



U.S. Citizenship
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Services

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File: SRC 05 218 51771 Office: TEXAS SERVICE CENTER Date: APR 05 2007

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:

SELF-REPRESENTED

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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 petitioner is a Florida corporation that claims to be engaged in the import and export of shoes and general merchandise to Venezuela and other countries. The petitioner states that it is a subsidiary of [REDACTED] located in Venezuela. The petitioner seeks to open a new office in the United States and has requested that the beneficiary be granted a three-year period in L-1A classification to serve as its general manager.¹

The director denied the petition concluding that the petitioner did not establish: (1) that the United States company has secured sufficient physical premises to house the new office; or (2) that the foreign entity had provided funding or capitalization for the U.S. company. The director also noted that the petitioner had failed to provide requested evidence regarding the educational qualifications of the foreign company's employees and denied the petition on this additional basis.

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, the petitioner asserts that the U.S. company did have a valid lease agreement as of the date of filing, but later moved and only submitted its second lease agreement in response to the request for evidence. With respect to the funding of the U.S. company, the petitioner asserts that it was not possible for the foreign entity to send direct wire transfers from Venezuela, but emphasizes that it explained that monies in the petitioner's checking account did in fact originate with the foreign entity. Finally, the petitioner asserts that copies of educational credentials for the foreign entity's employees have been requested but are not immediately available. The petitioner submits a letter and additional documentary evidence in support of the appeal.

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.

¹ Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (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 regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that 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 involves 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 (l)(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 first issue addressed by the director is whether the petitioner had secured sufficient physical premises to house the new office as of the date the petition was filed.

The nonimmigrant petition was filed on August 4, 2005. The petitioner stated on Form I-129 that the beneficiary would work at the following address: [REDACTED] The petitioner did not submit evidence that the U.S. company had leased or purchased property located at this address, although the petitioner did indicate that a commercial lease agreement was enclosed with its initial petition filing. The petitioner indicated in a cover letter that the U.S. company would operate as a purchasing center for items to be exported to Venezuela.

On November 21, 2005, the director issued a request for additional evidence, in part requesting that the petitioner submit a copy of its lease and square footage layout of the premises for the principal place of business.

In a response received on February 15, 2006, the petitioner submitted a copy of a lease agreement, dated November 1, 2005, between Revelation Marketplace as lessor and the beneficiary [REDACTED] as lessee. According to the terms of the agreement, the petitioner is "granted the right and privilege only for the purpose of selling: Jewelry." The lease agreement does not provide an address for the premises. Although the petitioner attached a copy of a floor plan identifying the leased space as a 60 foot by 30 foot area, the lease agreement refers to the "Lessee's booth(s)" and references the "flea marketplace."

The director denied the petition on May 26, 2006, concluding that the petitioner had failed to establish that it had secured physical premises sufficient to house the new office as of the date the petition was filed. The director observed that the submitted lease agreement was signed on November 1, 2005, almost three months subsequent to the filing of the petition.

On appeal, the petitioner asserts that it is re-submitting a copy of its "first lease, which was actually a month to month contract at al local flea market, where they first rented when the mall they moved to in November was under construction." In support of this assertion, the petitioner submits a statement from "Bargaintown Flea Market (Redlands Marketplace)," located at 24400 S. Dixie Highway, Leisure City, Florida, dated August 1, 2005, which indicates: "This is to certify that the above mentioned has a month to month contract for the rental of a kiosk at the indoor area of this market." The document indicates the petitioner as tenant and indicates that the type of business is "retail sports articles."

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that it has secured sufficient physical premises to house its new office as of the date the petition was filed. The AAO acknowledges the petitioner's submission of its original month-to-month contract for a flea market kiosk, which was apparently in place prior to the filing of the instant petition. However, given the petitioner's assertion that it intends to operate primarily as a purchasing and export operation with up to nine employees, a kiosk in a flea market has not been shown to be suitable physical premises for the intended business. The document submitted on appeal is not a lease agreement and does not indicate the size of the premises, nor has the petitioner submitted evidence that it paid rent in accordance with the terms of the month-to-month contract prior to signing its current lease agreement in November 2005. Given the petitioner's failure to submit evidence relating to the initial premises prior to the director's decision, the AAO finds the provided certification from the landlord insufficient to establish the petitioner's eligibility at the time of filing. 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)).

