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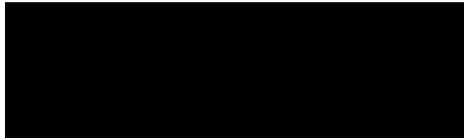
DA

FILE: EAC 03 095 52637 Office: VERMONT SERVICE CENTER Date: JUN 13 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:



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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be an affiliate of Jinwong Furniture, located in Korea. The petitioner plans to operate an import, manufacturing, and distribution of office furniture and parts business. The U.S. entity was incorporated in the State of Pennsylvania on November 20, 2001. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office. Accordingly, on January 31, 2003, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for three years. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's president.

On April 3, 2003 the director denied the petition. The director determined that the petitioner failed to establish that: 1) the U.S. entity was a new office; and 2) the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, the petitioner's counsel claims that "the U.S. entity is a new office" because "it has not been doing business in the U.S. for more than one year" and the petitioner previously submitted sufficient evidence to meet the requirements for a new office petition.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

- (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.

Pursuant to 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 to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (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 first issue in this proceeding is whether the petitioner should be considered a new office. The regulations at 8 C.F.R. §§ 214.2(l)(1)(ii)(F) and (H) define "new office" and "doing business" as:

(F) New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

(H) 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 31, 2003, the petitioner submitted the Form I-129. On the Form I-129, the petitioner indicated that the petitioner was a new office. The petitioner submitted its articles of incorporation

showing that the U.S. entity was incorporated on November 20, 2001. The petitioner also submitted evidence to indicate that the petitioner was in its preliminary stages of development.

On February 13, 2003, the director requested additional evidence to establish when the U.S. office started doing business.

The petitioner responded to the director's request stating that it has not "started business full scale" and that it has been preparing to take orders from dealers, placing orders, and delivering the products after its May 2003 show.

On April 3, 2003 the director denied the petition. The director determined that the petitioner failed to establish that the U.S. entity was a new office because "there was evidence of business having been conducted more than one year prior to the filing of the petition" on January 31, 2003.¹

On appeal, the petitioner's counsel claims, "[T]he U.S. entity is a new office" because "it has not been doing business in the U.S. for more than one year." The petitioner submits a time frame for the petitioner's business activities which included "incorporating, opening a bank account, transferring funds, signing a lease, and receiving proposals for support services and the purchase of equipment."

On review, the petitioner has been doing business less than one year and is considered a new office pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F). The petitioner was incorporated on November 20, 2001 and filed its petition on January 31, 2003. Although the U.S. entity was incorporated in November 2001, at the time of filing the visa petition, the petitioner does not appear to have been engaged in the regular, systematic, or continuous provision of goods and/or services from the time of establishment in November 2001 until filing. Rather, the petitioner submitted documentation that indicated that the petitioner was in the preliminary stages of development.

After careful consideration of the evidence, the AAO withdraws this portion of the director's decision and concludes that the petitioner has established that the U.S. entity has been doing business less than one year to qualify as a new office. Therefore, the AAO will adjudicate this matter as a new office petition.

The AAO now turns to the second issue in this proceeding of whether the petitioner will support an executive or managerial position within one year of the approval of the petition. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

¹ The AAO notes that the director appears to not consider this matter as a new office petition. However, there is some indication that the director is uncertain whether this matter should be adjudicated as a new office petition as the director stated "it is not a new office . . . [e]ven if this were not the case" and "[e]ven if this petition qualified as a new office petition." As a result, the AAO will determine whether to adjudicate this matter as a new office petition.

The term “managerial capacity” means an assignment within an organization in which the employee primarily-

- (i.) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii.) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii.) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv.) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.

