

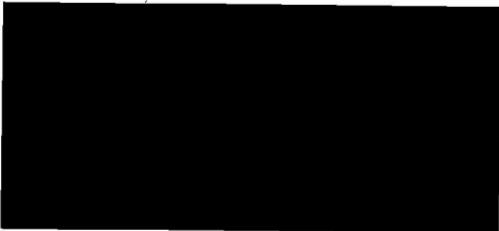
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FILE: EAC 04 267 52999 Office: VERMONT SERVICE CENTER Date: JUL 10 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 is a new office that claims to be engaging in the production, marketing and sale of traditional handcrafted merchandise from India. It seeks to employ the beneficiary as its principal officer, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition, concluding the U.S. entity would not support a primarily managerial or executive position within one year of approval of the petition and, therefore, the beneficiary does not qualify for classification under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, the petitioner asserts that the beneficiary's job duties would be managerial in nature, and the company expects to expand its staff in the future. The petitioner submits additional evidence to support these assertions.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. 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. 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 in part 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.

Moreover, pursuant to the regulation at 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 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 (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 issue in this proceeding is whether within one year of approval of the petition the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

In a letter dated September 30, 2004 accompanying the Form I-129, Petition for a Nonimmigrant Worker, the petitioner provided the following description of the beneficiary's proposed duties in the United States:

[The beneficiary] will devote virtually all of his time in the United States to the commencement and management of the U.S. business. His duties will include the creation of new designs from samples of raw material imported from India, corresponding with his Indian affiliate for bulk manufacturing, analyzing the market for new and current designs, customizing jewelry according to customer[s] requirements, maintaining inventory, establishing new customers.

The petitioner indicated on the Form I-129 that it currently has two employees. In the September 30, 2004 letter, the petitioner states that it "intends to employ a minimum of 2-3 people in its store" in addition to the beneficiary.

On October 12, 2004, the director requested that the petitioner submit additional evidence to establish, among other things, that the petitioner will grow to be of sufficient size to support a managerial or executive position. Specifically, the director requested: (1) a description of the staff of the U.S. entity, including the number of employees, their job titles, duties and wages, and a description of the management and personnel structure of the U.S. operation; (2) a comprehensive description of the beneficiary's proposed duties, indicating how the beneficiary's duties will be managerial or executive in nature; and (3) an organizational chart for the U.S. entity, with complete position descriptions for all employees.

In a response dated October 28, 2004, counsel for the petitioner described the beneficiary's anticipated duties as follows:

[The beneficiary] will oversee and manage all employees. In addition, he will analyze the market for new and current designs, identify and procure new wholesale customers, create new designs for samples from raw material imported from India and send the designs back to India for bulk manufacturing. He will also explore the export market, evaluate the new employment positions, oversee recruitments and have authority to hire and fire employees. He will negotiate and enter into new contracts for bulk selling. Further, [the beneficiary] will develop a comprehensive strategic plan for a full-service, in-house communications division.

He will also establish relationships with outside communications professionals to enhance productivity and reach in the marketplace and develop protocols for media relations and media training, conference and event media, targeted message development and communications strategies, to include popular magazines, major newspapers, television and radio, promotional and educational writing, community relations and rapid response to outside requests.

Counsel also stated that the beneficiary will serve as vice president of the U.S. entity, and that there will be four proposed employees in addition to the beneficiary, including an office assistant, two sales persons, and a computer assistant. In the proposed organizational chart submitted by the petitioner, however, the beneficiary is shown as the vice president of the company with the president position above him and four positions below him including an artisan, an office assistant/computer programmer, and two sales persons.

On November 10, 2004, the director denied the petition. The director determined that the record does not demonstrate that the U.S. entity would grow sufficiently to support a primarily managerial or executive position within one year of approval of the petition. Specifically, the director noted that based on the evidence of record, the U.S. company is very small, and while it employs only two people at the time of the petition, the business plan does not indicate that more employees would be hired. The director further observed that the beneficiary would be working at a level no higher than that of a first line supervisor, and would not be supervising other managerial, supervisory, or professional employees. Moreover, the director noted that unless the company will employ many more workers, it appears there would be insufficient staff to relieve the beneficiary from performing primarily non-managerial tasks. The director therefore concluded that the beneficiary does not qualify for L-1A classification.

