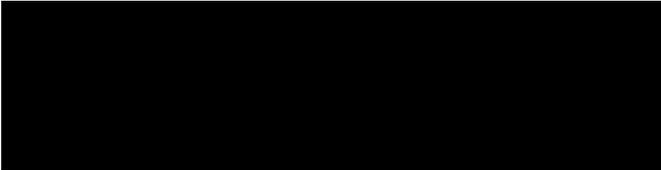


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FILE: SRC 03 206 50591 Office: TEXAS SERVICE CENTER Date: DEC 01 2005

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:

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, Texas 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 Texas corporation engaged in the business of importing and distributing goods and providing travel services. The petitioner filed this nonimmigrant petition seeking to extend the employment of its president 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 claims to be a subsidiary of [REDACTED] located in Nepal. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay. The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, the petitioner disputes the director's findings and submits additional information to support its claim. Although the petitioner indicated in its Form I-290B that a brief would be submitted within 30 days, the AAO has received no additional evidence or information. As such, a decision regarding the issue of the petitioner's eligibility will be based on the record as presently constituted.

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 demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed primarily in a 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-

- 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.

In the supplement to Form I-129, the petitioner provided the following description of the beneficiary's proposed job duties:

Manage U.S. subsidiary; negotiate with various [sic] agencies with trade and travel arrangement; establish and implement marketing policies; manage shipping and storage of imported goods; determine inventory levels; establish and implement accounting control; take necessary decision on the [sic] behalf of the company; evaluate the market trends with supporting business; control company administration.

On September 16, 2003, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a list of duties performed by the beneficiary as well as a percentage breakdown of time spent on each duty. The petitioner was asked to discuss the job titles and job duties of any subordinates the beneficiary may have and to specifically identify who sells the petitioner's products or services and who handles the shipping and handling duties.

The petitioner responded with a letter dated October 13, 2003, which contains the following list of the beneficiary's proposed duties:

- a. Manage [the] U[.]S. [s]ubsidiary and negotiate with various agencies with trade and travel arrangements.
- b. Establish and manage shipping and storage of imported goods; determine inventory level of merchandise.
- c. Establish administration and account control; make all necessary decisions on behalf of the company.
- d. Co-ordinate with Nepali [m]anagers of [the] parent company regarding trade and travel matter[s]; evaluate special orders [sic] packaging tour[s] from different countries; arrange arrival and departure policies for individual[s] outside the country.

Although the petitioner stated that the beneficiary would spend between 40 and 45 hours carrying out the above responsibilities, it did not provide a percentage breakdown of time that would be spent on each of the beneficiary's individual duties. Additionally, the petitioner indicated that the beneficiary would handle negotiations with regard to trade and travel arrangements. However, the petitioner did not define this task within the context of its particular business. Thus, there is no indication as to what duties are actually involved in such negotiations. The petitioner also provided no explanation as to what it means to "evaluate special orders" with regard to tour packages. The petitioner did not explain what is meant by "special orders," nor did it specify the criteria for such evaluations.

The petitioner indicated that the beneficiary has one subordinate employee whose duties include managing the office, answering phones, sending out correspondence, making deposits, and coordinating with customers. Employment of this employee is corroborated in the petitioner's quarterly report for the third quarter of 2003, the time period during which the petition was filed.

On April 29, 2004, the director denied the petition noting that the petitioner has operated for one year and can no longer be deemed a new office as defined in 8 C.F.R 214.2(l)(1)(ii). The director concluded that at the time the petition was filed the petitioner had not progressed beyond the initial stage of development and would not employ the beneficiary in a primarily managerial or executive capacity. Although the director also concluded that the petitioner had not established its ability to remunerate the beneficiary, the AAO hereby withdraws this comment, as it does not accurately reflect the statutory or regulatory requirements with regard to the benefit sought. Pursuant to 8 C.F.R 214.2(l)(3)(vi)(C) a petitioner seeking to employ a beneficiary in a new office in the specialized knowledge category is required to establish its ability to pay the beneficiary.