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

The term “executive capacity” means an assignment within an organization in which the employee primarily-

- (i.) directs the management of the organization or a major component or function of the organization;
- (ii.) establishes the goals and policies of the organization, component, or function;
- (iii.) exercises wide latitude in discretionary decision-making; and
- (iv.) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner described the beneficiary’s proposed U.S. duties on the Form I-129 and in a January 29, 2003 supporting letter as:

Managerial/executive position in the [U.S. company]. He will hire and manage local employees to set up production and assembly line. [The beneficiary] has to hire professional assistance in the area of accounting, legal, and marketing. He will interview company accounting firms, company law firms, and marketing consultants. He also needs to attend industrial trade shows throughout the U.S. to

develop and establish market ties and to negotiate with potential customers and dealers for import, export and distribution of high volume trade purchases.

On February 13, 2003, the director issued a request for evidence. In particular, the director requested: 1) a copy of the business plan for commencing the start-up of the business in the United States; 2) an explanation of how the new company will grow to be a sufficient size to support a managerial or executive position; and, 3) an explanation of how the beneficiary will be relieved from performing the non-managerial, day-to-day operations of the business.

In response, the petitioner submitted a timetable of its business plan and hiring schedule.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. As discussed above, the director concluded that the U.S. entity did not meet the definition of a new office. However, the director asserted that if the petition was considered to be a new office, the evidence did not show that sufficient growth would occur within the one-year time frame to support an executive or managerial position.

On appeal, the petitioner's counsel claims that the petitioner has met the requirements for a new office petition.

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 proposed employment involved executive or managerial authority over the new operation. It is unclear what managerial or executive duties the beneficiary will primarily perform for the U.S. entity because the beneficiary's proposed job description is vague. The petitioner described the beneficiary's proposed duties as "managerial/executive." However, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. In addition, the petitioner described the beneficiary's duties as including "hir[ing] professional assistance in the area of accounting, legal, and marketing" and "to develop and establish market ties and to negotiate with potential customers." However, the petitioner fails to explain how hiring professional assistants will preclude the beneficiary from primarily performing nonexecutive or nonmanagerial duties or how the beneficiary will develop and establish market ties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, in examining the business plan, the precedent decision, *Matter of Ho*, 22 I&N Dec. 206, 213 (Comm.1998), lists possible criteria for establishing an acceptable business plan. "The plan should set forth the business's organizational structure and its personnel's experience. It should

explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions." The decision concluded, "Most importantly, the business plan must be credible." *Id.* at 213. Although *Matter of Ho, Id.*, addresses the specific requirements for the immigrant investor visa classification, the discussion of the business plan requirements is instructive for the L-1A new office requirements. On review, the petitioner's business plan indicates that the company will not begin operating at full capacity until August 2003 six months after the petition was submitted which raises the question as to the actual staffing levels by the end of the first year. Although the petitioner did provide a hiring plan indicating that it intended to hire a sales manager, trade agent, assistant production manager, and assembly workers during the first year the petition did not adequately explain what duties the proposed employees would perform. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 and that often the full range of managerial responsibility cannot be performed. 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 and the 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.

In this matter, the petitioner has not established that the U.S. entity will support an executive or managerial position within one year of the approval of the petition. For this reason, the petition may not be approved.

The AAO now turns to an issue raised by the director of whether the beneficiary has been employed abroad in a qualifying managerial or executive capacity. As previously stated, the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *See* 8 C.F.R. § 214.2(l)(3)(v)(b).

On the Form I-129, the petitioner described the beneficiary's foreign duties as "[s]upervised and managed [the foreign entity] as the president. Established company policy, marketed [the foreign entity's] products. Managed personnel, financial, R & D matters of the company." In addition, in a January 29, 2003 letter, the petitioner claimed that the beneficiary has "3 years of experience at [the foreign company]." The petitioner also claimed that the beneficiary's "15 years of experience in office furniture manufacturing industry gives him sufficient knowledge and experience to fulfill the duties of president for [the U.S. entity]."

In a request for additional evidence on February 13, 2003, the director requested: 1) a description of the number of foreign subordinate supervisors under the beneficiary's management; 2) a description of the foreign job duties and titles of the subordinate employees; 3) an explanation of what executive and technical skills are required to perform the beneficiary's overseas duties; 4) a description of the time the beneficiary spends on his foreign executive and nonexecutive duties; and, 5) the beneficiary's degree of discretionary authority over the foreign day-to-day operations.