Furthermore, the AAO notes that the address of the flea market at which the petitioner claims to have rented a kiosk does not match the address identified as the beneficiary's intended worksite on Form I-129. 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). The petitioner has not submitted evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

The second issue addressed by the director is whether the U.S. company had received an investment from the foreign entity at the time the petition was filed. When filing a petition for a beneficiary who is to be employed in a new office in a managerial or executive capacity, the petitioner is required to submit evidence to establish the size of the United States investment and the financial ability to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(v)(C)(2).

The petitioner stated on Form I-129 that it is a majority-owned subsidiary of [REDACTED] C.A., a Venezuelan company. In support of the petition, the petitioner submitted a Union Planters Bank deposit receipt in the amount of \$4,605.00, dated April 20, 2005, which is identified as a "DDA Business Deposit." The deposit receipt does not indicate the name of the account holder, but was submitted as evidence of the U.S. company's bank account. The petitioner did not submit a business plan or other evidence related to the size of the investment in the U.S. company, or its anticipated start up costs.

In a request for evidence dated November 21, 2005, the director instructed the petitioner to submit evidence of the funding or capitalization of the U.S. company, including copies of wire transfers showing transfer of funds from the foreign organization and evidence of financial resources committed by the foreign company, as well as copies of bank statements for the U.S. company's business checking and savings accounts.

In its response, the petitioner submitted the U.S. company's December 2005 Washington Mutual Bank, FA bank statements, which shows four customer deposits totaling \$13,419.00, and a month-end balance of \$10,351.57. The petitioner also submitted a Western Union money transfer receipt indicating that the foreign entity wired \$7,000.00 to the beneficiary on December 1, 2005.

The director denied the petition on May 26, 2006, concluding that the petitioner failed to establish that the U.S. company has been funded by the foreign entity and has the financial ability to commence doing business in the United States. The director acknowledged receipt of the petitioner's December 2005 bank statement, but noted that the transactions were made in the form of "customer deposits," with no evidence that the funds originated with the foreign entity. The director noted that the wire transfer receipt submitted was received by the beneficiary and is thus considered "personal funds." The director further noted that the submitted evidence was dated December 2005, which was subsequent to the date the petition was filed.

On appeal, the petitioner states:

When the additional evidence was presented, we demonstrated the deposits that had been made, and clearly explained that these funds had been deposited by the foreign company, since their [sic] is no way the foreign company can send any direct wire transfers from Venezuela.

In support of the appeal, the petitioner submits a letter from the foreign entity, dated June 12, 2006, which further explains the funding of the U.S. entity as follows:

The President of the Republic of Venezuela Commander [REDACTED] has implemented a currency control bill that does not allow direct wire transfers from banks in Venezuela to the United States, therefore forcing international investors to use other means to deposit money into the USA accounts.

The main office in Venezuela has sent for purposes of developing a new company a total of approximately \$50,000 and this money has been used in this past year gradually to develop the operations which is now starting to take place.

The petitioner submits copies of the company's Washington Mutual bank statements for the months of January 2006 through May 2006, and a letter from the bank confirming that the petitioner opened a checking account at the bank on September 26, 2005, which had a balance of \$14,073.84 as of April 5, 2006.

Upon review, the petitioner's assertions are not persuasive. Preliminarily, the AAO notes that the record contains no evidence detailing the anticipated start-up costs for the petitioning company. Although the petitioner submitted a brief business plan, it does not outline the petitioner's proposed budget or otherwise indicate what size investment would be required to achieve its objectives for the first year of operations. Without additional evidence, the AAO cannot determine the investment required to allow the petitioner to commence doing business operations in the United States and move forward with its plan to expand to the point where it would realistically support an executive or managerial position within one year. 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. at 165.