On appeal, the petitioner offers an expanded description of the beneficiary's job duties and asserts that the beneficiary's duties should be viewed in the context of a small start-up business. The petitioner contends that the beneficiary does not function as a first-line supervisor and that his responsibilities are analogous to those of a number of different managerial positions in a large corporation, including a business development manager, a production manager, a human resources manager, a business analyst and a public relations manager. The petitioner also asserts that business growth should increase two to three times the projections of the first year, and hiring needs would increase accordingly, but the petitioner offered no specific details regarding the anticipated expansion of the staff.

Upon review of the record, the AAO concurs with the director's conclusion. 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. 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, organizational structure, and 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 instance, the petitioner has not sufficiently established that within one year of approval of the petition, the beneficiary's responsibilities would be in a *primarily* managerial or executive capacity. Whether the beneficiary will be 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. While the petitioner claimed that the beneficiary would "oversee and manage all employees," the job descriptions provided by the petitioner also indicate that the beneficiary will be directly performing many of the day-to-day operations of the company, including product design, market analysis and research, inventory control, customer service, purchasing, sales, and public relations. These are tasks that are necessary to produce the products or provide the services of the company. The petitioner did not provide any breakdown of the amount of time the beneficiary would spend on each job duty, such that the AAO could determine whether the beneficiary would be primarily performing managerial or executive duties, or the non-qualifying duties described above. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Additionally, the record is insufficient to demonstrate that there would be additional staff to relieve the beneficiary from performing non-qualifying functions within the requisite one year of approval of the petition. In response to the director's request for further evidence, counsel for the petitioner claimed that the company expects to hire four employees in addition to the beneficiary. However, counsel's letter described these additional employees as an office assistant, a computer assistant, and two sales person, whereas the organizational chart submitted at the same time indicates that the beneficiary's subordinates would include an artisan, an office assistant/computer programmer, and two sales persons. The petitioner did not explain or account for this discrepancy. 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). Moreover, the petitioner did not specify any dates by which these proposed employees would be hired. In addition, the business plan for the U.S. entity submitted with the initial petition made no mention of plans to hire additional employees, and the financial projections for both the first and second year provide for an annual salary for one single employee, at \$2,000 per month.¹ Given these deficiencies in the record, the AAO cannot determine whether the petitioner actually intends to hire additional employees, when those employees would be hired, and what position those employees would actually fill. Thus, the record as presently constituted is insufficient to establish that there would be

¹ The AAO notes that on the Form I-129, the petitioner indicated that the beneficiary's expected annual salary is \$75,000. In addition, a set of financial projections for the first and second year submitted in response to the request for additional evidence lists the beneficiary's annual salary at \$75,000 plus a total of \$96,000 combined salary per year for four additional employees. The petitioner has offered no explanation for the discrepancies relating to projected salaries in the two sets of financial projections. Again, 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. at 591-92.

additional staff to relieve the beneficiary from performing non-qualifying job duties and allow him to function in a primarily managerial or executive capacity within one year of approval of the petition.

Based on the foregoing, the AAO concurs with the director's conclusion that the petitioner has failed to demonstrate that the intended United States operation, within one year of the approval of the petition, will support the beneficiary in an executive or managerial position.

Beyond the director's decision, the petitioner has not provided sufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In considering a petitioner's claimed qualifying relationship, CIS must be able to examine evidence such as the stock certificates, stock ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings 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. On the Form I-129, the petitioner indicated that the U.S. entity and the foreign entity are affiliates since the same individual, the beneficiary, owns 100% of the foreign entity and 80% of the U.S. entity. However, the petitioner did not submit any documentation to support its claim regarding the ownership and control of the foreign entity. With respect to the U.S. entity, the petitioner submitted only a letter from a person identified as the president of the company certifying that the beneficiary owns 80% of the company. This letter alone is insufficient proof of the ownership and control 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In light of the lack of supporting documentation, the petitioner has failed to establish that the U.S. and foreign entities are affiliates as defined in the regulations. 8 CFR § 214.2(l)(1)(ii). For this additional reason, the petition will be denied.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.