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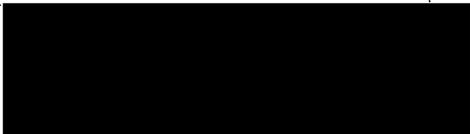
MAR 07 2007

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, 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 seeks to temporarily employ the beneficiary as its president/operations manager in the United States as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The U.S. petitioner, a corporation organized in the State of Illinois, is engaged in retail services and claims to be the affiliate of [REDACTED] located in [REDACTED]. The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity at the end of the petitioner's first year of operations.

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 for the petitioner asserts that the director erred in her decision in terms of her application of the law, and contends that the petitioner in fact submitted a comprehensive business plan outlining the proposed structure and employee positions for the U.S. entity. Counsel further asserts that the director did not take into consideration the overwhelming evidence provided in the record. In support of these assertions, 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.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity; including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.
- (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:
 - (A) Sufficient physical premises to house the new office have been secured;
 - (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
 - (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (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.

This matter presents two related, but distinct, issues: (1) whether the U.S. entity will be able to support a managerial or executive position within one year after the petition's approval; and (2) 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.

With the initial petition, the petitioner provided a letter of support dated March 14, 2005 which was prepared by the beneficiary in his capacity as president of the entity. The letter provided a general overview of the beneficiary's proposed duties in the United States as well as a general discussion of the potential growth of the U.S. entity through its acquisition of retail outlets. Specifically, the petitioner stated:

[The petitioner] requires the services of [the beneficiary] in the executive position as a President on a temporary basis in the United States. He will be responsible for overseeing regional market expansion, direct management, organize and control organization's major operations through other employees. The details of these duties are:

- ✓ Direct the management of [the petitioner] and establish organizational goals and policies;
- ✓ Plan develop and organize general company strategies and exercise discretion over day-to-day operations of the activity and functions of [the petitioner];

- ✓ Maintain client relationship by overseeing quality control and fulfillment of client needs;
- ✓ Develop new client relationship and expand business opportunities by overseeing the provision of the market performed by [the petitioner];
- ✓ Assess the needs of clients and develop market research strategies that best meet clients' needs;
- ✓ Oversee project pricing and budget management[.]

The petitioner concluded by stating that the beneficiary's "temporary expertise is required in the initial stages of planning, organizing and directing the company."

With regard to the petitioner's business, documentation was submitted which established that the beneficiary, as an individual and not on behalf of the U.S. petitioner, purchased a convenience store called Home Décor. Additionally, two franchise agreements between the beneficiary and Tobmar Investments International, Inc. were submitted, which indicated that the beneficiary would operate two specialty newsstand outlets known as Gateway Newsstands. Finally, it is noted for the record that on the L supplement to the Form I-129, the petitioner indicated that it currently employed only one person, the beneficiary.¹

On April 5, 2005, the director requested additional evidence with regard to the overall business plan of the petitioner, its primary purpose, and its current financial status. In addition, additional details regarding the beneficiary's managerial and/or executive capacity were requested. In a response dated June 27, 2005, the petitioner, through counsel, submitted a letter accompanied by a business plan which addressed the petitioner's intended growth in a generalized manner. No additional details with regard to the managerial and/or executive nature of the beneficiary's proposed position were submitted.

On July 7, 2005 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States and that the petitioner had failed to show that the petitioner would grow to the point where it could support a primarily managerial or executive position within the first year of operations. Specifically, the director concluded that the record contained no evidence that the petitioner and the foreign entity were involved in the acquisition of the retail outlets acquired by the beneficiary. Noting that the purchase of the Home Décor location and the monies tendered pursuant to the franchise agreement were funds borrowed by the beneficiary, not financed by the foreign entity, the director concluded that a significant investment by the foreign entity was not present.

¹ The record as a whole indicates that there are no other employees on staff at the petitioner's office other than the beneficiary. Specifically, the business plan submitted in response to the request for evidence is dictated by the beneficiary himself in the first person. Furthermore, all alleged agreements for the acquisition of retail stores through purchase or franchise agreement are executed by the beneficiary. Finally, the record indicates, in the business plan, that the petitioner intends to eventually hire U.S. based employees once the instant petition is approved.

Additionally, the director noted that despite the submission of a business plan in response to the request for evidence, the petitioner had failed to sufficiently articulate the exact nature of the petitioner's business plan. In particular, the director noted that although the plan discussed the hiring of staff, there was no specific discussion of what positions would be filled and of what their duties would consist, thereby precluding a finding that the beneficiary would be relieved from performing non-qualifying duties within one year. Finally, the director noted that the insufficient documentation pertaining to the organizational structure of the foreign entity made it impossible to conclude that the U.S. petitioner would be able to support the beneficiary in a primarily managerial or executive capacity within one year.

