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U.S. Citizenship
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Services

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File: WAC 05 027 50720 Office: CALIFORNIA SERVICE CENTER Date: **JUL 12 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, Chief
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 extend the temporary employment of the beneficiary as its chief executive officer 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, claims to be an industrial firm engaged in the importation of shea butter and claims to be an affiliate of [REDACTED] located in Lira, Uganda. The petitioner 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. Specifically, the director noted that the petitioner had not shown that it could support the beneficiary in such a position at the end of its initial period of operations. In addition, the director noted that the petitioner had failed to establish that the beneficiary's services in the United States would be for a temporary period, since the record indicated that the beneficiary was the sole owner of both the foreign entity and the U.S. petitioner.

On appeal, counsel for the petitioner alleges that the director misapplied the law to the evidence. Specifically, counsel asserts that the director's reasoning is inconsistent with the business reality, and reflects a fundamental misunderstanding of the documentary evidence submitted. In the brief accompanying the appeal, counsel expanded by providing further clarification as to why the petitioner was qualified for the benefit sought.

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)(14)(ii) 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 has been and will continue to 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.

On the Form I-129 filed on November 8, 2004, the petitioner claims that the beneficiary is coming to the United States to open a new office. However, the record reflects that the petitioner was incorporated on May 21, 2002, and that two previous new office L-1A petitions had been granted on behalf of the petitioner for the beneficiary (WAC-02-199-54246, from 09/04/2002 to 09/03/2003, and WAC-03-248-51626, from 11/21/2003 to 11/20 2004). Therefore, the director concluded that the instant petition warranted consideration under the regulations pertaining to a new office extension, and the AAO agrees.

There was insufficient supporting documentation submitted with the extension request to satisfy the regulatory requirements. As a result, the director issued a request for evidence on November 16, 2004. In addition to requesting documentation pertaining to all aspects of the regulations governing new office extensions, the director requested the following information with regard to the beneficiary:

- The total numbers of employees retained by the petitioner;
- U.S. organizational chart describing the petitioner's managerial hierarchy and staffing levels, including the names of all employees, their position titles, their job duties, their educational backgrounds, their annual salaries or wages, their immigration status, and their source of remuneration;
- A more specific description of the beneficiary's duties, including who the beneficiary directs and the percentage of time he devotes to each of his tasks;
- The petitioner's quarterly wage reports and payroll summaries for the last four quarters;
- The purpose for the beneficiary in coming to the United States; and
- Specific details with regard to the beneficiary's executive duties in the United States for the past six months, including the specific goals and policies he has established, the specific discretionary decisions the beneficiary has exercised, and a specific day-to-day description of the duties the beneficiary has performed.

In a response dated January 13, 2005, the petitioner responded to the director's request. In a cover letter from counsel, it was indicated that the beneficiary is currently the only employee of the petitioner. Furthermore, counsel stated that "[t]he organizational chart illustrates the proposed U.S. employees. At this juncture job descriptions/job duties, salaries/wages and immigrant status have not yet been finalized." In lieu of an organizational chart for the U.S. entity, counsel submitted the foreign entity's organizational chart with a supplement describing the positions and duties of each employee abroad.

With regard to the director's specific request for further information regarding the beneficiary's duties, counsel submits a Business Plan and Analysis of Operations for the petitioner dated April 2002. Under section XX, the plan indicates that the petitioner will commence operations by hiring ten qualified and experienced employees. Additionally, the plan lists the beneficiary's "vision of the company and its ability to compete and thrive in the U.S. marketplace." Finally, section II outlines the beneficiary's objectives, including "set up manufacturing and distribution plants in the United States by January 2003." In conclusion, counsel claims in its cover letter that since the petitioner is a new business entity, it has not yet done a payroll summary nor has it filed quarterly tax returns or a U.S. Corporation Income Tax Return.

On January 27, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would be acting in a managerial or executive capacity, and concluded that the beneficiary, as the sole employee of the company, would be performing all of the day-to-day operational duties of the company. More specifically, the director noted that despite the two previous years granted to the beneficiary to begin operations of the U.S. entity, the entity was still in a start-up phase and was thus unable to support the beneficiary in a managerial or executive capacity.

