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U.S. Citizenship
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Services

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FILE: SRC 04 208 50576 Office: TEXAS SERVICE CENTER Date: **SEP 05 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)

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, Texas 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 Florida that is engaged in property investment and development, seeks to employ the beneficiary as its general manager and chief executive officer. The petitioner claims that it is the subsidiary of [REDACTED] located in Tel Aviv, Israel.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary was employed abroad in a primarily managerial or executive position; or (2) the beneficiary would be employed in a primarily managerial or executive position within one year of the petition's approval.

On appeal, counsel for the petitioner provides supplemental evidence, which addresses the director's bases for denial, and contends that the petitioner did in fact meet the evidentiary requirements.

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.

This matter presents two related, but distinct, issues: (1) whether the beneficiary was employed abroad in a primarily managerial or executive capacity; and (2) whether the U.S. entity will be able to support the beneficiary in a managerial or executive position within one year of the petition's approval. The AAO will first address the issue of whether the beneficiary was employed abroad in a qualifying 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 L supplement to Form I-129, the petitioner provided the following general overview of the beneficiary's duties in the foreign entity:

[The beneficiary] is a licensed builder and contractor in Israel. He has worked in the field for over 12 years and has owned and operated [the foreign entity] for the past 7 years. Aside from his many years of experience building, contracting, and property investment projects, [the beneficiary's] daily duties include contracting and tendering bids for large government, municipal and private corporations, selection, instructing, and managing large number of employees (in-house and contracted), purchasing and renting equipment according to projects requirement, contracting and working with suppliers and sub-contractors, selling, promoting, investing, etc.

In a letter from the petitioner dated July 6, 2004, the petitioner further stated that the beneficiary would manage both companies during the start-up phase of the U.S. company, and that he would travel routinely back and forth between the United States and Israel until he was able to hire and train a local manager for the U.S. entity.

On September 11, 2004, the director requested additional evidence with regard to the beneficiary's duties abroad. Specifically, the director asked the petitioner to provide a more detailed description of the beneficiary's position abroad including all duties and the percentage of time spent on each duty. The petitioner was also asked to provide information on the beneficiary's subordinates as well as a brief description of their titles and duties. Finally, payroll records to corroborate the claimed employment of these persons was requested. In a response dated February 28, 2004, the petitioner, through counsel, submitted a letter accompanied by the documentary evidence requested. With regard to the beneficiary's duties, counsel confirmed that the beneficiary's title was Company Owner/Contractor/Property Investment Developer, and provided the following list of his specific duties:

- 2.1 Determine staffing requirements and interview, hire, train new employees, or oversee those personnel processes.
- 2.2 **Establish and implement policies, goals, objectives, and procedures, conferring with owners, municipalities, and staff members as necessary.**
- 2.3 **Manage staff, preparing work schedules and assigning specific duties.**
- 2.4 Monitor projects to ensure that they are being executed efficiently and effectively while staying within budgetary limits.
- 2.5 Plan and direct activities such as submitting tenders, meeting with potential clients and coordinating with employees, suppliers, and other contractors as required.
- 2.6 **Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement.**
- 2.7 Submit tenders, negotiate contracts, meet with municipal engineering and building authorization departments.
- 2.8 Use survey instruments, metering devices, tape measures, and test equipment, such as concrete strength measures, to perform inspections.
- 2.9 Inspect bridges, dams, highways, buildings, wiring, plumbing, electrical circuits, sewers, heating systems, and foundations during and after construction.
- 2.10 Review and interpret plans, blueprints, site layouts, specifications, and construction methods.
- 2.11 Monitor construction sites to ensure adherence to contracting requirements and specifications.
- 2.12 Measure dimensions and verify level, alignment, and elevation of structures and fixtures to ensure compliance to building plans and codes.
- 2.13 Compute estimates of work completed or of needed renovations or upgrades, and approve payment for contractors.
- 2.14 Supervises and coordinates activities of constructions trades workers
- 2.15 Directs and leads workers engaged in construction activities.
- 2.16 **Assigns work to employees, using material and worker requirements data.**
- 2.17 Confers with staff and worker to ensure production and personnel problems are resolved.

