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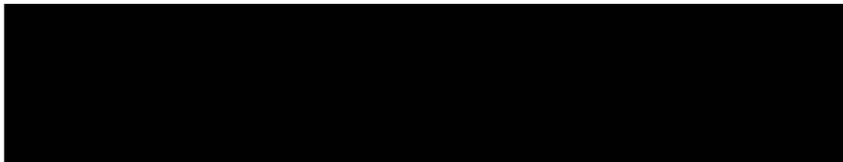
File: WAC 03 237 50655 Office: CALIFORNIA SERVICE CENTER Date: **APR 03 2006**

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)

IN 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 Director, California Service Center, denied the petition for a nonimmigrant visa, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is engaged in **the design, manufacture, and import of agricultural machinery**. The petitioner claims that it is an affiliate of [REDACTED] located in Moshav Menahmia, Israel. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. On appeal, counsel for the petitioner contends that the director erroneously denied the petition. Specifically, counsel asserts that all of the beneficiary's duties are executive, and that the beneficiary has a subordinate staff to relieve him from performing the day-to-day duties of the company. In support of this contention, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. In addition, 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.

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 (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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

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

The primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

With the initial petition, counsel submitted a letter of support from the petitioner, which stated that the beneficiary had spent the previous year attempting to perfect an original agricultural machine for the farming of avocados. The petitioner stated that it encountered many delays during these first twelve months of the beneficiary's stay, and that at the time of filing, it had not yet established a full work force as its agricultural device was still in the developmental stage. The petitioner further stated that the workers who assisted the beneficiary in the development of this project to date had been paid by the individual ranches for whom they worked, and not by the petitioner directly. The petitioner did not provide any additional information with regard to the beneficiary's duties during the previous year and merely discussed what the beneficiary would be doing during the next two years after the petition was approved.

The director, therefore, found this initial evidence to be insufficient and consequently issued a request for evidence (RFE) on October 12, 2004. The RFE requested the petitioner to submit a more detailed description of the beneficiary's duties during the previous year as well as requested an updated organizational chart for the U.S. entity which showed the name and position titles of all employees. Finally, the director requested additional documentation verifying the business dealings of the petitioner for the previous year, including a copy of its commercial lease, client lists, and invoices.

In a response dated January 2, 2004, the petitioner, through counsel, submitted the requested information. The petitioner stated that since filing it had hired a work force of nine individuals, and an updated organizational chart listed these individuals by name and position. With regard to the beneficiary's duties, the petitioner provided the following list:

- 1) OVERALL CONTROL OF THE US BUSINESS. 15%
- 2) PLANNING, ORGANIZING AND MARKETING THE BUSINESS. 20%
- 3) RESPONSIBLE FOR ALL CORPORATE DECISIONS, HIRING AND TRAINING SPECIALTY WORKERS AND FOREMEN. 10%
- 4) EVALUATING THE PROGRESS AND EFFECTIVENESS OF INSTALLED PROTOTYPES[.] 20%
- 5) COORDINATING DEVELOPMENT FIGURES WITH FOREIGN PARTNER VIA INTERNET AND PHONE MEETING TO DOUBLECHECK ANY FIGURES. 10%

- 6) MEETING WITH CURRENT FARMERS PERSONALLY AS THE JOBS INVOLVED ARE SEVERAL THOUSANDS OF DOLLARS AND SINCE THE BUSINESS IS NOT YET A HOUSEHOLD NAME IT IS REQUIRED TO MEET IN PERSON TO ESTABLISH AND NURTURE TRUST IN OUR COMPANY AND ITS DESIGNS. 10%
- 7) SUPERVISE THE R&D OF EQUIPMENT, ASSIGN TASKS TO THE FOREMAN TO COMPLETE WITH THEIR ASSIGNED WORK STAFF. 15%

The updated organizational chart the petitioner provided indicated that the beneficiary oversaw a corporate secretary, two foremen, five laborers, a field technician, and a maintenance worker.

