes that the petitioner stated that the beneficiary served as the Kenyan entity’s manager and financial controller. The petitioner provided three descriptions of the beneficiary’s duties in Kenya. The most detailed description, dated December 20, 2001, stated that the beneficiary’s duties included:

- Daily control of the running of the timber yard
- Overseeing management staff and their performances
- Directing the Staff Supervisor, Samuel Omutele, and working through him to achieve company goals and standards
- Marketing strategies
- Customer relationship [*sic*]
- Standard of workmanship and company service
- Development planning as Board member

The overseas entity’s organizational chart described the beneficiary as overseeing a staff supervisor. The staff supervisor, in turn, oversees 12 industrial workers. The organizational chart did not provide further details about the beneficiary’s daily duties.

A significant portion of the beneficiary’s tasks overseas include providing “daily control” of the timber yard, maintaining “customer relationship[s],” and “marketing.” As explained earlier, an employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial capacity. *Matter of Church Scientology International, supra*.

Furthermore, the job description above is vague; consequently, the AAO cannot determine whether the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel abroad who relieve him from performing nonqualifying duties. *See* section 101(a)(44)(A)(ii) of the Act.

Moreover, as previously noted, going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra; Republic of Transkei v. INS, supra; Matter of Treasure Craft of California, supra.* As the petitioner has not established that the beneficiary was primarily employed in a managerial or executive capacity overseas, the petition may not be approved.

Likewise, the business plan for the new office is inadequately documented. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(1). In short, the business plan primarily comprises “review[ing]” the current situation at an, as yet unidentified, convenience store. The lack of a sufficiently detailed business plan further precludes the AAO from determining whether the petitioner will be able to support a manager or executive within one year of operation. As the petitioner has not obtained sufficient premises, sufficiently documented the beneficiary’s overseas duties, or provided an adequate business plan, the petition must be denied.

Finally, on appeal, the petitioner offers evidence indicating that the U.S. entity leased premises and is operating as the “Big Belli Deli,” a convenience store in Hazlet, New Jersey. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).*

Furthermore, on appeal, the petitioner states that the beneficiary will perform solely executive, rather than managerial and executive, duties for the new office. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title, its level of authority within the organizational hierarchy, or the associated job responsibilities. 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 Corporation, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).* The U.S. entity may, however, file a new petition to reflect the claimed changed circumstances.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.