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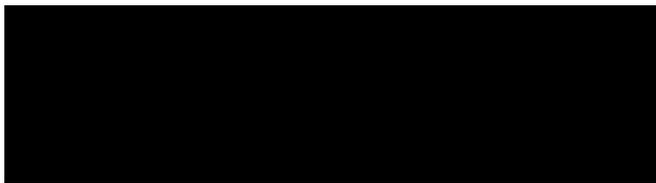
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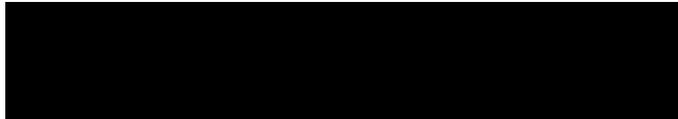
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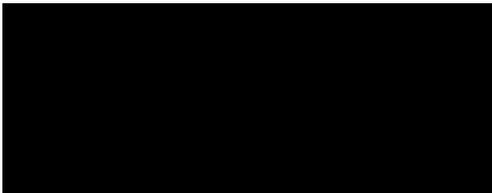
Date: JUN 10 2005

IN RE: Petitioner:
Beneficiary:



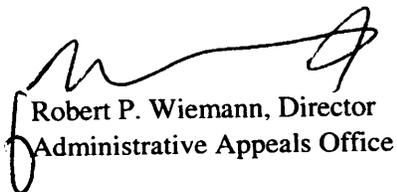
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 2002, and is described as a marketer of developed housing (Bungalows). The petitioner claims to be an affiliate of [REDACTED] and [REDACTED] located in Anand, India. It seeks to employ the beneficiary temporarily in the United States as the president of its new office for three years. The director determined that the petitioner failed to establish that: (1) it had secured sufficient physical premises to house the new office; (2) the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity; and (3) that within one year of approval of the petition the U.S. entity would be in a position to support a managerial or executive position.

On appeal, counsel disagrees with the director's decision and states that the petitioner has submitted sufficient evidence to establish that sufficient physical premises to house the new office have been obtained; that the evidence demonstrates that the beneficiary will be employed primarily in a managerial or executive capacity; and that the U.S. entity would be in a position to support a managerial or executive position within one year of operation.

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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(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 first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that sufficient physical premises have been obtained to house the U.S. entity's new office.

In response to the director's request for evidence demonstrating that the petitioner had acquired sufficient physical premises to house its new office, the petitioner stated:

We are in the process of acquiring premises but have put the process on hold for two reasons (i) We were unsure as to when the L-1A would be approved; and (ii) we were in the process of negotiating with a landlord when our accountant passed away and [the beneficiary] had to fly back to the UK and subsequently, to India and back again to the UK in order to take care of business.

The director, in denying the petition, noted that the record was void of any evidence to show that arrangements had been made by the petitioner to secure sufficient physical premises.

On appeal, counsel asserts that the beneficiary returned from his travels on April 23, 2003, and thereafter entered into a lease agreement. The petitioner submits a copy of a commercial lease agreement signed and dated May 1, 2003.

The petition in the instant matter was filed on January 23, 2003. Therefore, the evidence does not establish that the petitioner had secured sufficient physical premises to house the new office at the time the petition was filed. Accordingly, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has submitted sufficient evidence to show that the U.S. entity will employ the beneficiary primarily in a managerial or executive capacity, and will be able to support a managerial or executive position within one year of approval of the petition.

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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially described the beneficiary's duties as:

[The beneficiary] will have direct responsibility for the profit/loss of the US operation and have direct authority to negotiate all prices and costs including leases, the hiring and firing of personnel, negotiating of salaries and negotiating of services from outside vendors. He will also be responsible for setting strategy, determining the marketing strategy and setting the pricing structure. He will start from scratch and in essence grow the operation from the ground up. . . .

The petitioner submitted a copy of the foreign and U.S. entities' organizational plan. The petitioner also submitted copies of the U.S. entity's Certificate of Incorporation and business documents pertaining to the foreign entity.

The director specifically requested in the Notice of Request For Evidence that the petitioner:

Submit evidence that established the size of the United States investment.

Submit documentary evidence that would show the foreign entity has been continuously in contact with your incorporator and your other representatives throughout the United States entity's incorporation process. In addition, please submit copies of the canceled checks, letters of credit, monetary transfers, etc. that were used by the foreign entity to fund the incorporation of the United States entity.

Submit a copy of your business plan for commencing your start-up company in the United States, giving specific dates (time table) for each proposed action, for one year starting with the date of your company's existence.

Submit a complete position description for all of your proposed employees in the United States as of the end of the first year of operation, including one for the beneficiary's position.

