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File: WAC 05 158 54989

Office:



Date: MAR 06 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:

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of freight forwarding junior executive to open a 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 business entity formed under the laws of Sri Lanka, claims to be engaged in the business of freight forwarding, and alleges that it has a qualifying relationship with a branch office registered to do business in the State of California.

The director denied the petition concluding that the petitioner failed to establish that sufficient physical premises have been secured to house the new office. The director also denied the petition because the petitioner failed to file the petition with the required initial evidence. The director did not request additional evidence from the petitioner pursuant to 8 C.F.R. § 103.2(b)(8).

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 submits additional evidence including a copy of a commercial lease.

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.

While not directly addressed by the petitioner or the director, a threshold issue in this matter is whether the record indicates that the petitioner qualifies as a "new office" under the regulations. Whether a petitioner will be, or will not be, treated as a "new office" for purposes of 8 C.F.R. § 214.2(l)(3)(v) depends on whether the petitioner meets, or does not meet, the definition of a "new office" contained in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as:

[A]n organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

Moreover, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines a "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying

organization in the United States and abroad.

In this matter, the petitioner claims to have been doing business in Sri Lanka since 1992. The record also indicates that the petitioner registered to do business in the State of California on January 29, 2001. The current petition was filed on May 31, 2005. Although it appears as if the petitioner had an organizational presence in the United States for four years preceding the filing of the instant petition, there is no evidence in the record that the petitioner had been doing business in a regular, systematic, and continuous fashion in the United States during that time. The petitioner attached no invoices evidencing business activity. Likewise, the petitioner did not attach any tax returns or employment records. Therefore, the "new office" regulations correctly apply to this petition.

In view of the above, the first issue in this matter is whether the petitioner has established that it has secured sufficient physical premises to house the new office in the United States.

In the initial petition, the petitioner failed to provide any evidence that it secured sufficient physical premises to house the new office. Without requesting additional evidence, the director denied the petition. On appeal, the petitioner provided a copy of a commercial lease dated January 3, 2005.¹

While this lease provides an address for the leased space, the lease does not indicate the square footage of the space or the permitted uses of the space. Moreover, the petitioner has failed to provide any details regarding its proposed business in the United States. The petitioner does not indicate whether employees will be employed at the leased premises, whether customers will visit the premises, or whether items will be stored at this location.

Title 8 C.F.R. § 214.2(l)(3)(v)(A) requires the petitioner to demonstrate in its petition that it has secured "sufficient" physical premises to house the new office. In this case, the petitioner has provided a lease which does not describe the size of the leased area or the permitted uses of the leased space. Moreover, the petitioner has failed to provide any details regarding its proposed use of this leased space. Therefore, it cannot be determined whether the premises will be "sufficient" for the new office. 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)). In view of these deficiencies in the record, the petitioner has not established that it has secured sufficient physical premises to house the new office, and for this reason the petition may not be approved.

¹Although not addressed by the petitioner, the director apparently violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence regarding the securing of sufficient physical premises before denying the petition. However, even if the director had committed a procedural error by failing to solicit further evidence of sufficient physical premises, it is not clear in this matter what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

The second issue in the present matter is whether the director appropriately denied the petition due to the petitioner's "failure to file without the required initial evidence" without first requesting further evidence pursuant to 8 C.F.R. § 103.2(b)(8). Upon review, the AAO concludes that the director erred, and this basis for denying the petition is hereby withdrawn.

Title 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. For example, if an L-1A petition includes evidence that the beneficiary had been employed abroad for only two months prior to the filing the petition even though 8 C.F.R. § 214.2(l)(3)(iii) requires one year of prior employment, the director may deny the petition without requesting further evidence. However, in this matter, the director did not specifically identify any evidence of ineligibility in the record. The director only determined that the petition failed to "submit any of the initial evidence requested by the I-129 filing instructions." Therefore, the director was required by 8 C.F.R. § 103.2(b)(8) to request additional evidence before denying the petition.

It is noted that the director determined that the petition contained discrepancies in the record which have not been satisfactorily explained. While such discrepancies may properly lead to a determination that the record contains evidence of ineligibility, thus obviating the need to request further evidence pursuant to 8 C.F.R. § 103.2(b)(8), the director did not specifically identify these discrepancies. When a petition is denied, the director shall "explain in writing the specific reasons for the denial." 8 C.F.R. § 103.3(a)(1)(i). Without specifically identifying those discrepancies supporting a finding of ineligibility, the director improperly denied the petition without first requesting further evidence pursuant to 8 C.F.R. § 103.2(b)(8).

