PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: EAC 02 206 52776 Office: VERMONT SERVICE CENTER Date: AUG 04 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

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 petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a new office providing investment and financial services. It seeks to employ the beneficiary as vice-president, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding the U.S. entity would not support a primarily managerial or executive position within one year of approval of the petition, and therefore, the beneficiary would not be employed in the U.S. entity in a qualifying capacity.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel claims that the petitioner has been aggrieved in fact and in law by the director's determination that the beneficiary would not be employed in the U.S. entity in a managerial capacity. Counsel submits a detailed brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. 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.

Moreover, pursuant to the regulation at 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 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 (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The issue in this proceeding is whether within one year of approval of the petition the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

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-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) 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;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) 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-

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner submitted with the petition for a nonimmigrant visa detailed letters from both counsel and the petitioner, in which the proposed duties of the beneficiary as vice-president were described. As each letter is part of the record, it will not be entirely repeated herein. The AAO will address the pertinent parts as they relate to the present issue. In the petitioner's letter, dated October 8, 2001, the petitioner stated that the beneficiary's job duties would include corporate planning, general administration, marketing-sales, business development, purchases, and personnel. Counsel's April 2, 2002 letter outlined the same responsibilities and included additional job duties related to the company's financial operations and contract administration and negotiation. In his letter, counsel also provided the following:

(i) Corporate Planning:

(a) [The beneficiary] has been deputed by the overseas principals to the U.S. subsidiary, with primary responsibilities to establish[,] conduct and control the business of the company. [The beneficiary] has been charged with responsibilities to steer the activities of the company and to operate the same as a profit center. [The beneficiary], therefore, looks for, and invites business opportunities, evaluates the basic feasibility of the business and weighs the overall economic viability of the proposition. [The beneficiary] has considered several factors including the economic situation, labor, [government] assistance, taxation, prevailing circumstances, particularly related to business.

* * *

(iii) Finance:

[The beneficiary] oversees the operations of [f]inance. The responsibilities in this area cover budget control, finance, cash flow, securing required funds, judicious employment of funds of the company, provision for developmental activities, [a]ccounting systems and records, MIS, [a]udit, [t]axation and other related matters. The Accountant will assist [the beneficiary] to effectively oversee the operations in this area and to ensure that the same adhere to the company's policies, practice, [and] current operations under budget control and future goals.

(iv) Marketing-Sales:

(a) [The beneficiary] directs the marketing policy of the company. The responsibilities include review of the market trends and to analyze the same to determine the overall investment atmosphere. [The beneficiary] will direct the efforts to develop contacts with potential clients, procure and retain institutional business and to take steps to ensure satisfaction of the regular clients . . . .

* * *

(v) Business Development:

(a) [The beneficiary] is responsible for business development, including market research, promotion and progress of the overall business of the company. This will account for 100% incoming revenue of the company. With the focus on providing good customer service, [the beneficiary] will earn continued support of clients on an increasing scale. The success of these operations will be seen in the fact of the increasing volume of business and profits in [the] future. As such, [the beneficiary] will look for new avenues of profitable investments with an aim to secure progressive development of business and thereby increasing the net revenues of the company.

* * *

(vi) Contracts:

(a) [The beneficiary] has been entrusted with job functions invoving [sic] contracts. . . . [The beneficiary] reviews contracts, renegotiates contract terms, determine[s] acceptable terms and will finalize the same and enter into suitable contracts. His responsibilities in this area also cover contract administration ensuring due implementation of the contracts thus finalized and entered into.

(b) With the given chart of responsibilities and the determined course of action, [the beneficiary] will avail [p]rofessional services, ancillary services for operations, such as established firms of investment brokers, share brokers, real estate brokers, business brokers, professional [a]ccountants, [a]ttorneys and other, under contract. This activity also calls for an involvement of the job functions of contract administration.

