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DA

FILE: SRC 03 049 52363 Office: TEXAS SERVICE CENTER Date: FEB 23 2005

IN RE: Petitioner:
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:

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

The petitioner [REDACTED] endeavors to classify the beneficiary as a manager or executive 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 an affiliate of [REDACTED] located in South Africa, and claims to be engaged in the foreign trade, investment, and other financial services business. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's president. The petitioner was incorporated in the State of Florida on May 5, 1997 and claims to have seven employees.¹

On April 17, 2003, the director denied the petition because the petitioner failed to establish: 1) that sufficient physical premises to house the new office had been secured; 2) that the U.S. entity had been doing business for the previous year; and, 3) that the beneficiary had been and will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner objects to the director's findings. The petitioner submits a letter and additional evidence to support his assertions.

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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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.

¹ In a November 29, 2002 letter signed by the beneficiary, the petitioner claimed that the U.S. company was incorporated on May 5, 1997; however, on the Form I-129, the petitioner claimed that the U.S. company was established in 1999. 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).

In addition, pursuant to 8 C.F.R. § 214.2(l)(14)(i), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires that, "the petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired."

Further, in relevant part, the regulations at 8 C.F.R. § 214.2(l)(3)(viii) state that an individual petition filed on Form I-129 shall be accompanied by "such other evidence as the director, in his or her discretion, may deem necessary."

The first issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office. The regulations at 8 C.F.R. § 214.2(l)(3)(v) indicate that the petitioner shall submit evidence that "[s]ufficient physical premises to house the new office have been secured."

Initially, the petitioner submitted insufficient evidence to establish that it had secured sufficient physical premises to house the new office. Consequently, on January 17, 2002, the director requested that the petitioner submit a copy of the lease agreement for the U.S. entity.

In response, the petitioner submitted a 2002 interest certificate from a mortgage company indicating the property is owned and not leased.

On April 17, 2003, the director denied the petition because the petitioner failed to establish that sufficient physical premises to house the new office had been secured. The director found that the evidence did not establish that the property was used to conduct business.

On appeal, the petitioner submits copies of an occupational license, an additional license, a warranty deed, and a previously submitted mortgage interest statement. The petitioner claims, "these show that the premises owned by the CEO are sufficient to conduct the business for the Company."

On review, the petitioner has failed to establish that it had secured sufficient physical premises to house the office as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). Although on appeal the petitioner submits additional evidence, it is unclear if the property was being used to conduct business. In this matter, the petitioner has not described its anticipated space requirements for its business and the documents in question do not specify the amount or type of space secured. It is also unclear whether this location has any restrictions or covenants that would prevent the petitioner from conducting business. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). For this reason, the petition may not be approved.

The second issue in this proceeding is whether the petitioning organization has been doing business.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines “doing business” as:

Doing business means 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.

On January 17, 2003, the director requested additional evidence establishing that the U.S. petitioner was currently conducting business. The director requested a copy of the petitioner’s sales contracts, invoices, or other evidence to show business activity.

In response, the petitioner submitted its Employer’s Quarterly Federal Tax Returns for the quarters ending December 31, 2002, September 30, 2002, and June 30, 2002.

On April 17, 2003, the director denied the petition because the petitioner failed to establish that the U.S. entity had been doing business for the previous year. The director found that the petitioner’s tax returns and invoices showed minimal business activity.

On appeal, the petitioner submits copies of its current financial statements, 2002 IRS Form 1040 tax return with Schedule C, letters, Internet communications, bank statements, advertisements, and telephone account information. The petitioner claims that the “U.S. Company and foreign affiliate is currently engaged in business operations.”

On review, the petitioner has not established that the U.S. entity has been doing business on a regular, systematic, and continuous basis pursuant to 8 C.F.R. 214.2(l)(1)(ii)(G)(2). The petitioner submitted minimal documentation to establish that the petitioner was doing business. The petitioner submitted three invoices dated December 3, 2002, December 18, 2002, and January 10, 2003. By themselves, the three invoices for activities that purportedly took place in December 2002 and January 2003 do not establish that the petitioner has been actively engaged in regular, systematic, and continuous business activities.