On appeal, counsel for the petitioner states that the evidence submitted in support of the petition was sufficient, and that since the petitioner was still in a critical start-up phase of development, it warranted consideration of this issue when examining the beneficiary's role in the company. Counsel argues that every manager and/or executive is sometimes required to perform tasks lower than those considered comparable to their level of pay, and asserts that the director used this factor as an erroneous basis on which to deny the petition. Counsel cites to the petitioner's hiring plan, the beneficiary's past performance in managing the foreign entity, and his high level of education as a means for concluding that the beneficiary is in fact qualified for the benefit sought.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the 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.*

Despite the specific requests of the director, the petitioner failed and/or refused to submit a detailed description of the beneficiary day to day duties, with particular emphasis on his duties for the six months prior to the petition's filing. The request for evidence outlined with great detail the evidence required to establish the beneficiary's eligibility in this matter. The petitioner, however, responded by submitting a generic business plan, dated April 2002, which outlined the goals and objectives of the petitioning entity.

The brief description of the beneficiary's "goals" and "vision of the company" failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Counsel asserts on appeal that this business plan, submitted as Exhibit G in response to the request for evidence, clearly established the beneficiary's role in a managerial or executive capacity. The AAO disagrees.

The generic overview of the petitioner's business plan, dated April 2002, does not describe the nature of the beneficiary's day-to-day tasks as of November 2004, the time of the petition's filing. The AAO, therefore, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. Despite the director's specific request for a detailed description of the beneficiary's duties for the past six months, the petitioner failed to directly respond to such

a request. 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). Additionally, the business plan failed to specifically articulate the nature of the beneficiary's duties, and merely focused on the petitioner's ultimate business goals. For example, stating in April 2002 that the beneficiary's objectives as chief executive officer include "maintain a gross margin above 50 percent" and "establish annual growth rate by 35 percent" do little to explain what the beneficiary was doing on a daily basis as of the filing of the extension request in November 2004. 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, *aff'd*, 905 F.2d 41.

In this matter, the petitioner basically equates managerial and executive capacity with the beneficiary's title of chief executive officer, yet fails to provide solid examples of how this managerial or executive capacity is actually attained. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The director clearly requested a detailed description of the beneficiary's duties in the United States with specific emphasis on the previous six months. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, but failed to do so. Again, 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).

Counsel suggests that the present petition should be adjudicated under the regulations governing new offices, provided in 8 C.F.R. § 214.2(l)(3)(v), as the beneficiary did not receive a full year in L-1A status. Counsel takes issue with the director's application of the regulatory requirements for new office extensions as provided in 8 C.F.R. § 214.2(l)(14)(ii). The initial new office petition (WAC-02-199-54246, from 09/04/2002 to 09/03/2003), was approved for a period of 365 days. The second petition, (WAC-03-248-51626, from 11/21/2003 to 11/20 2004), was also approved for an additional 365 days. Counsel asserts that due to delays with name checks, the petitioner was unable to enter the United States until September 20, 2004. Regardless, any request for an extension of a petition that was originally approved as a new office must be evaluated under the criteria set forth at 8 C.F.R. § 214.2(l)(14)(ii).

In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require Citizenship and Immigration Services (CIS) to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the initial new office petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In this matter, although the petitioner's business plan indicates that additional employees will be hired in the future, there is no evidence to show that the beneficiary has a subordinate staff to relieve him from performing the on-qualifying duties required when a business is in a start-up phase. Even though the enterprise remains in a preliminary stage of organizational development,

despite its incorporation in 2002, and regardless of any difficulty the beneficiary may have had in obtaining entry to the United States, the petitioner is not relieved from meeting the statutory requirements. Since the record lacks any credible evidence which describes in detail the nature of the beneficiary's duties, the AAO must conclude that 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.

The second issue in this matter is whether the services of the beneficiary are intended for a temporary period. Generally, the petitioner for an L-1 nonimmigrant classification needs to submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Iovic*, 18 I&N Dec. 361 (Comm. 1982); see also 8 C.F.R. § 214.2(l)(3)(vii). In this matter, the record indicates that the beneficiary is the sole owner of both the petitioning organization and foreign entity abroad. 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. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. In this matter, the petitioner claims that it is still in the preliminary stages of establishing its business organization, and in response to the director's request for its federal income tax return, the petitioner advised that it has not yet filed a return as it has yet to commence business operations. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. By the petitioner's own admission, it has yet to commence business operations despite its incorporation in May 2002. 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. 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 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.