Submit evidence to show how your new company in the United States will grow to be of sufficient size to support a managerial or executive position. This evidence should

demonstrate that the beneficiary, within one year of operation, will be relieved from performing the non-managerial, day to day operations involved in producing a product or providing a service.

In response to the director's request for additional evidence, the petitioner submitted a copy of a canceled check, dated May 12, 2002, in the amount of £31,000 (\$48,425.46 US) to demonstrate the transfer of funds to the U.S. entity as initial start-up capital. The petitioner also submitted a copy of its bank statement, a copy of the company's 2002 tax return, and a confirmation letter from [REDACTED]. The petitioner submitted a copy of an informal business plan for the U.S. entity, which contained a one-year projection. The petitioner submitted a copy of an organizational plan and stated that the work teams function as independent contractors rather than employees.

The director denied the petition by determining that the petitioner had failed to submit sufficient evidence to demonstrate that the beneficiary would be employed primarily in a managerial or executive capacity, and that the evidence was insufficient to show that the U.S. entity would grow within one year of operation to be able to support such a position. The director noted that instead of providing a plan for the organization's business activities and staffing requirements, the petitioner submitted an informal business plan for the first year of operation. The director also noted that the petitioner indicated the U.S. entity would hire a "staff person" and "professionals." The director stated that the evidence demonstrated that the beneficiary would spend the majority of the first year marketing the entity's product and would be engaged in similar activity beyond that first year. The director also stated that although the marketing activities may be essential for the operation of the business, none of them appeared to require an organizational hierarchy of professional staff members to carry out the function. The director further stated that the petitioner had failed to demonstrate that the beneficiary would be involved in the supervision of other supervisory, professional, or managerial employees who would relieve him from performing non-qualifying duties.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary returned to the United States on April 23, 2003, and has since hired sufficient personnel to operate the U.S. entity. The petitioner submitted copies of company checks and pay stubs dated May 5, 2003, and after. The petitioner also submitted a revised business plan and financial projections.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. 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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. In the instant matter, the petitioner's description of the beneficiary's proposed job duties is vague and general and does not reflect that his employment will be primarily managerial or executive in nature. For example, the petitioner stated that the beneficiary's proposed job duties would include: direct responsibility for the profit/loss of the US operation, determining the marketing strategy, and setting the pricing structure.

In addition, the petitioner described the beneficiary as marketing and selling the petitioner's 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).

The petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial or executive, but it fails to quantify the time the beneficiary would spend on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as selling the product, negotiating the contracts, and marketing the petitioner's product, are not managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary will be primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the petitioner asserts that the beneficiary will be managing a subordinate staff, the record does not establish that the subordinate staff will be composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary would be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

While counsel has presented additional clarifications and explanations, the record does not support a finding that the U.S. entity will contain the organizational complexity to support the proposed managerial or executive position within one year of operation in compliance with the regulatory requirements for a "new office" pursuant to 8 C.F.R. § 214.2(1)(3)(v). In addition, the petitioner failed to adequately respond to the director's specific request for a business plan that shows in detail how the new business will be fully operational within one year, with employees in place and doing business by providing a product or service. The business plan submitted by the petitioner fails to detail accurate, realistic projections to establish that the U.S. entity will realize growth within one year sufficient to support a managerial or executive position. Although the evidence demonstrates that the petitioner intends to hire new employees it has not provided detailed position descriptions to show that they will be employed in professional positions.

The business plan is not supported by independent documentary evidence that would show that its projections and assertions are accurate or valid. There has been no evidence presented that details the time frame in which each new employee will be hired, what the new hires duties will consist of, or how the beneficiary's duties will interrelate with that of the new hires. There is no evidence to show that the beneficiary will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. 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). Rather than the beneficiary functioning at a senior level within the organizational hierarchy within one year of operation in the United States, it appears from the record that he will continue to perform the functions of the organization and carry out the day-to-day services of the business. The actual duties themselves reveal the true nature of the employment. *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). The petitioner's evidence is not sufficient in establishing that within one year of operation, the beneficiary will be directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher level executives.

On review, the petitioner has failed to submit sufficient evidence to establish that the U.S. entity has obtained sufficient physical premises to house the new office; that the beneficiary will be employed primarily in a managerial or executive capacity; or that the organization will be able to support such a position within one year of operation. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record contains insufficient evidence to establish that the foreign company employed the beneficiary primarily in a managerial or executive capacity. Although the petitioner refers to the beneficiary's overseas position as executive in that he developed business projects and operated the foreign entity, there is no evidence to demonstrate that he spent the majority of his time performing executive duties as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). In addition, the petitioner has failed to establish that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). There has been insufficient evidence submitted to demonstrate the stock ownership and managerial control of the U.S. and foreign entities. For these additional reasons, 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 of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp.2nd 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.