Finally, the director's reliance on 8 C.F.R. § 103.2(a)(1) in denying the petition without requesting further evidence is misplaced. Although the director properly indicated that this section requires the petitioner to follow instructions on the Form I-129 and to submit the proper documentation, this regulation must be read in conjunction with 8 C.F.R. § 103.2(b)(8). As explained above, this regulation clearly obligates the director to request further evidence unless he finds evidence of ineligibility in the petition. As this was not done, the director was required to request further evidence.

Accordingly, the AAO withdraws the decision of the director as it pertains to the denial of the petition for failure to file the petition without the required initial evidence.

Beyond the decision of the director, and after reviewing the record as supplemented by the petitioner on appeal, a related matter is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

As explained above, as this petition pertains to a "new office," the petitioner must 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.

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.

In this matter, the petitioner has not established that the intended United States operation, within one year of the approval of the petition, will support a managerial or executive position. The petitioner has failed to provide any evidence relating to its proposed United States operation other than (1) evidence of registration with the State of California; (2) the opening of a bank account in the United States; (3) a proposed organizational chart and employee roster identifying between five and seven proposed employees; and (4) a one-page statement indicating its intent to expand into the United States market. The petitioner has failed to provide any coherent description of the nature of the office, the scope of the entity, or its financial goals. Moreover, the petition has failed to specifically describe the proposed duties of the beneficiary after the first year in operation or to establish that the beneficiary, assuming the proposed employees shown on the organizational chart are hired, will be employed primarily as a manager or executive. Overall, the petitioner did not explain what, exactly, its business operation will do in the United States, and thus failed to demonstrate that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations. 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 intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, and the petition may not be approved for this additional reason.

Beyond the decision of the director, and after reviewing the record as supplemented by the petitioner on appeal, a related matter is whether the petitioner has established that it has a qualifying relationship with the branch office registered to do business in the State of California as required by 8 C.F.R. § 214(I)(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 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(I). Moreover, the petition must establish that the foreign entity is "doing business" as defined in 8 C.F.R. § 214.2(I)(1)(ii)(H). In the current case, the petitioner alleges that it has registered to do business in the United States and that this branch office is owned and controlled by the petitioner.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also* *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In support of its petition, the petitioner has supplied a variety of organizational documents pertaining to both the petitioner and the branch office registered to do business in the United States. However, these documents are so rife with inconsistencies that it is impossible to discern the exact relationship between the foreign entity

and the United States branch office. First, the petitioner has supplied evidence that it registered with the State of California in 2001 as a foreign limited liability company. This evidence includes a list of three members. However, elsewhere in the petition, the petitioner identifies two different individuals as each owning 50% of both the United States entity and the petitioner. Second, the petitioner supplied a Memorandum of Association for the Sri Lankan business entity listing four shareholders. None of the four shareholders is listed as one of the three members of the limited liability company as shown in the California organizational filings or as one of the members identified in a separate memorandum. The petitioner does not explain any of these inconsistencies. 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). 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. *Id.* at 591.

Moreover, the petitioner has not established that it is "doing business" as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). Other than evidence of the petitioner's formation under the laws of Sri Lanka, the petitioner provided 15 bills of lading from 2002 and 2003 and a few letters of reference as evidence of its regular, systematic, or continuous business operations. As the current petition was filed in 2005, this evidence does not establish that the petitioner is currently doing business abroad.

Accordingly, the petitioner has not established that it has a qualifying relationship with the United States branch office, and for this additional reason the petition may not be approved.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary had been employed in a primarily managerial or executive capacity overseas for one year within the preceding three years.

8 C.F.R. § 214.2(l)(3)(v)(B) requires that the petitioner 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 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 the initial I-129 petition and on appeal, the petitioner provided virtually no information regarding the beneficiary's duties with the foreign employer. While the petitioner did provide an organizational chart and alleges that the beneficiary engages in "overall supervision being the junior executive" of the business operation, the petitioner did not provide a coherent list of job duties for the beneficiary. 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). Since the AAO will look first to the petitioner's description of the job duties when examining the executive or managerial capacity of the beneficiary, it is essential that the petitioner provide very specific information regarding the beneficiary's duties abroad. *See generally* 8 C.F.R. § 214.2(l)(3)(v). Therefore, given the lack of evidence, it is impossible for Citizenship and Immigration Services (CIS) to determine whether the beneficiary had been employed in an executive or managerial capacity overseas.

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.

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.