* * *

(vii) Personnel:

(a) [The beneficiary] with the control over the [g]eneral [a]dministration, is also in charge of the personnel department and will operate with an authority to hire and fire the staff. This function also covers training of personnel operating with the company. [The beneficiary] will review the performance of each individual staff member and study the employee's attitude towards [the] work environment to evaluate their motivation and overall efficiency to perform vis-à-vis their job related skills, interpersonnel [sic] attitude and intellectual capabilities to deal with situations on the spot. [The beneficiary] will also review other factors, such as punctuality, sincerity, honesty, speed and other, for ongoing and periodical rating of each employee and to decide about their remuneration and rewards. [The beneficiary] will establish and follow policies to continually boost the morale of the staff working for the organization. This job function of the alien beneficiary . . . conform[s] with the regulation 8 C.F.R. [§]214.2(l)(1)(ii)(B)(3).

Counsel also stated that the beneficiary would perform the function of general administration, and would focus on establishing the U.S. business and carrying out the operation of the company. Counsel noted that the beneficiary would be supported by a secretarial staff.

In addition, counsel explained that the beneficiary has been offered an opportunity to "take over" an existing U.S. business, which is involved in the sale of general merchandise. Counsel claimed that the proposal, which is on hold pending the approval of the present petition, would allow the petitioning organization to immediately operate with a positive cash flow, and become a self-sufficient entity within one year of approval of the petition as required in the regulations.

The petitioner submitted a business plan for the U.S. corporation in which it explained that the purpose of the organization was to perform as an investment company and provide investment consultancy services. The petitioner also provided a proposed U.S. organizational chart identifying the beneficiary as vice-president, subordinate to the president. The chart also indicated that the petitioner anticipated employing a secretary, accountant, consultant, and "staff" as subordinates to the beneficiary.

In a detailed notice dated July 9, 2002, the director requested that the petitioner submit additional evidence related to the U.S. and foreign entities. With regard to the present issue, the director requested: (1) a copy of the petitioner's license to do business in the U.S.; (2) clarification of the petitioner's business address, and the address at which the beneficiary would work; (3) photographs of the interior and exterior U.S. office premises; (4) a comprehensive description of the beneficiary's managerial or executive job duties; (5) a description of the positions for all U.S. employees, including the beneficiary; and (6) a breakdown of the number of hours each employee would devote on a weekly basis to the named job duties.

In a response dated September 9, 2002, counsel submitted a copy of the petitioner's previously submitted October 8, 2001 letter as evidence of the beneficiary's proposed job duties in the U.S. entity. In an accompanying letter, counsel also provided a similar outline of the beneficiary's job responsibilities. With regard to the proposed personnel of the U.S. entity, counsel resubmitted the organizational chart. In addition, counsel explained in his response that the accounting, finance, and tax functions of the business would be performed by the accountant, that the sales manager would support the beneficiary in the areas of sales and business development, and that additional staff would assist in the personnel department.

Counsel also explained that the petitioning organization is located in East Brunswick, New Jersey, and that the beneficiary would be employed in this same location. Counsel submitted photographs of the premises.

In his decision, the director noted that although requested, the petitioner neglected to submit a position description for each proposed employee and a breakdown of the time devoted to each job duty. The director also stated that the description of the beneficiary's position was insufficient to demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity. Additionally, the director stated that it is not clearly evident from the record that the beneficiary would manage an essential function of the organization, or that the beneficiary would function at a senior level within the organization. The director also concluded that the petitioner had not established that the beneficiary would manage supervisory, professional, or managerial employees who would relieve him from performing services of the U.S. corporation. The director therefore determined that within one year of approval of the petition the beneficiary would not be employed in a primarily managerial or executive position, and consequently, denied the petition.

Although counsel submits a lengthy brief on appeal, a significant portion includes a restatement of the job descriptions previously submitted with the petition and in response to the director's request for evidence. Therefore, only a summary of counsel's brief will be provided herein. Counsel contends that the beneficiary would meet the regulatory requirements of performing in a primarily managerial position in the U.S. entity as

he would be responsible for corporate planning, general administration, finance, contract administration, sales, marketing, personnel and business development. Counsel also explains that as a part of the general administration, the beneficiary may take over "an existing and operating [U.S.] business." With regard to this business, counsel explains that the present manager and staff would continue to be employed and would report directly to the beneficiary. Counsel submits a similar organization chart for the U.S. company, but includes agents and brokers as additional subordinate employees who would assist in business development.

