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File: SRC 05 800 30431 Office: TEXAS SERVICE CENTER Date: **MAY 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, Texas 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 to open a new office in the United States as a manager or executive 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 Texas, claims to be engaged in the business of automotive repair and alleges that it has a qualifying relationship with [REDACTED] of Sweden.

The director denied the petition concluding that the petitioner failed to demonstrate that (1) the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position; (2) sufficient premises have been secured to house the new office; (3) the beneficiary had been employed abroad in a managerial or executive capacity; or (4) the petitioner has a qualifying relationship with the foreign entity.

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 asserts that the petitioner adequately established that it has a qualifying relationship with the foreign entity and that the director inappropriately denied the petition "in large part due to a typo." In support of the appeal, counsel submitted a letter 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.

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 intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. Specifically, at issue is whether the petitioner has established that an investment has been made in the United States entity and that the foreign entity has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

In the initial petition, the petitioner provided evidence that a \$60,000.00 deposit was made into the petitioner's bank account on June 16, 2005. The source of this deposit was not identified. The petitioner provided no information regarding current assets or cash flow of the foreign entity.

On July 18, 2005, the director requested additional evidence regarding the capitalization of the petitioner and the financial resources committed by the foreign entity.

In response, the petitioner provided bank statements for a different account having an ending balance of \$2,237.21.

On August 2, 2005, the director denied the petition. The director determined that the petitioner failed to demonstrate that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position because the petitioner failed to establish that an investment had been made in the United States operation or that the foreign entity has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

On appeal, counsel to the petitioner does not directly address this determination. However, counsel does submit additional evidence regarding the capitalization of the United States entity.

Upon review, the AAO concurs with the director's decision and will dismiss the appeal.

As a threshold matter, it must be noted that the wire transfer materials and other evidence submitted on appeal by the petitioner to establish that the foreign entity has made an investment in the United States operation will not be considered by the AAO in adjudicating this appeal. The petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now attempts to supplement this response 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 Obaighena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In reviewing the record of proceeding, the petitioner has not established that an investment had been made in the United States entity or that the foreign entity has the financial ability to remunerate the beneficiary and to commence doing business in the United States. First, the record is devoid of any evidence regarding the assets or cash flow of the foreign entity. Therefore, there is no evidence that the foreign entity can remunerate the beneficiary or commence doing business in the United States. Second, although the petitioner provided evidence that \$60,000.00 was deposited into its bank account in June 2005, all of this money was moved out of this account shortly thereafter. The record does not establish the origin or this money or how it was used. Without more information regarding the source and use of these funds, it cannot be concluded that this single deposit constitutes an "investment" in the United States entity. 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)).

Accordingly, the petitioner has failed to demonstrate 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 reason.¹

¹Beyond the decision of the director, the petitioner has also failed to define the scope of the United States entity, its organizational structure, and its financial goals. While the petitioner provided an organizational chart, this chart only lists the beneficiary as the president and identifies a "manager" and four mechanics. As the chart

The second issue in this matter is whether the petitioner has established that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

In the initial petition, the petitioner provided a sublease between [REDACTED] and the petitioner for office space located on the second floor of [REDACTED] Houston, Texas. The original lease between [REDACTED] and the landlord was not produced even though specifically requested by the director. In response to the Request for Evidence, the petitioner provided a letter dated July 25, 2005 in which the petitioner states that the beneficiary "made arrangements to use the garage facilities located at [REDACTED] Houston, Texas." The petitioner also indicated that the petitioner's current employees are working at that location.

On August 2, 2005, the director denied the petition. The director determined that, because the petitioner failed to provide a copy of a lease, the petitioner had not established that sufficient premises to house the new office had been secured prior to filing the petition.

On appeal, counsel to the petitioner fails to address this issue.

provides no substantive information regarding the organization of the United States entity other than revealing its prospective employment of six people, the petitioner has not carried its burden in establishing the organizational structure of the United States operation. Likewise, while the petitioner provided a "business plan," this two-page document contains uncorroborated statements and predictions regarding "projected gross income" and the petitioner's intent to "expand" into the United States market. 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. As the petitioner's business plan fails to substantively describe its proposed business, the petitioner has failed to define the scope of the United States entity or its financial goals. Therefore, the petition may not be approved for this additional reason.

Upon review, the AAO concurs with the director's decision and will dismiss the appeal.

