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FILE: LIN 05 139 52786 Office: NEBRASKA SERVICE CENTER Date: **APR 05 2007**

IN RE: Petitioner:
Beneficiary:



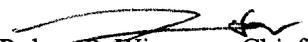
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Nebraska 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 extend the employment of its vice president of operations 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, a corporation organized in the State of Oregon, claims to be the subsidiary of Remix, Ltd., located in Khabarousk, Russia. The petitioner identifies itself as a website development company. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for an additional three 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.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that new evidence not previously available would show that the director's decision was erroneous. In support of this contention, counsel submits a brief and additional evidence.

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.

Pursuant to 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 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 (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 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 managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The issue in this matter is whether the beneficiary will 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 L Supplement to Form I-129, the petitioner briefly described the beneficiary's duties in the U.S. as follows:

Contact sales managers/executives of USA target companies to negotiate multimedia services directed at webpage development; hire and supervise talent to deliver contracted services

No additional information was provided with regard to the beneficiary's duties. The record further indicated that in addition to the beneficiary, the U.S. entity employed a president. No subordinate staff members were identified.

On May 10, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request asked the petitioner to submit a more detailed description of the beneficiary's duties specifically addressing the ability of the beneficiary to function in a managerial role. Evidence or an explanation regarding the ability of the beneficiary to hire, fire, and pay staff was requested. In addition, the director requested quarterly tax returns as evidence of the petitioner's employees and current staffing levels.

Counsel for the petitioner submitted a response dated July 29, 2005. Included in the response was a letter from the foreign entity dated July 27, 2005, which provided an updated overview of the beneficiary's duties. Specifically, it stated:

Our executive employee [the beneficiary] holds the position of Vice-President of [the petitioner]. Her managerial duties in the current position include:

- organization of the web and multimedia component development[;]
- conducting negotiations with the top-managers of the client companies;
- supervising and control of projects implementation;
- hiring [and] firing of the personnel for [the petitioner] to perform duties in the web and multimedia components of our business;
- conducting negotiations and securing strategic alliances with the companies in this market segment[.]

During her first year in her current position [the beneficiary] has played [an] integral role in creating our initial client network on both the East and West coasts of the States. [The beneficiary] was successful in establishing and organizing our growing presence on the East coast. After multiple trips she has been successful at making [the petitioner] truly national by establishing our presence in Tampa, Florida. [The beneficiary] has also conducted numerous strategic negotiations with potential partners in California and Washington. [The beneficiary] has been successful in negotiations with corporate clients leading to the consummation of numerous contracts of which approximately 25% have been successfully accomplished with the balance currently under development.

The petitioner also included copies of the beneficiary's travel itineraries for the previous year in addition to a client list. No additional discussion or evidence of the presence or hiring of other staff members was provided.

On December 12, 2005, 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 function at a senior level within the organization or that the beneficiary had sufficient subordinate staff to relieve her from performing non-qualifying duties. Finally, the director concluded that the petitioner had not yet reached the point where it could employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner provides extensive evidence pertaining to the petitioner's recent business dealings, and claims that based upon the petitioner's expansion in recent months, it should be evident that the beneficiary is employed as a manager in the United States. Counsel also included additional details not previously submitted with regard to the beneficiary's duties. The petitioner, however, was put on notice of this required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner provided only a brief clarification of the beneficiary's duties and now submits an expanded overview 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 Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In this matter, only a very brief statement regarding the beneficiary's role in the U.S. entity was provided on the L Supplement to Form I-129. In response to the director's request for additional evidence which demonstrated that the beneficiary was a manager and held a high level of authority within the petitioning entity, the petitioner provided another brief description, which was largely generalized and not very specific.

This updated description of duties indicated that the beneficiary was largely involved in conducting negotiations and securing strategic alliances. Additionally, the petitioner submitted evidence that the beneficiary traveled extensively to meet with clients to personally conduct such negotiations. Finally, her duties were said to include the organization of the web and multimedia component development. This statement essentially acknowledges that the beneficiary is primarily responsible for acquiring clients and setting up alliances and contracts, factors which are essential to the continued operation of the petitioner's business. These duties, however, do not fall directly under traditional managerial duties as defined in the statute.

In addition, the current organizational hierarchy raises questions with regard to the exact nature of the beneficiary's routine workday. For example, the petition indicates that the beneficiary is supported only by one other person, who has the title of president and co-owner of the petitioner. Although the beneficiary's duties included the duty of "hiring and firing personnel," no staff members have been hired since the new office petition was granted. As a result, therefore, it appears that the beneficiary is primarily responsible for promoting the company and expanding its sales and marketing contacts, duties which, though critical to the petitioner's success, are not traditionally managerial in nature. In addition, as the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what would be non-managerial, the AAO cannot determine whether the beneficiary would be 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). 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). This factor, coupled with the lack of subordinate staff members to relieve her from these and other non-qualifying duties, suggests that the beneficiary is not employed in a primarily managerial or executive capacity.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D).

At the time of filing, the petitioner was a one-year-old website development company that claimed to have a projected gross annual income of \$455,000 for the year 2005. The petitioner's income tax return, however, shows a gross annual income of only \$22,125 for 2004. The firm employed the beneficiary as vice president, plus a president. The AAO notes that both employees have executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. In fact, based on the petitioner's representations, it appears that the beneficiary was primarily responsible for all sales and marketing functions for the company. Consequently, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as vice-president and one other person employed as the company's president. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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 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 the instant matter, it is clear that at the time of filing, the beneficiary was responsible for all aspects of the business. As previously stated, 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. at 604. Moreover, 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 evidence presented, 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.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the U.S. entity and the claimed foreign employer pursuant to 8 C.F.R. 214.2(l)(1)(ii)(G). The petition includes evidence in the form of a Shareholder's Agreement and its accompanying Exhibit A that the U.S. petitioner is owned as follows:

Remix, Ltd.	52%
Beneficiary	24%
Serge Kuptsov	24%

Other documentation contained in the record, however, raises questions with regard to the validity of this claim. First, none of the share certificates included in the record are issued to Remix, Ltd., the claimed foreign parent and majority owner of the petitioner. Instead, a certificate for 52 shares is issued to an individual named [REDACTED]; who appears to be the president of the foreign entity. The issuance of 52

shares to this individual directly contradicts the claim in the shareholders agreement that Remix, Ltd., a legal entity separate and apart from its shareholders, is the majority owner of the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). More importantly, however, the petitioner's income tax return for 2004 was filed using a Form 1120S, U.S. Income Tax Return for an S Corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. See Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity.

A further review of the tax return indicates on Schedule K-1 that contrary to the shareholder's agreement and share certificates contained in the record, the petitioner is owned equally by the beneficiary and Serge Kuptsov. Under section H of these forms, both the beneficiary and [REDACTED] indicate that they own 50% of the petitioner. This conflicting information has not been resolved. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). 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).

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.