However, the petitioner in the instant matter is ineligible to file another new office petition on behalf of the beneficiary and seeks to employ him as a manager or executive, not as a specialized knowledge individual.

On appeal, counsel asserts that the petitioner currently has four employees, including the beneficiary, and briefly states the job duties of the four employees. The petitioner also submits its first quarterly wage report for 2004 identifying the four claimed employees. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In the instant matter, the petitioner previously indicated that it had two employees, including the beneficiary, at the time the petition was filed. As such, the two employees the petitioner hired after the Form I-129 was filed cannot be considered as part of the petitioner's organizational hierarchy for the purpose of determining its eligibility for the benefit sought in this matter.

Counsel also asserts that the regulations allow for a beneficiary that manages an essential function instead of personnel and claims that the beneficiary in the instant matter is responsible for the company's overall management.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function *with specificity*, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's 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 employed in a managerial or executive capacity. *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. 1988)). Thus, while a function manager is not required to supervise personnel, the petitioner must nevertheless establish that the petitioner has an adequate staff of employees or hires outside contractors to relieve the beneficiary from having to engage regularly in the performance of nonqualifying tasks. In this matter, the petitioner failed to provide a detailed explanation as to who actually performs the petitioner's daily essential tasks. Furthermore, the petitioner failed to identify the beneficiary's essential function with any degree of specificity. Merely stating that the beneficiary would be responsible for the "overall management" of the petitioner is not synonymous with identifying an essential function.

Furthermore, while the right to hire and fire employees conveys a certain degree of discretionary authority, it does not suggest that the beneficiary's primary concern is handling matters and carrying out duties of a managerial or executive nature, particularly when the petitioner's organizational structure shows only two employees available to carry out the petitioner's essential and general operational tasks.

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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F.

Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* In the present matter, the petitioner submitted a job description in response to the RFE, which suggests that the beneficiary would oversee shipping and storage of goods, maintain control over accounts, and establish arrival and departure policies. However, there is no indication that the petitioner employed anyone to actually carry out the shipping and storage-related duties, set up the accounts that the beneficiary would manage, or actually carry out the arrival and departure policies the beneficiary would establish. While the beneficiary submits a separate affidavit on appeal claiming that he currently oversees a marketing manager and a finance manager, neither of these positions was filled at the time the I-129 petition was filed. Thus, the AAO must question who, if not the beneficiary, was actually carrying out the duties of the marketing and finance managers at the time the petition was filed. It is noted that 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).

Additionally, the beneficiary's affidavit provides a less general list of his current duties. However, the beneficiary's current duties are performed with an expanded support staff. At the time the petition was filed, the petitioner's support staff did not include marketing and financial managers. As previously stated, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. The record lacks a detailed description of the duties the beneficiary would have been performing at the time the petition was filed.

The vague description of the beneficiary's position precludes the AAO from making a determination as to the nature of the duties the beneficiary would primarily perform. 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 convey an understanding of what the beneficiary would actually do on a daily basis.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. Although the petitioner indicates that it is a service provider, there is no clear indication as to who was actually providing the service at the time the petition was filed. The petitioner has not demonstrated that at the time the petition was filed it had reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires that the petitioner submit evidence that the United States entity has been doing business as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H) for the previous year. In the instant matter, the record contains invoices for services rendered by the petitioner in August, September, and October of 2003. Although the petitioner submitted "Proforma" invoices for July 2002, September and October 2002, and July 2003 for services it expected to render, there is no indication that these services were actually rendered as anticipated. Additionally, even if the services were rendered, there is no evidence to show that they were consistently rendered on a monthly

basis from July 2002 to July 2003. Accordingly, the AAO concludes that the petitioner failed to establish that it had been doing business for one year prior to filing the petition.

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). As such, based on the additional grounds discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.