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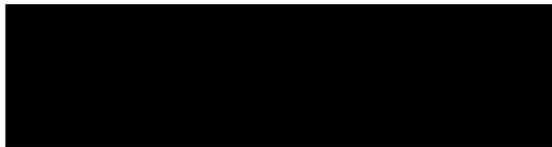
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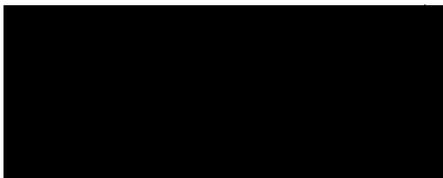


FILE: SRC 03 198 53696 Office: TEXAS SERVICE CENTER Date: JUN 28 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

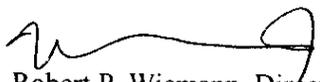
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Texas 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 incorporated March 6, 2002, and claims to be in the placement and personnel services business. The petitioner claims that the U.S. entity is an affiliate of [REDACTED] located in Secunderabad, India. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and CEO for a period of three years, at a yearly salary of \$84,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been or would be employed by the U.S. entity primarily in a managerial or executive capacity. The beneficiary was initially granted a one-year period of its stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will continue to be managerial, executive, and involve specialized knowledge.

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 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity has been and will be primarily managerial or executive in nature.

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.

The petitioner initially stated in the petition that the beneficiary's responsibilities include overseeing the entire U.S. operation, procuring contracts for the company's personnel placement services, and hiring and firing employees.

The director requested that the petitioner submit:

- A. Copies of the State Quarterly Income Tax returns for the past year, which lists all employees by name.
- B. Organizational chart which lists all positions.
- C. Identifying photos of the office space for the beneficiary and of the business premises.
- D. List all employee positions and duties.
- E. List all of the beneficiary's specific duties and the percentage of time spent on each.

In response to the director's request for additional evidence, the petitioner described the beneficiary's duties and the percentage of time he spends on them as:

- Marketing of the [REDACTED] services to U.S. Based Clients: 60%
- Recruiting of Personnel to meet the needs of US Clients 25%
- Administration and Financial Management - [REDACTED] 5%
- Technology and Technical Infrastructure Development [REDACTED] 10%

The petitioner also submitted photos of the premises used to house the U.S. entity, a copy of the U.S. entity's IRS Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2002, a Memorandum of Agreement dated March 19, 2002, U.S. entity Articles of Incorporation and By-Laws, a company organizational chart, and a copy of the beneficiary's resume. In the beneficiary's resume he described his duties and responsibilities as:

- Created and Implemented IT Training at the Retail and Corporate Market Segments.
- Developed Overseas markets in Australia, U.S., [and] New Zealand & UK for special purpose Skills in IT, Health Care and Education.
- Reviewed and Redesigned the Financial and Operating structure of the Corporation.
- Developed and Implemented Special Purpose Training products using interactive methods.
- Developed and Implemented Recruiting processes that provided value for money solutions to clients.

- Created the necessary Business processes to assist clients in Selecting and Employing Skilled Personnel in IT, Health Care and Education.
- Managed the Product Development Process with respect to new Training Products using the Internet and Interactive Voice/Sound Effects.
- Created a network of committed individuals to take the Recruiting and Placement Business to the next level.
- Developed Special Purpose recruiting methodologies that would ensure client confidence and provide a seamless interface between overseas locations.

The director denied the petition stating that the petitioner had failed to submit sufficient evidence to establish that the beneficiary had been or would be employed by the U.S. entity in a primarily managerial or executive capacity. The director noted the petitioner's failure to comply with the Request for Evidence. The director stated that the evidence showed the beneficiary spent 60 percent of his time marketing and 25 percent of his time recruiting personnel. The director concluded the beneficiary has been and would be primarily engaged in the day-to-day operations of the business itself rather than managing any professionals or managing subordinates.