Although the petitioner has explained that Venezuelan currency control laws prohibited the direct transfer of monies from the foreign entity's bank to the U.S. entity, the petitioner has still failed to document how the claimed funds were transferred to the United States. If the claimed investment ultimately originated with the foreign entity, it is reasonable to expect copies of the foreign entities bank statements showing deductions related to its investments in the U.S. entity, a more specific explanation regarding how the money was transferred, and documentation of specific deposits of funds into the petitioner's account that originated with the foreign entity. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Finally, all of the evidence submitted in response to the director's request for evidence and on appeal relates to the funding of the United States entity after December 2005. As noted by the director, the record contains no evidence that any investment had been made in the United States entity as of August 2005 when the petition was filed. 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). Based on the foregoing discussion, the appeal will be dismissed.

The third ground for denial stated by the director was related to the petitioner's failure to submit evidence of the educational credentials held by the beneficiary's subordinates within the foreign entity. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Upon review, the AAO finds sufficient evidence to establish that the beneficiary was employed by the entity in a qualifying managerial or executive capacity, and as such, documentary evidence regarding the

educational credentials of the beneficiary's subordinates was not material to rendering a decision on this issue. If it is claimed that the beneficiary was employed in a managerial capacity based on his supervision of lower-level personnel, the petitioner must establish that the subordinate employees were supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner never claimed that the beneficiary managed professional employees, but rather indicated that his subordinates were supervisors or managers. Accordingly, the director's decision with respect to this issue will be withdrawn.

Beyond the decision of the director, the record is not persuasive in establishing that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner intends to hire the beneficiary as its general manager. The petitioner stated in its supporting letter that the U.S. company will serve as a purchasing center for export of shoes and other products to Venezuela, and noted that the beneficiary would be responsible for "developing operational strategies," "finding and meeting merchants willing to work with the company," "meeting with bank and financial institutions to obtain credit lines," "set up guidelines to be followed by customer service specialists and department managers," and "continuing to develop [sic] new ideas and maintain the company standards." 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. The petitioner has failed to provide any detail or explanation of the beneficiary's proposed activities in the course of his daily routine. 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).

In her request for evidence dated November 21, 2005, the director instructed the petitioner to submit a proposed organizational chart for the United States business indicating the positions to be supervised by the beneficiary, as well as a business plan for the U.S. company demonstrating the functions the beneficiary will manage by the end of the first year of operations. In response, the petitioner submitted a proposed organizational chart indicating that the beneficiary would supervise a marketing and sales manager, three sales people, an administrative manager and an administrative assistant. The petitioner stated "the company is now hiring technical and nontechnical personnel in order to fill their organizational chart positions." The petitioner also submitted a business plan, which indicates that the company will purchase and export shoes, clothes and sports equipment. The business plan does not discuss the petitioner's proposed organizational structure or staffing levels.

Upon review, the petitioner has not provided a sufficiently detailed description of the duties to be performed in the United States, a clear timeline for the hiring of additional staff for the U.S. entity, or job descriptions for the proposed employees, and thus it cannot be determined that the beneficiary would be relieved from performing the day-to-day operational duties of the company within one year. 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. at 165.

The record also contains conflicting evidence regarding the type of business to be operated by the petitioning company. Notwithstanding the petitioner's claims that it will source, purchase and export shoes, clothes and sporting goods to Venezuela, the petitioner has submitted two lease agreements, one of which indicates that the company will operate a flea market kiosk selling sporting goods, and one of which indicates that the company will operate a flea market booth selling jewelry. In addition, one of the lease agreements indicates that the petitioner is doing business as [REDACTED]. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at

591-92. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. Because of this unresolved discrepancy regarding the type of business to be operated, the AAO cannot determine if the proposed organizational chart presents a credible depiction of the petitioner's hiring plans.

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.

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 organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

The petitioner's business plan is brief and vaguely written, with no information regarding the petitioner's financial objectives, market analysis, or proposed organizational structure. As a result, it is impossible to determine if the petitioner can realistically be expected to launch and staff its business within a one-year period. 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. at 165. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year. For this additional reason, the appeal will be dismissed.

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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.