

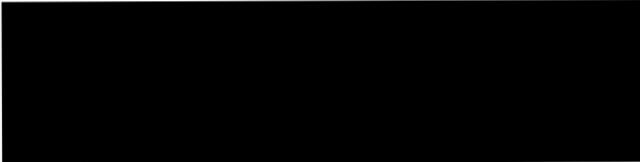
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File: WAC 04 183 50809 Office: CALIFORNIA SERVICE CENTER Date: **APR 03 2006**

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. 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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee to open a new office pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims to be a California general partnership and also claims to be the affiliate of [REDACTED] located in Leon, Guanajuato, Mexico. The petitioner plans to operate an international freight service and intends to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner did not establish that it would be able to support the beneficiary in a primarily managerial or executive position at the end of the first year of operations. On appeal, counsel for the petitioner asserts that the director's decision was not based on the evidence submitted and that the director in fact misinterpreted the petitioner's statements with regard to its proposed business expansion. 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.

- (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; 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 primary issue in this matter is whether the U.S. organization will be able to support the beneficiary in a primarily managerial or executive capacity 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), 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.

In a letter accompanying the initial petition dated June 2, 2004, counsel for the petitioner provided an overview of the petitioner's business and stated that it intended to hire 15 employees during the first two years of operations.¹ In support of the petition, counsel submitted a proposed organizational chart for the petitioner as well as a description of the beneficiary's proposed duties. The organizational chart indicated that the beneficiary would eventually oversee two employees: (1) an operations manager, who in turn would oversee a traffic supervisor, a maintenance worker, a permit supervisor, an unspecified number of truck drivers, and two permit clerks; and (2) an administrative manager, who would oversee a controller, a sales manager, an office manager, a bookkeeper, a "salesmen," and another bookkeeper/clerk. (It is unclear whether the term "salesmen" denotes more than one sales person or was a typographical error on the part of the petitioner).

With regard to the beneficiary's proposed duties, the petitioner provided the following list along with the percentage of time the beneficiary would devote to each task:

1. Develop budgetary and fiscal planning, marketing and legal strategies (10%)
2. Set policies and job descriptions for all executive and managerial employees (5%)
3. Establish performance standards for all divisions and employees (5%)
4. Hire and fire authority (5%)
5. Obtain new clients (20%)

¹ The AAO notes that in a separate letter from the petitioner, also dated June 2, 2004, the petitioner states that it would hire 15 employees during the *first* year of operations. 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).

6. Supervise the Administration Manager (15%)
7. Supervise the Operations Manager (15%)
8. Review and act upon reports by the Operations Manager and the Administration Manager (10%)
9. Responsible for Corporate Legal Matters (15%)

The director asked for additional evidence regarding the petitioner's proposed business in a request for evidence issued on March 16, 2004. Specifically, the director's request included copies of licenses, permits, and invoices for the petitioner, as well as a confirmation of the petitioner's occupancy of its commercial premises from its landlord. In a response dated July 23, 2004, counsel for the petitioner provided most of the requested information, but stated that the petitioner could not supply invoices at the present time because it would "not actually commence doing business until the beneficiary obtains her L1 visa."

On August 5, 2004 the director denied the petition. The director found that the totality of the evidence in the record was insufficient to establish that the beneficiary would be primarily employed in a managerial or executive capacity by the end of the first year of operations. In addition, the director concluded that the proposed business plan and corporate structure of the US entity was unclear as a result of the petitioner's failure to submit evidence, such as a comprehensive business plan. Finally, the director concluded that the actual duties of the beneficiary could not be determined, since the exact nature of the services to be provided by the petitioner could not be ascertained from the minimal evidence contained in the record.

On appeal, counsel asserts that the director erroneously ignored significant evidence in the record which specifically addressed the petitioner's business plan and its proposed organizational structure. Specifically, counsel asserts that the petitioner adequately addressed the petitioner's hiring plan with the organizational chart it submitted with the initial petition and, furthermore, that it provided ample detail regarding the petitioner's business plan and services by way of its permits, business licenses, and the like.

The main factors to examine in this matter are the nature and scope of the beneficiary's proposed duties, the proposed organizational structure and hiring plan of the petitioning enterprise, and its business plan for the first year of operations.

Counsel correctly observes that 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 instead 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.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's staffing requirements and contain a timetable for hiring, as well as a job description for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

In this matter, the petitioner states that it is an "international freight service." When asked for copies of invoices as evidence of the nature of its product or services, the petitioner responded by stating that it would provide trucking services and would not sell any goods. The record, however, indicates that the petitioner currently occupies an office space measuring 10' x 15'. There is no mention of the petitioner's planned acquisition of trucks, whether the vehicles will be purchased or leased, or what accommodations will be available for housing these trucks. In addition, there is no evidence of the financial ability of the petitioner to actually acquire these essential vehicles for conducting its business.

On appeal, the petitioner, through counsel, contends that this issue has been thoroughly addressed. Counsel alleges that the petitioner already obtained a business license and the necessary registrations and licenses, and that this information was made part of the record prior to adjudication. Counsel, however, overlooks the fact that there is no mention of the trucks necessary to provide the petitioner's service. Furthermore, the petitioner does not provide the proposed number of trucks it will need to commence operations, nor does it discuss the size of these trucks or whether a storage facility has been found in which to house these essential assets. The petitioner provides no details with regard to the manner in which clients will be obtained, thereby suggesting that funding for advertising and marketing has not been designated. The overall discussion of the petitioner's business is vague and generalized, and therefore prohibits the AAO from finding in favor of the petitioner.

Additionally, the proposed position of the beneficiary is president of an international freight service that alleges to provide trucking services. At the time of filing, the petitioner has no employees and no trucks through which to transport cargo. The petitioner has not demonstrated that the beneficiary, as president, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel within one year. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it will

employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties within one year. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Although the petitioner indicates that it will hire two subordinate managers in the future, there is no organized hiring plan in effect and it appears that such employees will only be hired if the beneficiary is successful in establishing the requisite client base. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements and it is not relieved from establishing and providing the necessary evidence to document that it is more likely than not that the claims made are true. Based on the limited documentation furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity within one year of the approval of the petition. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO also notes that the petitioner has failed to sufficiently document its claimed affiliation with the foreign entity. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this matter, the petitioner claims that the U.S. entity and the foreign entity are both owned by the same seven individuals, each of whom own the same number of shares in each entity. Although the partnership agreement for the U.S. entity was submitted, the petitioner provided no documentation pertaining to the ownership of the foreign entity. In order to confirm the claimed affiliation, corporate documentation regarding the foreign entity must be submitted to corroborate the claim. 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)). Based on the current record, there is insufficient evidence to demonstrate that the petitioner was an affiliate of the foreign entity as of the filing date of this petition, and thus it cannot be concluded that the petitioner had a qualifying relationship with the foreign entity as required by the regulations. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all 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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.