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File: EAC 04 151 52333 Office: VERMONT SERVICE CENTER Date: FEB 01 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)

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of general manager to be employed at its new office 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 petitioner, a corporation organized under the laws of the State of New Jersey, claims to be a liquor retailer and wholesaler, and alleges that it is the affiliate of the Trade House of Kalmykia, a Russian limited liability company.

The director denied the petition concluding that the petitioner failed to establish that (1) 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; or (2) the beneficiary will be employed in the United States in an executive or managerial position.

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, counsel to the petitioner asserts that the record establishes that the beneficiary will be employed in an executive or managerial capacity and that the petitioner's failure to provide copies of its 2004 tax returns was excusable as a new business.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states 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, 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 first issue in this proceeding is whether the beneficiary had been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

Title 8 C.F.R. § 214.2(l)(3)(v)(B) requires that the petitioner prove 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."

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.

The petitioner does not clarify whether the beneficiary is claiming to have been primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to have been employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In a letter dated April 19, 2004 appended to the initial I-129 petition, the petitioner describes the beneficiary's duties with the foreign employer. The petitioner asserts that the beneficiary managed ten employees, including two subordinate supervisors, as the chief of the commercial contracting department. The petitioner further described the beneficiary's duties as follows:

- Overseeing the activities and functioning of the company in the areas of operating, planning, sales, research and development to effect operational efficiency and economy;
- Coordinating and directing quality control to ensure continuous sales of product consistent with the established industry standards; determining tendencies of the manufacturing and marketing; hiring and training of new personnel;
- Negotiating contracts and directing expansion of operations having total discretion over expansion sites and the projected rate of expansion [citation omitted].

The petitioner did not provide any information regarding the duties or educational levels of the alleged subordinate employees.

On June 22, 2004, the director requested additional evidence. Specifically, the director requested evidence that the beneficiary was employed in a managerial or executive capacity abroad.

In response, the petitioner provided a letter (with translation dated September 15, 2004) from the foreign entity confirming that the beneficiary has been employed since December 17, 1997 as the manager of the commercial contracting department. The letter further described the beneficiary's duties abroad as follows:

1. Carry out the management of financial and economical activities of the company;
2. Prepare prospective and current plans of product distribution;
3. Ensure quality, organization and distribution of products;
4. Take the necessary actions to enter into financial agreements with suppliers and distributors in a timely manner;
5. Expand the direct and indirect contracts with distributors;
6. Ensure the fulfillment of obligations prescribed in a contract, such as:
 - quantity;
 - nomenclature;
 - variety;
 - quality;
 - time frames.
7. Participate on behalf of the company in trading, expositions, markets, advertising and selling the product;
8. Organize the timely preparation of financial and other documents and calculations;
9. Study the market conjecture;
10. Represent the interests of the company on the issues pertaining to production activities of the company.

Again, the petitioner did not provide any further details regarding the beneficiary's subordinate employees and did not provide an organizational chart for the foreign entity.

On October 15, 2004, the director denied the petition concluding that the record did not establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

On appeal, the petitioner does not specifically address this determination, although counsel to the petitioner does state in the Form I-290B that the petitioner has provided a full explanation of the beneficiary's duties thus establishing employment in a managerial or executive capacity.

Upon review, petitioner's assertions are not persuasive.

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(1)(3). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary has been primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entailed executive responsibilities, while other duties were managerial. A beneficiary may not claim to have been employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner has failed to prove that the beneficiary has been acting in a "managerial" capacity. In support of its application, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary has been doing on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include planning product distribution, overseeing the management of certain aspects of the business, and coordinating and directing quality control; however, the petitioner did not explain how, or by whom, any of these duties were carried out. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner also failed to prove that the beneficiary supervised and controlled the work of other supervisory, professional, or managerial employees, or managed an essential function within the organization. As explained above, the petitioner failed to provide any information regarding the beneficiary's alleged ten subordinates, including the two subordinate supervisors. The petitioner also failed to provide an organizational chart for the foreign entity. Absent supporting evidence on the foreign entity's staff, it is impossible for Citizenship and Immigration Services (CIS) to determine whether the beneficiary had been supervising other supervisory, professional, or managerial employees. Given the information provided by the petitioner, the beneficiary would appear to be a first-line supervisor, the provider of actual services, or a combination of both. An employee who "primarily" performs the tasks necessary to produce a product or to

provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Since record fails to reveal the educational or skill level of the subordinate employees, it cannot be determined if they rise to the level of a professional employees.¹ Therefore, the record does not prove that the beneficiary has acted in a managerial capacity.²

Similarly, the petitioner has failed to prove that the beneficiary had been acting in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a

¹In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

²While the petitioner has not specifically argued that the beneficiary managed an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, *i.e.*, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would have been managerial functions and what proportion would have been non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would have been managerial, nor can it deduce whether the beneficiary had been 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).

beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* As indicated above, the petitioner has failed to establish that the beneficiary, who was allegedly managing employees who were apparently engaged in providing services to customers, has been acting primarily in an executive capacity.

