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File: WAC 04 139 52007 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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a corporation organized in the State of California that is described as a bakery equipment distributor, seeks to employ the beneficiary as its president. The petitioner claims that it is the subsidiary of [REDACTED], located in Goes, The Netherlands.

The director denied the petition, determining that the petitioner had failed to establish that (1) the beneficiary would be employed in a managerial or executive capacity; or (2) the petitioner was currently doing business as defined by the regulations.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner submits a brief and alleges that key evidence was overlooked and misinterpreted in evaluating the petition.

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(I)(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 (I)(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 primary issue in the present matter is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(1)(3)(ii).

In this case, the director found that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. In an affidavit dated February 11, 2004 from [REDACTED] Executive Vice President of the petitioner, the beneficiary's proposed duties in the U.S. were described as follows:

- a) Defining the long-term business objectives for [the petitioner] and developing strategic performance targets for subordinate areas of responsibility, while ensuring that functional strategies are developed, evaluated in and implemented.
- b) Translating the annual overall performance targets of the company into objectives for the operative plan of the subordinate functions, monitoring the achievement of objectives and introducing corrective steps in the event of budget variances.
- c) Ensuring the development and implementation of marketing and sales strategies in accordance with the business strategy of [the petitioner] while taking into account the global customer segment strategies, the selection of target markets and the pricing policy for the brands.
- d) Defining the financial, accounting, liquidity and fiscal policy in accordance with corporate guidelines, and ensuring that it is implemented in order to optimize the rate of return of [the petitioner's] investments.
- e) Developing a strategy-oriented and efficient organization structure with a view to introducing structural and process adjustments in the event of organizational deficits.
- f) Ensuring the procedure of qualitative and quantitative information on market conditions and market trends in the USA, with a view to initiating projects to develop a new type of [service] or to enhance existing services.
- g) Developing sales development measures based on the business strategy of [the petitioner], and defining and initiating sales development projects in order to expand and further develop the business.
- h) Establishing and maintaining contacts with the company's top customers in order to improve customer relations and to assert the list prices and pricing policy in the trade.

The director found this initial evidence to be insufficient to establish that the beneficiary would be employed abroad in a primarily managerial or executive capacity. Consequently, in a request for evidence issued on May 17, 2004, further information regarding the beneficiary's proposed employment was requested. In a response dated July 23, 2004, the petitioner submitted additional evidence in support of the claimed managerial and/or executive employment, including a personnel chart, a new description of duties and the percentage time spent thereon, and copies of its quarterly wage reports for the previous four quarters. The most recent report, for the quarter ending 3/31/2004, documented the petitioner's employment of only two employees, namely, [REDACTED] chief executive officer, and [REDACTED] customer service associate.

Counsel's letter alleged that based on the beneficiary's work experience with the foreign entity abroad as general manager, he would be well qualified as the president of the U.S. operation. The newly submitted list of the beneficiary's duties was virtually identical to the original list of duties submitted. The only differences, highlighted in bold type below, were the percentages of time devoted to each identified duty and a new claim that the beneficiary supervised subordinate staff:

- 1 Defining the long-term business objectives for [the petitioner] and developing strategic performance targets for subordinate areas of responsibility, while ensuring that functional strategies are developed, evaluated in and implemented **(10% of time spent)**.
- 2 Translating the annual overall performance targets of the company into objectives for the operative plan of the subordinate functions, monitoring the achievement of objectives and introducing corrective steps in the event of budget variances **(10% of time spent)**.
- 3 Ensuring the development and implementation of marketing and sales strategies in accordance with the business strategy of [the petitioner] while taking into account the global customer segment strategies, the selection of target markets and the pricing policy for the brands **(10% of time spent)**.
- 4 Defining the financial, accounting, liquidity and fiscal policy in accordance with corporate guidelines, and ensuring that it is implemented in order to optimize the rate of return of [the petitioner's] investments **(10% of time spent)**.
- 5 Developing a strategy-oriented and efficient organization structure with a view to introducing structural and process adjustments in the event of organizational deficits, **overseeing the work of employees under the beneficiary's supervision (25% of time spent)**.
- 6 Ensuring the procedure of qualitative and quantitative information on market conditions and market trends in the USA, with a view to initiating projects to develop a new type of [service] or to enhance existing services **(10% of time spent)**.
- 7 Developing sales development measures based on the business strategy of [the petitioner], and defining and initiating sales development projects in order to expand and further develop the business **(10% of time spent)**.
- 8 Establishing and maintaining contacts with the company's top customers in order to improve customer relations and to assert the list prices and pricing policy in the trade **(5% of time spent)**.