In addition, the AAO notes several discrepancies in the record. First, the petitioner submitted a checking account statement for the statement period from October 19, 2002 through November 15, 2002 listing the beneficiary’s name rather than the U.S. company’s name. Second, the Employer’s Quarterly Federal Tax Returns for the quarters ending December 31, 2002, September 30, 2002, and June 30, 2002 show the petitioner’s address as [REDACTED] rather than the one listed on the Form I-129, bank statements, and 2002 Schedule C, Form 1040 tax return, which indicate the petitioner’s address as [REDACTED]. Third, on appeal, the petitioner submitted a copy of its Wilmington Trust bank statement listing the U.S. entity’s address as [REDACTED]. This is the same address as the foreign entity’s (Alan’s Professional Services) address listed on the Form I-129. Fourth, the petitioner indicated on an April 15, 2003 National Bank statement that the petitioner’s address was [REDACTED]. Fifth, the petitioner submitted three invoices. One of the invoices, dated December 3, 2002, is for Razzle Dazzle, Inc. located at [REDACTED]. This address is the same location as the address listed for the U.S. entity on the three Employer’s Quarterly

Federal Tax Returns, Form 941. The inconsistencies between the submitted evidence raise serious doubts regarding the petitioner's claim that the U.S. company has been doing business for the previous year. 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). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further, the AAO notes that the petitioner claims on appeal that it is "mainly concerned with Import / Export and foreign investments of international clients." Although specifically requested to submit evidence of its business activities, the petitioner failed to submit any customs forms. Upon the importation of goods into the United States, the Customs Form 7501, Entry Summary, serves to classify the goods under the Harmonized Tariff Schedules of the United States and to ascertain customs duties and taxes. The Customs Form 301, Customs Bond, serves to secure the payment of import duties and taxes upon entry of the goods into the United States. According to 19 C.F.R. § 144.12, the Customs Form 7501 shall show the value, classification, and rate of duty for the imported goods as approved by the port director at the time the entry summary is filed. The regulation at 19 C.F.R. § 144.13 states that the Customs Form 301 will be filed in the amount required by the port director to support the entry documentation. Although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation may reasonably be expected to submit copies of these forms to show that they are doing business as an import business. In this matter, the petitioner has failed to submit any such documentation.

After careful consideration, the AAO concludes that the petitioner has not demonstrated that the U.S. entity had been doing business regularly, systematically, and continuously as defined by 8 C.F.R. § 214.2(l)(1)(ii)(H). For this reason, the petition may not be approved.

The third issue in this proceeding is whether the beneficiary has been and will be primarily performing executive or managerial duties for the United States 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.

On December 9, 2002, the petitioner filed the Form I-129. On the Form I-129, the petitioner described the beneficiary's proposed U.S. duties as the "President and Chief Executive Officer."

On January 17, 2003, the director requested additional evidence. Specifically, the director requested evidence of the current staffing levels in the United States.

In response, the petitioner indicated that the U.S. company employed a marketing professional and an administration and office services employee. The petitioner also indicated that it employed an administration and offices services employee, marketing professional, accounts clerk, and sales and offices services employee at the foreign entity in its South African office. It stated that all employees of the foreign and U.S. offices report directly to the beneficiary.

On April 17, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The director found that there was insufficient evidence to establish that the U.S. company employed seven workers as the petitioner indicated on the Form I-129.

On appeal, the petitioner claims that the beneficiary has directed the U.S. and foreign organizations. The petitioner submits a letter and describes the beneficiary's duties as:

In charge of strategic decision making, the control and management of Branch Managers who in turn supervise their sales staff . . . meet face to face with branch managers for their performance appraisals and modifications to their office procedures and policies. . . . The over all guidance and policy making decisions are made by [the beneficiary], and all international coordination and expansion shall vest in him. He shall appoint, dismiss the managers, sign all wage, salary, commission checks as well as all other operating checks made out by branch managers in the U.S. and Overseas. He should also acquire as wide a range of skills useful to management of the U.S. and foreign business entities and required for specific licensures.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The beneficiary's described duties are general and vague. For example, the petitioner described the beneficiary's duties as "[i]n charge of strategic decision making" and "[p]resident and [c]hief [e]xecutive [o]fficer." However, it is unclear what strategies the beneficiary will direct or what exactly his role will entail as the president and chief executive officer of the 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).