- 2.18 Examines and inspects work progress, equipment and construction sites to verify safety and ensure that specifications are met.
- 2.19 Estimates material and worker requirements to complete job.
- 2.20 Reads specifications, such as blueprints and data, to determine construction requirements.
- 2.21 Analyzes and plans installation and construction of equipment and structures.
- 2.22 Confer with supervisory personnel, owners, contractors, and design professionals to discuss and resolve matters such as work procedures, complaints, and construction problems.
- 2.23 Determine labor requirements and dispatch workers to construction sites.
- 2.24 Direct and supervise workers.**
- 2.25 Interpret and explain plans and contract terms to administrative staff, workers, and clients, representing the owner or developer.
- 2.26 Plan, organize, and direct activities concerned with the construction and maintenance of structures, facilities, and systems.
- 2.27 Prepare and submit budget estimates and progress and cost tracking reports.
- 2.28 Schedule the project in logical steps and budget time required to meet deadlines.
- 2.29 Select, contract, and oversee workers who complete specific pieces of the project, such as painting or plumbing.
- 2.30 Study job specifications to determine appropriate construction methods.

The above duties, highlighted in bold text, are the duties the petitioner claims that the beneficiary performs every day. The remaining duties are performed per project, and/or as necessary.

The response to the request for evidence further indicated that the beneficiary oversaw “four salaried employees” and 10-20 “outsourced contractors and day workers.”

On December 14, 2004 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary was employed abroad in a primarily managerial or executive capacity as defined by the regulations. Specifically, the director found that the duties of the beneficiary did not appear to be primarily qualifying duties, and that the beneficiary’s alleged subordinate staff was not documented in the record. The director concluded that the beneficiary was primarily performing tasks necessary to the viability of the business abroad, and thus he was not a qualified manager or executive.

On appeal, counsel contends that the petitioner provided the necessary evidence to show the qualifications of the beneficiary, and claims that the newly submitted evidence proves that the beneficiary oversaw a subordinate staff of professionals in order to qualify as a manager.

The AAO, upon review of the record of proceeding, concurs with the director’s finding. 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.*

The initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including a more specific description of the beneficiary's duties. The petitioner responded to this request, and in addition to describing the beneficiary's duties in further detail, the petitioner claimed that the beneficiary oversaw both salaried employees and contractors.

The AAO, upon review of the record of proceeding, 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. 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 fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. More specifically, although the petitioner clarified that certain tasks were performed "every day," while others were performed "per project" or "as needed," the AAO is unable to determine exactly how often the beneficiary devotes his time to one group of tasks over another. This failure of documentation is important because many of the beneficiary's identified duties, such as "examines and inspects work progress, equipment and construction sites to verify safety and ensure that specifications are met," "reads specifications, such as blueprints and data, to determine construction requirements," and "measure[s] dimensions and verify level, alignment, and elevation of structures and fixtures to ensure compliance to building plans and codes" do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

These duties indicate that the beneficiary plays an active role in visiting and overseeing site projects and the work that is constructed on these sites. While the beneficiary failed to clarify how often projects are undertaken, it can logically be presumed, since the petitioner's business is a property development business, that projects are almost constantly being performed under contractual obligations. As a result, it seems evident from the description of duties provided that the beneficiary will engage in direct supervision of the projects, including actively ensuring that the project complies with building codes and other such requirements. Since the petitioner clearly states that the beneficiary is a licensed builder and contractor with over 12 years of experience, it appears that the beneficiary primarily plays an active role in these projects. 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 has failed to show that the beneficiary has sufficient subordinate staff to relieve him from performing an active role in project management. While the petitioner, in response to the request for evidence, asserted that the beneficiary oversees four employees and multiple contractors,

the evidence in the record does not corroborate this claim. For example, the payroll documentation submitted indicates that only two employees were retained by the petitioner for the entire year of 2003, with two other employees only working a partial year. The claim with regard to contracted employees is likewise unclear.