On review, the record does not establish that within one year of approval of the petition the beneficiary would be employed in the U.S. entity a primarily managerial position. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, organizational structure, and size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The AAO recognizes that while the petitioner submitted detailed descriptions of some managerial job duties to be performed by beneficiary in the U.S. entity following the developmental stage, the petitioner has not sufficiently established that within one year of approval of the petition the beneficiary's responsibilities would be in a primarily managerial capacity. Whether the beneficiary will be a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, although requested by the director, the petitioner fails to provide a weekly breakdown of the amount of time the beneficiary would spend on each job duty, as well as document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner's 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).

Additionally, the record does not demonstrate that the beneficiary would be relieved from performing non-qualifying functions within the requisite one year of approval of the petition. Counsel stated that the beneficiary would be responsible for the corporate planning, general administration, finance, marketing–sales, business development, contract negotiations, and personnel functions of the U.S. organization. Counsel also named subordinate employees that the petitioner anticipates hiring to assist in the performance of the functions related to corporate planning, general administration, finance and business development. Although the organizational chart identifies these proposed employees, the business plan does not indicate a date by which the employees would be hired. In fact, it is noted in the business plan that employees "will be recruited as per need of the [c]ompany." It is therefore unclear whether the beneficiary would be relieved from performing non-qualifying job duties to function in a primarily managerial capacity. 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). Also, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, counsel has not identified any employees who would be hired to relieve the beneficiary from performing the remaining functions of marketing, sales, personnel training or contract negotiations. Again, 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. *Id.* While counsel contends on appeal that CIS considers "contract administration" an acceptable managerial job duty, counsel has neglected to provide any documentation demonstrating that CIS has previously decided such. Again, absent further evidence, the record does not establish that the beneficiary would be relieved from performing the above-listed non-qualifying job duties within one year of approval of the petition.

Furthermore, counsel's assertion that the beneficiary's opportunity to take over an established U.S. company contributes to his future employment in a primarily managerial capacity is not supported by the record. Counsel has not provided any credible evidence that this business opportunity exists. If in fact this company exists, counsel has not demonstrated that the business presently employs a manager and supporting staff, nor has counsel presented documentation, such as a purchase agreement, that the beneficiary would assume a managerial role over the organization. Also, as this established U.S. business is involved in the sale of general merchandise, the petitioner has not explained how this function coincides with the objectives of the petitioning organization as an investment consultancy company. 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).

Based on the evidence presented, the record does not demonstrate that within one year of approval of the petition the beneficiary would be employed in the U.S. entity in a primarily managerial capacity. Consequently, the appeal will be dismissed.

Beyond the decision of the director, the record contains inconsistencies as to whether the petitioner secured sufficient premises for the new U.S. office as required in the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner submitted a lease agreement with its petition that identified the petitioning organization as the lessee of office space located at 320 Columbia Avenue, Jersey City, New Jersey for the period from August 2001 through July 2006. However, when asked by the director for clarification of the U.S. business's address and the location where the beneficiary would be employed, the petitioner indicated that the petitioning organization is located at 97 Route 18 South, Suite 3000, East Brunswick, New Jersey. The petitioner also stated that the beneficiary would be employed at this address, and submitted photographs of the premises. None of the eight photographs, which includes pictures of the office door and the inside of the office seating area, show the name of the petitioning organization or in any way indicate that the petitioner is operating out of the office. The petitioner failed to submit a lease agreement for this property. The petitioner also failed to explain the discrepancy between the office in Jersey City and the East Brunswick office identified by the petitioner as its office premises. 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). For this additional reason, the petition will be denied.

An additional issue not addressed by the director pertains to the financial status of the foreign entity. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2), the petitioner shall submit information regarding the foreign entity's financial ability to remunerate the beneficiary and to commence doing business in the United States. In the present matter, the AAO is unable to determine the financial status of the foreign organization as all financial data submitted by the petitioner is identified in rupees rather than U.S. dollars.

See 8 C.F.R. § 103.2(b)(3). The documentation provided by the petitioner is ineffective in establishing the financial ability of the foreign company to do business in the United States. Again, the petition will be denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.