



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: EAC 02 066 54082 Office: VERMONT SERVICE CENTER

Date: APR 26 2004

IN RE: Petitioner:
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]

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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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.

[Handwritten signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner [REDACTED], avers that it is a wholly-owned subsidiary of Maharaja Management Services Limited, located in Kenya. The petitioner plans to operate a computer services business. The U.S. entity was incorporated in the State of Delaware on July 17, 2001 and has two employees. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office.¹ Accordingly, in December 2001, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for one year. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's president and managing director.

On June 19, 2002, the director denied the petition. The director determined that the petitioner will not support an executive or managerial position within one year.

On appeal, the petitioner's counsel claims that the petitioner will support an executive or managerial position within one year.

The AAO notes that counsel on appeal appears to disregard the director's conclusion. Counsel states that the director failed to consider the petitioner is a relatively young organization. Counsel asserts that the documentary evidence clearly demonstrates that the petitioner should be considered a new office for immigration purposes. However, counsel's assertion is unwarranted because the director concurs with counsel. The director determined that the petitioning entity is considered a new office.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 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.

Pursuant to 8 C.F.R. § 214.2(l)(3), an individual petition filed on Form I-129 shall be accompanied by:

¹ On Form I-129, the petitioner indicated that the beneficiary was not coming to the United States to open a new office. However, based upon counsel's brief and the petitioner's supporting letters, the petitioner has hired the beneficiary to open a new office. Thus, the petitioner must have erroneously checked the wrong box on Form I-129.

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (I)(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's prior year of employment abroad 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.
- (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 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 over the new operation;
- (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 (I)(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.

The petitioner initially submitted some documentation on the issue of whether the intended United States operation will, within one year of the approval of the petition, support an executive or managerial position. As a result, on January 30, 2002, the director issued a request for evidence. In particular, the director requested detailed documentary evidence for each of the elements under 8 C.F.R. § 214.2(l)(3)(v).²

² The AAO acknowledges that the beneficiary may perform some non-managerial or non-executive tasks during the first year of operation. The director’s managerial and executive

Initially, the petitioner submitted an October 27, 2001 lease for the term January 11, 2001 through an unclear date of 30/10-02 for the office space at 331 Main Street, Beacon, New York.³ In addition, in the response to the request for additional information, the petitioner submitted an April 22, 2002 letter from the petitioner's landlord confirming the petitioner is leasing the premises.

The petitioner also submitted several copies of photographs of the leased premises. Specifically, the photocopied photographs illustrated the claimed front door of the office and alleged interior. However, although the U.S. entity's business name appears in a photograph, the pictures themselves depict generic scenes and are difficult to read. Thus, it is difficult to determine whether the photographs depict the petitioner's actual business location. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, the petitioner also failed to comply with the director's request to submit additional evidence. The photographs fail to illustrate the address of the business and the outside of the office building. 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). In sum, the petitioner has not secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v). For this reason, the petition may not be approved.

The AAO will now consider whether the beneficiary meets the criteria of 8 C.F.R. § 214.2(l)(3)(v)(b). As previously stated, the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *See id.*

In 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). On review, the AAO finds that the beneficiary has not been employed in a managerial or executive capacity abroad as required by 8 C.F.R. § 214.2(l)(3)(v)(b).

In a November 7, 2001 letter, the director of the foreign entity stated that the beneficiary's position is primarily executive and managerial. The letter also stated that the beneficiary directed the company in formulating short and long term goals and implementing programs and strategies to achieve these goals.

analysis may, however, be relevant after the petitioner has been in operation for one year. Nevertheless, as explained in this decision, the director properly concluded that the new office is not established.

³ The petitioner wrote the lease's termination date in a European style. However, the AAO is not required to translate European style dates. It is incumbent upon the petitioner to utilize the proper format and resolve any uncertainties as to when the lease terminates.

The AAO notes that the petitioner never clarified whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. In the November 7, 2001 letter, the director of the foreign entity stated, "The beneficiary's position is an executive and managerial position." However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In an April 26, 2002 letter, the petitioner further described the beneficiary's duties abroad as:

Actively involved in the management of the company's executive/managerial affairs and responsibilities . . . , instrumental in developing, implementing, and directing the effective operation of corporate policies and strategies . . . , has supervised various managerial and supervisory personnel She is highly qualified for the proposed position by virtue of her academic credentials, business skills, knowledge of the computer industry, marketing and negotiation skills. Specifically, she possesses in-depth knowledge of all aspects of the computer education/training business and has well established business relationships.

The petitioner also submitted a copy of an organizational chart for the foreign entity. The chart, however, is so complex that it obscures the organization's lines of authority. Moreover, the chart does not describe the actual tasks of the employees and provides nothing more than titles. It is also unclear how the foreign organization supports the petitioner's business plan or its relationship to the U.S. entity.

The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For instance, the petitioner is described as "involved," "formulating short and long term goals," "instrumental in developing, implementing, and directing," "responsible for guiding the company," and "administration and oversight of all discretionary operations." The petitioner did not, however, define or clarify these duties. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*.

In addition, the petitioner generally paraphrased the statutory definition of executive and managerial capacity. See section 101(a)(44)(A) of the Act. For instance, the beneficiary's position is depicted as involving wide discretionary authority over subordinate personnel. However, 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, the November 7, 2001 letter describes the beneficiary as engaging in the development and implementation of marketing strategies, product and curriculum development, business contacts and other relationship negotiations, and business development. Since the beneficiary actually engages in these activities rather than directs them, she is performing tasks necessary to provide a service or product. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

After careful consideration of the evidence, the AAO concludes that the beneficiary has not been employed primarily in a qualifying managerial or executive capacity abroad. For this reason, the petition may not be approved.