The petitioner has failed to establish that it has secured sufficient physical premises to house the new office for several reasons. First, as determined by the director, the petitioner failed to provide a copy of the original lease between the sublessor and the landlord. Without an opportunity to examine the terms of this lease, it cannot be determined whether the physical premises in question will be sufficient to house the new office. Second, given that the petitioner has described its business as "automotive repair and replacement shop," it is not credible that a second floor office will sufficiently house the new office, and the record is devoid of any evidence to the contrary. 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. Third, the record contains serious inconsistencies regarding the physical location of the United States operation which have not been properly explained by the petitioner. For example, while a sublease for [REDACTED] [REDACTED] Houston, Texas, was provided, the petitioner explained in its letter of July 25, 2005 that it has "made arrangements" to use a garage located at [REDACTED] Houston, Texas. This discrepancy was never explained by the petitioner. 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).

Accordingly, the petitioner failed to establish that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(l)(3)(v)(A), and the petition may not be approved for that reason.

The third issue in this matter is whether the petitioner has established that the beneficiary had been employed abroad in a managerial or executive capacity for one year as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

As explained by the director in her decision denying the petition on this basis, the petitioner failed to provide any evidence regarding the beneficiary's duties or position abroad other than an organizational chart. This chart lists the beneficiary as the "president" and identifies a manager/mechanic and a driver. Other than this document, the record is devoid of any evidence regarding the beneficiary's alleged managerial or executive position abroad. The record does not include a description of the beneficiary's job duties or those of his alleged subordinate employees. Moreover, the petitioner failed to provide this information even though the director specifically requested it in her Request for Evidence. As indicated by the director, 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).

On appeal, counsel to the petitioner failed to directly address this issue.

Upon review, the AAO concurs with the director's decision and will dismiss the appeal.

Title 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.

As explained above, the petitioner offered no evidence regarding the beneficiary's job duties abroad. While the petitioner provided an organizational chart for the foreign entity, this chart is devoid of any information regarding duties, skill levels, or educational backgrounds. 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, *aff'd*, 905 F.2d 41. 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 presented, 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.²

The fourth issue in this matter is whether the petitioner established that it 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," and are or will be "doing business" as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). *See generally* section 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. An entity is "doing business" if it is engaged in the "regular, systematic, and continuous provision of goods and/or services."

In the initial petition, the petitioner alleges that it is 65% owned by the beneficiary and that the foreign entity is 100% owned by the foreign entity. However, in response to the Request for Evidence, the petitioner provided stock certificates indicating that the foreign entity owns 75% of the petitioner and an unrelated party owns the remaining 25%. Also, even though the director specifically requested evidence regarding the ownership and control of the foreign entity, the petitioner failed to provide such evidence. The petitioner also failed to provide any evidence of the foreign entity's current business operations.

²It is noted that the director's decision alludes to the petitioner's failure to establish that the beneficiary will be employed in the United States primarily in an executive or managerial capacity. As the petitioner need not establish that the beneficiary will be immediately employed in a managerial or executive capacity in the United States in the context of a "new office" petition, the director's comments as they apply to the beneficiary's proposed duties in the United States will be withdrawn.

On August 2, 2005, the director denied the petition. The director determined that, due to the unexplained inconsistencies in the record and the petitioner's failure to establish that the foreign entity is doing business, the petitioner has not established that it has a qualifying relationship with the foreign entity.

On appeal, counsel to the petitioner asserts that the petitioner adequately established that it has a qualifying relationship with the foreign entity and that the director inappropriately denied the petition "in large part due to a typo."

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

In the current case, the petitioner alleges that the beneficiary owns a majority interest in, and controls, both the foreign employer and the petitioner. However, because the evidence submitted to substantiate this allegation is materially inconsistent with this allegation, and the petitioner fails to satisfactorily explain this inconsistency, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity. As explained above, the petitioner alleges that the *beneficiary* owns 65% of the petitioner even though the stock certificates indicate that the *foreign entity* owns 75% of the petitioner. This is more than "a typo." While the exact percentages of ownership may be immaterial in this case so long as they exceed 50%, the identities of the stockholders are crucial given the petitioner's failure to establish the ownership and control of the foreign entity. For example, even if the beneficiary owns and controls the petitioner (as specifically alleged by the petitioner), the petitioner has still failed to establish that it has a qualifying relationship with the foreign entity, because the ownership and control of the foreign entity has never been established. It is incumbent upon the petitioner to resolve such 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. Therefore, the petitioner has not established that it has a qualifying relationship with the foreign entity, and petition may not be approved for this reason.

Moreover, as explained above, the petitioner has not established that the foreign entity is "doing business" as defined in the regulations. While the petitioner provided evidence of past business activity in Sweden, the record is devoid of any evidence of current business activity. Therefore, as the petitioner failed to establish that the foreign entity is doing business, the petitioner has failed to establish that the foreign entity is a qualifying organization.

Accordingly, the petitioner did not establish that it and the organization which claimed to employ the alien overseas are qualifying organizations as required by 8 C.F.R. § 214(I)(3)(i), and the petition may not be approved for that 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.