Further, the petitioner generally paraphrased the statutory definition of executive. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner stated that the beneficiary duties included "[t]he over all guidance and policy making decisions." 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); *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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).

Moreover, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. On appeal, the petitioner claims that the beneficiary is in charge of the "management of [b]ranch [m]anagers who in turn supervise their sales staff." However, the petitioner described two employees in the response to the director's request for additional evidence, a marketing professional and an administration and office services employee that the beneficiary oversees. There is insufficient evidence to establish that these employees are managerial or that the petitioner actually employed these workers. The petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. The petitioner also has

not explained how their services obviate the need for the beneficiary to primarily conduct the petitioner's business. Again, without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

The AAO notes that although the director requested that the petitioner provide a description of the subordinate employees' duties, the petitioner failed to submit this information. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

Further, the AAO is not persuaded that the beneficiary's duties establish that the beneficiary has managerial control and authority over a function of the company. The petitioner claims that the beneficiary "should also acquire as wide a range of skills useful to management of the U.S. and foreign business entities and required for specific licensures." 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In the instant matter, the petitioner claimed that the beneficiary manages the businesses. However, to allow the broad application of the term "essential function" to include such broad claims, without identifying specifics, would render the term meaningless.

Finally, it is noted that the beneficiary has obtained a Florida real estate salesperson license, after taking the examination in April 2003. This license raises the question of whether the beneficiary is actively selling real estate rather than engaging in the claimed duties.

After careful consideration of the evidence, the AAO concludes that the petitioner has failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not submitted any evidence to establish that the foreign sole proprietorship continues to do business, as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). A sole proprietorship is a business in which one person owns all of the assets and operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Edition). As the beneficiary claims to be the owner and sole proprietor of the U.S. and foreign businesses, the presence of the beneficiary in the United States raises the question of whether the foreign

business continues to do business abroad. The lack of current evidence leads the AAO to conclude that the foreign sole proprietorship is no longer doing business.

Additionally, it remains to be determined that the beneficiary's services are for a temporary period. The petitioner indicated that the beneficiary is the sole owner of both companies. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For these additional reasons, the petition may not be approved.

Beyond the decision of the director, the petitioner's Internal Revenue Service (IRS), Form 1040, Schedule C tax return reveals that the beneficiary is doing business as a sole proprietorship and that it is not a subsidiary and is not affiliated with any other entity. As a matter of law, the beneficiary is ineligible for the classification sought. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. See 8 C.F.R. 214.2(l)(1)(ii)(G)(2). The petition includes evidence, including an IRS Form 1040 with Schedule C that demonstrates that the beneficiary is doing business as a sole proprietorship. Again, a sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* at 1398. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. See *Matter of United Investment Group*, 19 I&N Dec. at 250. As in the present matter, if the petitioner is actually the individual beneficiary doing business as a sole proprietorship, with no authorized branch office of the foreign employer or separate legal entity in the United States, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization. Consequently, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States as an employer. See 8 C.F.R. § 214.2(l)(1)(ii)(G). For this further reason, the petition may not be approved.

Beyond the decision of the director, the AAO finds that the beneficiary has not been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated, to establish L-1 eligibility under section 101(a)(15)(L) of the Act, 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. The petitioner submitted a limited and vague description of the beneficiary's foreign duties. For example, in a November 15, 2002 letter, the petitioner described the beneficiary's duties as the "owner, Manager and Chief Executive Officer." 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 sum, the AAO is not persuaded that the beneficiary has been employed in a primarily managerial or executive capacity abroad. For this additional reason, the petition may not be approved.

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 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 appeal will be dismissed.

CIS records reflect that the petitioner filed an I-140, receipt number SRC 01 030 55966. The petition was received on November 7, 2000 and subsequently approved. In addition, the petitioner filed a second I-129, receipt number SRC 04 043 51911, received on December 1, 2003 and currently pending. If the two petitions are based on similar claims and evidence, the approved petition should be reviewed for possible revocation and the pending I-129 should be closely examined and adjudicated.

ORDER: The appeal is dismissed.