The director denied the petition on August 5, 2004, finding that the petitioner had failed to demonstrate that the beneficiary would be employed in a capacity that was primarily managerial or executive. Specifically, the director found that the beneficiary would be primarily performing the necessary services of the business, and furthermore, that the beneficiary was not overseeing a subordinate staff of professionals, managers, or supervisors so that he was relieved from performing his non-qualifying duties. Upon review of the record, the AAO concurs with the director's decision.

Whether the beneficiary is a managerial 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. Here, the petitioner provides a vague description of duties that seem to indicate that the

beneficiary will play a key role in the production and distribution of the petitioner's products. 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). In this case, the majority of the beneficiary's tasks involve first-hand participation in developing sales strategies and contacts. These duties are essential to the establishment of the petitioner's business and incorporate the crucial daily services necessary for the business to become viable. 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).

Furthermore, the petitioner seems to rely on the beneficiary's managerial title abroad as a basis for his qualifications as a manager or executive. However, the evidence contained in the record does not support this contention. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604. In this case, although the petitioner claims that the beneficiary will serve as president and will oversee a staff of four subordinates, the record indicates that at the time of filing, only two other employees worked for the petitioner, and that neither qualified as a managerial, professional, or supervisory employee. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Since the response to the director's request for evidence indicated that the beneficiary would spend 25% of his time supervising personnel, this issue must be explored.

While an organizational chart lists five subordinate employees under the beneficiary, the wage reports and payroll summaries submitted indicate that at the time of filing, only the CEO and Customer Service employee were employed by the petitioner. Though requested by the director, the petitioner did not provide the level of education required to perform the duties of these positions, but merely provided their salary amounts and position titles. Any 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). Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Finally, since the petitioner provided no description of the duties of these two employees, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

On appeal, counsel relies on his July 23, 2003 letter, and alleges that the beneficiary is the engineer who created the petitioner's chief product, namely, a glaze spraying machine. Since the beneficiary, according to counsel, is not ready and willing to transfer the drawings and designs for this machine to the U.S. unless he is there to personally supervise its production, counsel contends that the beneficiary's transfer is necessary. Once he obtains his visa, according to counsel, he will be in the position to hire five new employees and subsequently manage the organization.

These assertions are not persuasive. 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, as the petitioner has not claimed that it is a new office, it cannot be deemed a new office under 8 C.F.R. § 214.2(l)(3)(v)(C) and is thus not afforded a start-up phase in which to hire additional employees in order for the business to become operational. The petitioner has failed to establish that the beneficiary will be coming to the United States to render his services in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

The second issue raised by the director is whether the petitioner has been doing business as required by the regulations for the previous year. The director concluded that the petitioner had not been engaged in "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization" as required by the regulation at 8 C.F.R. §214.2(l)(1)(ii)(H), which defines the term "doing business."

Upon review, the director's treatment of this issue is inappropriate. The instant petition is an initial petition to classify the beneficiary as an L-1A nonimmigrant intracompany transferee. Since the petition does not involve an L-1 extension, there is no requirement that the petitioner demonstrate that it was doing business during the year prior to the petition's filing. Specifically, proof that a petitioner has been doing business for the previous year is required under 8 C.F.R. § 214.2(l)(14)(ii)(B) when a petitioner seeks to extend a petition which involved the opening of a new office. In this case, however, the petitioner is not seeking an extension, but rather is filing an initial petition. The AAO notes that the director may erroneously have treated the petition as an immigrant petition and relied on the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D), which requires that a petition for an immigrant worker demonstrate that the petitioner had been doing business for one year prior to the petition's filing. Since this petition pertains to a nonimmigrant intracompany transferee, the requirement that the petitioner be doing business during the previous year is not applicable. The decision of the director with regard to this issue is hereby withdrawn.

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the Dutch entity. The petitioner claims that it is a subsidiary of the foreign entity by way of the foreign entity's 51% ownership of the U.S. entity. The petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See Internal Revenue Code, § 1361(b)(1999)*. A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved. 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).

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.