On July 30, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary had been and would continue to be performing the day-to-day tasks of the organization and would act as a first-line supervisor as opposed to a manager or executive as required by the regulations.

On appeal, counsel asserts that the director's conclusion was erroneous and that the beneficiary in fact is primarily a manager and an executive with a sufficient staff to relieve him from performing non-qualifying duties. Counsel offers numerous examples of the manner in which the beneficiary's duties conform with the regulatory requirements and underlines the key points for emphasis. In conclusion, counsel contends that virtually all of the beneficiary's duties involve exercising direction and supervision over others, thus qualifying him for the benefit sought.

Upon review, counsel's assertions are not persuasive. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a manager and an executive by virtue of his position title, experience, and associated duties. However, the description of duties provided is vague and not comprehensive in that it fails to specify the exact nature of the claimed qualifying duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*. 905 F.2d 41 (2d. Cir. 1990).

The description of the beneficiary's duties, provided in the response to the request for evidence, is vague and seems to merely repeat the regulatory definitions. More specifically, counsel on appeal addresses each prong of the regulatory definitions and summarizes the beneficiary's duties by inserting the key language of the regulations. The identification of duties such as "planning, organizing and marketing" and "overall control of the U.S. business" does little to clarify what the beneficiary does on an average workday. In fact, some of these duties are extremely similar to and simply paraphrase the executive duties set forth in section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). However, 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 at 1108, *aff'd*. 905 F.2d 41; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5. In response to the request for evidence, the petitioner indicated that 20% of the beneficiary's time was devoted to evaluating the

progress and effectiveness of installed prototypes, 10% of his time was devoted to meeting personally with farmers, and 15% of his time was devoted to research and development. Furthermore, the initial petition indicated that during the past year, the beneficiary was the petitioner's sole employee and that his time had been devoted to the development of an "original agricultural machine."

With the beneficiary spending such a large percentage of his time dealing personally with clients, evaluating prototypes, and supervising the research and development of equipment, in addition to his individual efforts in developing the petitioner's key agricultural device, it appears the beneficiary is performing the majority of the necessary functions required to generate the goods and services of the petitioner's new business. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp at 1108, *aff'd*, 905 F.2d 41. In reviewing the beneficiary's stated duties, it appears that the majority of his time is devoted to technical duties necessary for the company's product development and expansion. 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).

Counsel further asserts on appeal that the beneficiary is a qualified manager because he oversees a staff of subordinates. While the AAO notes that counsel submits various documents verifying the employment of at least ten persons during the second quarter of 2004, this evidence will not be considered in this analysis because these employees were hired *after* the petition was filed. With the initial petition, the petitioner submitted a generic organizational chart which showed the proposed positions which would be filled when the beneficiary's visa was extended. In its letter dated August 13, 2003, the petitioner clearly indicates that it had not yet established a full work force as its agricultural device was still in the development stage. It further stated that the workers who assisted the beneficiary to date had been individually compensated by third parties, and were not employees of the petitioner. No payroll records, W-2 forms, or wage reports were submitted to establish that the petitioner employed any persons other than the beneficiary. In fact, the petitioner's U.S. Corporation Income Tax Return for 2002 indicates that no wages, salaries, or costs of labor were paid during that time.

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). Since these persons were not employed by the petitioner until after the petition's filing, the petitioner cannot rely on the current staffing levels to support its contention that the beneficiary is primarily a manager or executive.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. In its August 13, 2003 letter, the petitioner indicated that it planned to hire additional managers and employees in the future and, on appeal, counsel submitted evidence that such employees were in fact hired in 2004. However, 8 C.F.R. § 214.2(1)(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, which in this case was August 26, 2003. There is no provision in 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 the instant matter, the petitioner

has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner indicates that the beneficiary is the majority 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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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

ORDER: The appeal is dismissed.