On appeal, counsel disagrees with the director's decision and asserts the beneficiary is employed by the U.S. entity in a managerial, executive, and specialized knowledge capacity. Counsel asserts the beneficiary performs managerial duties in that he manages the entire operation, and an essential function known as the "external business environment" of the organization. Counsel also asserts the beneficiary continues to hold executive positions such as chairman, managing director, and president abroad. Counsel contends the beneficiary performs executive duties in that he directs the management of the U.S. entity and all of the [REDACTED] group companies worldwide. Counsel further contends that the beneficiary, as an executive, establishes the goals and policies of the organization internationally, exercises wide latitude in discretionary decision-making, receives only general direction from the board of directors, and exercises full executive authority. Counsel also contends the beneficiary retains direct supervisory authority over several employees abroad.

Counsel's assertions are not persuasive. On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been and will be employed in a managerial or executive capacity. In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's 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.* In the instant matter, the record shows that the beneficiary was the sole employee of the U.S. entity at the time the petition was filed. The record also demonstrates that the beneficiary will perform various job duties while employed by the U.S. entity. Here, the petitioner has failed to distinguish the beneficiary's role in the operation of its business. For example, the petitioner describes the beneficiary's duties as managerial in that he manages an essential function of the organization, executive in that he establishes company policies and goals and exercises a wide latitude in discretionary decision-making, and administrative in that he will be marketing the company's services to U.S. based clients.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that

the beneficiary's duties include directing the management of the organization and establishing goals and policies. The petitioner did not, however, define the organization's goals and policies, nor clarify how the beneficiary directs the management of the U.S. entity. 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). 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).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision-making. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra.*; *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner stated that the beneficiary spends 60 percent of his time marketing the company's services to U.S. based clients. Since the beneficiary spends the majority of his time actually marketing the petitioner's product, he is performing a task necessary to provide a service or product and this duty will not be considered managerial or executive in nature. 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).

Even though the petitioner claims that the beneficiary directs and manages the petitioner's external business environment, it does not claim to have anyone on its staff to actually perform the duties associated with such function. Thus, either the beneficiary himself is performing the duties associated with the petitioner's external business environment or he does not actually manage the function as claimed. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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).

In the request for evidence, the director requested that the petitioner submit copies of the State Quarterly Income Tax returns for the past year, which lists all employees by name, and a list of all employees' positions and duties. The petitioner failed to submit these documents in response. This evidence is critical, as it would have established the number of employees employed by the U.S. entity as well as the duties they perform. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). 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). For this reason, the petition will not be approved.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner infers throughout the record that it plans to hire additional managers and employees in the future. In addition, the U.S. entity's organizational chart depicts proposed employee positions. 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). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In this matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Finally, on appeal counsel contends the beneficiary has specialized knowledge through his work in India, Australia, and the United States, in setting business policies, business development, human resource management, and strategic development. Counsel also contends that the beneficiary has established a set of business practices and procedures for the ██████ group of companies that is proprietary to the success of the group of companies. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). If the petitioner believed that the beneficiary was eligible for this nonimmigrant visa classification as an employee who possessed specialized knowledge, the petitioner was required to request such classification when filing the petition. *See Matter of Michelin Tire Corp., supra.* There are no statutory or regulatory provisions that allow a petitioner to select alternative classifications within a single petition. The AAO notes that, if the petitioner wishes to seek classification of the beneficiary as an L-1B intracompany transferee, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year “new office” validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not satisfied all of the enumerated evidentiary requirements. Although the petitioner claims that it has acquired sufficient physical premises to house the U.S. entity, a review of the color photographs submitted in response to the director’s request for evidence demonstrates that the business premises is an apartment. There is no evidence to demonstrate that the beneficiary’s apartment is sufficient in size and space, and complies with commercial zoning requirements. In review of the record, there is insufficient evidence to establish that the petitioner has secured sufficient physical premises to house the new office pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A). Furthermore, there is insufficient evidence to establish that the U.S. and foreign entities are doing business pursuant to the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B). In this matter, the petitioner submitted as evidence of doing business a Memorandum of Agreement. A single memorandum of agreement is insufficient to demonstrate that the U.S. entity has been engaged in the regular, systematic, and continuous provision of goods and/or services. The petitioner claims that the beneficiary continues to spend time performing duties for the foreign entity and its affiliates abroad. There has been no evidence submitted to demonstrate that in the absence of the beneficiary, the foreign entity has been and will be able to continue doing business. 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).

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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.