On appeal, counsel for the petitioner alleges that the director's decision ignored the facts of record and contends that the purpose of the U.S. operation as well as the duties of the beneficiary were clearly defined by the evidence submitted prior to adjudication. In the appeal brief, however, counsel restates portions of the previously submitted description of duties and resubmits the documentation submitted prior to adjudication, and relies upon his brief statements and this resubmitted documentation for satisfying the burden of proof in these proceedings.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the updated business plan, it appears that the petitioner has failed to establish that it will be able to support the beneficiary in a capacity that is primarily managerial or executive at the end of the first year of operations. In addition, the AAO notes that the description of duties was too vague to ascertain whether the beneficiary will be acting in a primarily managerial or executive capacity.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's staffing requirements and contain a timetable for hiring, as well as a job description for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

In this case, the business plan submitted by the petitioner was vague and lacked detail with regard to the petitioner's planned objectives and timeline for achieving its goals. Even if the business plan submitted on appeal was admissible, it is identical to the previously-submitted document, thereby providing no clarification with regard to this issue. The petitioner omits any discussion of market strategy and the relative strengths and weaknesses of the petitioner. Although it contends that it will hire employees, no specific timeline for hiring is provided, nor is there a detailed description of the position(s) to be created and what their duties would be. As a result, the petitioner has failed to submit a detailed and credible business plan.

Furthermore, although documentation was submitted to support the claim that the petitioner has acquired a convenience store and will operate two additional stores under a franchise agreement, all of these undertakings were executed by the beneficiary as an individual, and not by the petitioning entity. The lack of tangible evidence establishing that the petitioner, as a legal entity, is engaged in these undertakings prohibits a finding that a legitimate business plan is in place. This deficiency in the record, coupled with the vague job description of the beneficiary, indicates that the petitioner will not be able to support a managerial or executive position at the end of the first year of operations. While the beneficiary is the intended president of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment following the petitioner's first year of operations.

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). In this case, the petitioner vaguely described the beneficiary's duties in the March 14, 2005 letter. This description of duties did little to define the beneficiary's obligations to the company. Despite the director's specific request for additional information pertaining to the beneficiary's employment capacity in the United States, no additional evidence was submitted. 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). The discussion of the beneficiary's role in the United States consists merely of vague and generalized duties, and essentially attributes all tasks and functions essential to the petitioner's operations to the beneficiary alone. As discussed above, no definite hiring plan or timeline was submitted which would demonstrate when and how the beneficiary would be relieved from performing such non-qualifying duties. While the AAO recognizes the need for a managerial or executive employee to undertake non-managerial and/or non-executive duties in the wake of a new company's establishment, the petitioner has failed to show how, if at all, the beneficiary will eventually be relieved from performing these tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the description of the beneficiary's proposed duties is vague and not specific enough to clearly establish the beneficiary's role in the company. 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 answer a critical question in this case: What will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990). Additionally, the initial description of duties seems to merely paraphrase the regulatory definition of executive capacity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity, or that the petitioner will grow to the point where it will require the services of a full-time manager or executive at the end of its first year of operations. Specifically, there is no clear evidence of the size of the United States investment, since it appears that the acquired properties were acquired by the beneficiary as an individual and not in his capacity as an officer of the petitioner. Secondly, there is insufficient evidence of the foreign entity's organizational structure and its financial ability to remunerate the beneficiary. Although counsel submits additional invoices on appeal to supplement the nature of the foreign entity's business structure, these documents are simply insufficient to establish that the foreign entity is capable of supporting the U.S. endeavor and financing the beneficiary's salary. Finally, the proposed duties of the beneficiary, in light of the nature of the proposed business (i.e., operating three retail convenience/specialty stores with no additional employees or specific hiring plan), are questionable at best and thus preclude the AAO from determining that the beneficiary will be employed in the United States in a primarily managerial or executive capacity by the end of the petitioner's first year of operations. For this reason, the petition may not be approved.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner has submitted a copy of a sales contract, evidencing the acquisition of a retail convenience store, as well as two franchise agreements for the operation of two newsstands. All three of these documents, however, were executed by the beneficiary as an individual, and not the petitioner. No commercial lease for premises to house the petitioner's enterprise has been submitted. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. 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.