In the response letter to the request for additional evidence, the petitioner appears to have responded to the director's request by providing further information about the beneficiary's U.S. duties and current role in establishing the U.S. office.

On April 3, 2003 the director denied the petition. The director noted that the petitioner failed to submit requested evidence to establish that the beneficiary currently serves in a managerial or executive level position abroad. However, the director assumed that the beneficiary is "engaged in managerial level work abroad based on the fact that he owns the company and there are several documents which suggest that the company abroad is of a size sufficient to support a manager or executive."

The director erred in his assumptions. Assumptions are not a substitute for probative evidence of eligibility in the record of proceeding. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). On review, the AAO finds insufficient evidence to establish that the beneficiary has been employed in a managerial or executive capacity abroad as required by 8 C.F.R. § 214.2(l)(3)(v)(b). Further, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For instance, the petitioner was described as "[s]upervised and managed [the foreign entity] as the president." The petitioner did not, however, define or clarify these duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In addition, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act. For instance, the beneficiary's position is depicted as "[e]stablish[ing] company policy." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Finally, on the Form I-129, the beneficiary's duties were described as "marketed [the foreign entity's] products." Since the beneficiary actually engaged in marketing activities rather than directing or managing them, he is performing tasks necessary to provide a service or product. An

employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Finally, as noted above, the petitioner failed to respond to the director's request for additional evidence issued on February 13, 2003. The director specifically requested that the petitioner submit a comprehensive description of the beneficiary's duties, the amount of time he devotes to managerial duties, and a detailed description of the foreign entity's staffing. Again, 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).

After careful consideration of the evidence, the AAO concludes that the beneficiary has not been employed in a qualifying managerial or executive capacity abroad and withdraws this portion of the director's decision. For this additional reason, the petition may not be approved.

Beyond the decision of the director, another issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner submitted a copy of two business leases and photographs. However, the petitioner has not described its anticipated space requirements for its import business and the leases in question does not specify the amount of space secured. The director, in his request for additional evidence, specifically requested photographs of the interior and exterior of the premises that clearly depict the organization and operation of the entity. In this matter, although the petitioner submitted leases for a showroom and a warehouse, the existence of the showroom is questionable. The photographs show an unidentified building and do not show the petitioner's office suite or number. The director specifically requested that the petitioner submit a comprehensive description of the beneficiary's duties, the amount of time he allocates to managerial duties, and a detailed description of the foreign entity's staffing levels. In addition, contrary to what the petitioner indicated as the new office's suite number on the Form I-129 and on its lease, the photographs appear to represent that the petitioner's office is located in a warehouse. 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. *Id.* At 591. In sum, based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. For this additional reason, the petition may not be approved.

Although not addressed by the director, the petitioner indicated that the beneficiary is the sole owner of both companies. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. 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. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii).

In addition, the petitioner 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). The petitioner claimed that the U.S. entity was an affiliate of the foreign entity based on common ownership and control by the beneficiary. The petitioner submitted a copy of a stock certificate and stock ledger indicating that the beneficiary is the owner of one of the U.S. entity's shares. However, the petitioner did not submit any evidence to substantiate its claim that the beneficiary owns the foreign entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Accordingly, the petitioner has not demonstrated that a qualifying relationship exists with a foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. For these further 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 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).

Finally, the AAO notes that counsel on appeal stated, "8 C.F.R. § 103.2(b)(16)(i) makes it a legal obligation for the Service to provide the applicant specific information on which it relied in making its adverse decision. Without such evidence it is difficult, if not impossible, to meaningfully evaluate the decision and prepare a rebuttal." However, counsel incorrectly interpreted and applied the law to this proceeding. The regulation at 8 C.F.R. § 103.2(b)(16)(i) applies to derogatory information unknown to the petitioner. Here, the director did not base his decision on unknown derogatory information; rather the record of proceeding, known to the petitioner, constituted the basis for the director's decision.

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

ORDER: The appeal is dismissed.