Accordingly, the petitioner did not establish 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 as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and for this reason the petition may not be approved.

The second issue in this matter is whether the petitioner has established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

As explained above, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states 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, the petitioner shall submit evidence that:

- (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.

In the letter dated April 19, 2004 appended to the initial petition, the petitioner states that it will be engaged in the wholesale, retail, import, and export of liquor and soft drinks, and describes the beneficiary as its prospective general manager. In support of the petition, the petitioner provided copies of its organizational documents and a "business profile" of the petitioner's business operations.

On June 22, 2004, the director requested additional evidence describing "in detail the type of business that is to be conducted by the United States entity." The director also requested tax documentation, bank statements,

information regarding potential customers, and evidence establishing that the beneficiary will be employed in an executive or managerial capacity in the United States.

In response, the petitioner provided an organizational chart for the petitioner showing the beneficiary reporting to the two stockholders of the corporation but managing all other employees including sales staff, clerical employees, and a driver. However, the petitioner did not indicate whether any of these subordinate positions have been filled or, if not, when the petitioner intends on hiring additional staff. The petitioner also provided a more detailed description of the beneficiary's proposed duties, information regarding the acquisition of business assets, a lease assignment, and a variety of business documents, bills, and checks collectively indicating that the petitioner intends on operating a retail liquor establishment.

On October 15, 2004, the director denied the petition concluding that the beneficiary will not be employed in the United States in an executive or managerial position.

On appeal, the petitioner asserts in the Form I-290B that the petitioner had provided a full explanation of the beneficiary's duties thus establishing employment in a managerial or executive capacity. The petitioner also asserts that its failure to provide tax documentation was fully explained and is excusable as a new business.

Upon review, the petitioner's assertions are not persuasive.

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 therefor. Most importantly, the business plan must be credible.

Id.

The petitioner has failed to present evidence sufficient to prove that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. First, the petitioner has not explained the organizational structure of the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(3). Second, the petitioner's vague "business profile" does not describe the petitioner's proposed business in sufficient detail. While this document describes the petitioner as entering the liquor and soft drink market, the profile fails to explain anything about the business, i.e., its customers, market, products, or competitors. While predicting "multifold growth," the profile provides no basis for this prediction other than "experts and our analysis," which the petitioner fails to reveal. The record is devoid of any evidence establishing 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.

Accordingly, the petitioner has not established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and for this reason the petition may not be approved.³

Beyond the decision of the director, the petitioner did not establish that the petitioner and the organization which employed the alien overseas are qualifying organizations as required by 8 C.F.R. § 214(l)(3)(i).

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (*i.e.*, one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section

³It should be noted that the director's decision could be construed to have denied the petition in part on the basis that the beneficiary will not be employed in an executive or managerial capacity immediately upon approval of the "new office" petition. As explained above, the petitioner is not obligated to establish that the beneficiary will be primarily employed in an executive or managerial capacity; rather, the petitioner must establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. 8 C.F.R. § 214.2(l)(3)(v)(C). To the extent the director based her denial on the petitioner's failure to establish that the beneficiary will be employed primarily in an executive or managerial capacity immediately upon approval of the "new office" petition, that determination is hereby withdrawn. However, as explained above, to the extent the director determined that the petitioner failed to establish that the beneficiary will be employed in an executive or managerial capacity within one year, that determination was correct and the appeal will be dismissed.

101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. In the current case, the petitioner alleges that one individual, [REDACTED], owns a majority interest in, and controls, both the foreign employer and the petitioner. However, because the record reveals that [REDACTED] does not own a majority of the shares in the foreign employer, it cannot be concluded that he owns and controls this entity. Therefore, the two entities are not affiliates.

As explained in the record, [REDACTED] owns 65% of the petitioner and 31.7% of the foreign entity. While [REDACTED] may, out of the four stockholders, own the largest block of stock in the foreign entity, the record is devoid of any evidence that this ownership share permits him to control this entity. Likewise, the record does not establish that the same group of individuals owns both entities. The other stockholder in the petitioner, [REDACTED], does not own any shares in the foreign entity. Therefore, as the petitioner has not established that [REDACTED] owns and controls both entities, the petitioner has not established that the two entities are qualifying organizations as affiliates. Accordingly, the petitioner may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.