The AAO now turns to the question of whether the petitioner provided sufficient supporting information pursuant to 8 C.F.R. § 214.2(I)(3)(v). Initially, the petitioner submitted a December 12, 2001 letter that incorporated the company's business plan:

- The company has already been incorporated under the laws of the State of Delaware, operating in New York, and adequately capitalized.
- The petitioner will be actively engaged in the U.S. providing computer training and related services, including import-export, and distribution of computers and related products and services such as computer training.

As noted earlier, the director requested additional information about the petitioner's business plan. In response, the petitioner submitted a March 2002 business plan. The March 2002 business plan reiterates the information above. Additionally, the business plan also described the beneficiary's proposed U.S. duties as:

- Responsible for guiding the company in a profitable direction for long-term growth;
- [Oversight of] all aspects of the business, from sales and marketing to human resources and accounting by supervising and directing subordinate managers;
- Administration and oversight of all discretionary operations, including start up of the operations of the U.S. subsidiary and coordinating the same with the parent company;
- Oversight of general corporate matters, including supervision and hiring of managerial level personnel and initial administrative affairs;
- Negotiation of related corporate contracts, establishment of business contracts, suppliers, lease negotiations and other relevant discretionary matters;

- Development and implementation of plans and strategies for long term growth, goals and objectives, and executive marketing of the company;
- Employee training, hiring and discharge, specifically managerial level employees such as sales and marketing directors and to establish and enforce corporate policies and objectives, etc.

Although the March 2002 business plan is lengthy, it does not present statements relevant to a new office petition; instead, the plan states generalities applicable to any Kenyan business beginning operations in the United States. For example, the plan discusses Kenya's predicted economic growth, import and export operations, foreign exchange, products and services, and foreign trade agreements.

Moreover, the petitioner's business plan lacks specificity and is vague. For instance, the business plan lists undefined goals as the beneficiary will be making contacts with "various personnel," participating in "substantial negotiations," directing "preliminary business," and conducting "substantial business with the foreign entity." Also, the petitioner plans to "increase market share and eliminate intermediary agent," "launch programs," and "procure products and conduct import/export operations, and provide computer services." These goals are non-specific and broad. In addition, the petitioner provides an explanation of customary business practice; however, the petitioner fails to explain how its business plan relates to such practices.

Additionally, the petitioner submitted a proposed U.S. business organizational chart in connection with the March 2002 business plan. However, the organizational chart is unclear. Although the petitioner submitted brief descriptions of the employees' duties, the chart and descriptions are uninformative as to whether they apply to the first year of operation or subsequent years of the business. There is also a discrepancy indicating an inconsistent number of employees. On Form I-129, the petitioner indicated that the U.S. entity has two employees. However, the U.S. organizational chart and April 26, 2002 letter of support in response to the director's request for additional evidence indicate that the U.S. entity's sole named employee is the beneficiary. Counsel also stated in the April 26, 2002 letter, "Because the petitioner has yet to commence operations, it does not yet have any regular employees and cannot produce employees' tax forms." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, in examining the business plan, the precedent decision, *Matter of Ho*, 22 I&N Dec. 206, 213 (Comm.1998), lists possible criteria for establishing an acceptable business plan. "The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions." The decision concluded, "Most importantly, the business plan must be credible." *Id.* at 213. Although *Matter of Ho, Id.*, addresses the specific requirements for the immigrant investor visa classification, the discussion of the business plan requirements is instructive for the L-1A new office requirements. Thus, given the business plan's inconsistencies, generalities, and lack of applicable information, it cannot demonstrate whether the new office will support a manager or executive within one year of filing this petition.

In sum, the petitioner has not complied with the new office requirements because of the vague and nonspecific descriptions of the proposed office, the entity's projected scope, the new office's organizational structure, and organizational structure of the foreign entity.

After careful consideration of the evidence, the AAO must conclude that the petitioner has not met the criterion at 8 C.F.R. § 214.2(l)(3)(v). For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner failed to establish that the foreign entity is a qualifying organization doing business as required by 8 C.F.R. § 214.2(l)(ii)(G)(2). The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) define "doing business" as "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 of the qualifying organization in the United States and abroad." *Id.* Although the petitioner submitted a complex organizational chart, supporting letters from industry business relations, Bureau of Labor Statistics information on the wholesale industry and the U.S. computer industry, a report of Kenya's economic conditions, miscellaneous documents, and receipts for taxes for fiscal year 2000, the AAO is unpersuaded that the foreign entity meets the regulatory requirements to qualify as a parent doing business in Kenya. The record does not contain evidence such as receipts, invoices, or contracts demonstrating that the foreign entity is currently operating a business.

Also, beyond the decision of the director, the minimal documentation of the foreign entity's business operations raises the issue of whether there is a qualifying relationship between and U.S. entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). Form I-129 indicates that the foreign entity owns 100 percent of the petitioner's stock. However, the record lacks evidence that typically documents a qualifying relationship. For instance, the petitioner did not submit copies of its articles of incorporation, bylaws, and stock ledger. Also, the U.S. Corporation Income Tax Return Form 1120, Schedule K, is incomplete. There is no indication on the tax return that documents a qualifying relationship between the petitioner and foreign entity. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. Based upon the lack of documentation, the AAO concludes that it is questionable whether a qualifying relationship exists between the U.S. and foreign entities. See 8 C.F.R. § 214.2(l)(1)(ii).

Finally, the AAO notes that, although counsel refers to several unpublished decisions, the record does not contain a copy of these decisions. Although 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. *See id.* Given that the cited cases are unpublished, the cases have no precedential effect in this matter.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.