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. In this matter, since the petitioner claims that the beneficiary “direct[s] and supervise[s] workers” daily, the petitioner must satisfy this criteria.

Though requested by the director, the petitioner did not provide any details with regard to the duties of the beneficiary’s alleged subordinates, nor is it clear whether an advanced degree is necessary to perform such duties. 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 any 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. Thus, 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 submits additional details for the first time with regard to the contracted employees allegedly working under the beneficiary’s supervision. Despite the director’s specific request in the request for evidence, this documentation was not submitted prior to adjudication. 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. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The petitioner, therefore, has failed to establish that the beneficiary is employed abroad in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

The second issue on appeal is whether the U.S. entity will be able to support the beneficiary in a managerial or executive position within one year after the petition’s approval. The director found the initial evidence with the petition to be insufficient to establish that this requirement could be met at the end of the first year of operations. Therefore, in the request for evidence previously discussed, the director requested additional documentation regarding the petitioner’s business plan, its leased premises, and the proposed duties of the beneficiary in the United States. In response, the petitioner stated that the beneficiary’s proposed duties in Florida would consist of opening the U.S. office, surveying sites and property for investment, hiring staff, and developing projects. The petitioner further indicated that the beneficiary would divide his time between Israel and the United States. Finally, as evidence of physical

premises to house the new office, the petitioner submitted evidence of the purchase of a single family home by the beneficiary in the State of Florida.

The director denied the petition, noting that no commercial premises had been secured for the petitioner's proposed business. Counsel on appeal asserts that in this "age of advanced telecommunications technologies" millions of businesses are conducted from residential homes, and that the petitioner's fledgling business should be no exception. The AAO disagrees.

The petitioner has failed to establish that it will be able to support the beneficiary in a capacity that is primarily managerial or executive at the end of the first year of operations. Specifically, the petitioner has provided a vague description of the beneficiary's proposed duties in the United States, contends that he will split his time between the U.S. and Israel, and that he will conduct this business out of his newly acquired residential property. In addition, the AAO notes that the petitioner failed to submit a comprehensive business plan, thereby suggesting that the beneficiary, as the alleged owner of both companies, is merely seeking entry into the U.S. for personal reasons and not to truly establish a legitimate business. While an authorization to transact business in the State of Florida is certainly a start, without further steps to show the intended result after a year of operations, the AAO cannot conclude that a legitimate business will exist to support a managerial or executive position.

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.

The petitioner has submitted nothing that conforms even loosely to a business plan. This deficiency in the record, coupled with the vague job description of the beneficiary, indicates that the petitioner will not be able to support a managerial or executive position at the end of the first year of operations. On appeal, counsel suggests that the petitioner's infancy should be considered when assessing the beneficiary's active

role in the performance of company duties, and his intention to start up the company from his U.S. residence. The AAO disagrees.

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 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. 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, or that the petitioner will grow to the point where it will require the services of a full-time manager or executive at the end of its first year of operations.

Specifically, the petitioner has failed to establish that it has secured sufficient physical premises to house the new business, as required by the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A). Additionally, the petitioner has failed to show that 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, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner, therefore, has not shown, by way of a comprehensive business plan and clear description of the beneficiary's proposed duties, that it will reach the point that it can employ the beneficiary in a predominantly managerial or executive position at the end of the first year. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the minimal documentation of the foreign entity's and the petitioner's ownership raises the issue of whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). While the petitioner claims that the beneficiary owns both companies, no corroborating evidence has been submitted to support this contention. 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)). For this additional reason, the petition may not be approved.

In addition, the petitioner indicates that the beneficiary is the sole 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, and

particularly since the record contains evidence of the beneficiary's purchase of a single family home in Florida, 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.

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.