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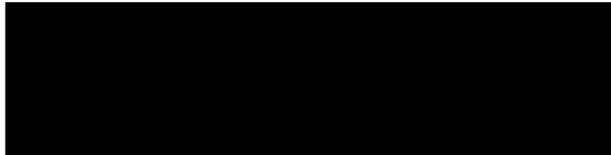


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File: SRC 05 237 52093 Office: TEXAS SERVICE CENTER Date:

**MAY 01 2007**

IN RE: Petitioner:  
Beneficiary:



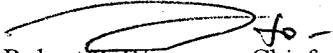
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 in the position of executive director 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 corporation organized under the laws of the State of Georgia, claims to be engaged in the business of real estate investment and rentals, and alleges that it is the affiliate of Vardhman Associates, a partnership formed under the laws of India.

The director denied the petition concluding that the petitioner failed to demonstrate (1) that a sufficient investment had been made in the United States operation such that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position; or (2) that the beneficiary has been employed abroad for one continuous year in the three year period preceding the filing of the petition.

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 (1) that the record establishes that the beneficiary has been employed abroad for at least one year preceding the filing of the petition even if the record contains immaterial discrepancies regarding the commencement date of his employment; and (2) that the petitioner need not establish that the foreign entity has actually transferred funds to the United States in order to establish that an investment has been made in the United States entity so long as the petitioner demonstrates that the foreign entity has the intent and ability to do so following the approval of the petition and the transfer of the beneficiary to the United States. In support of the appeal, counsel submitted a brief.

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 petitioner established that a sufficient investment was made in the United States operation.

As the petitioner provided no evidence of the size of the United States investment, the director requested that the petitioner submit evidence of the transfer of funds from the foreign entity to the United States entity. In response, the petitioner provided a letter from an Indian accountant dated October 1, 2005 indicating that the foreign entity had "earmarked" approximately \$100,000.00 for investment in the United States operation. The petitioner also provided a bank statement purporting to establish the availability of these funds. However, the

petitioner provided no evidence that this money or any other assets had been transferred to, or invested in, the United States entity.

On December 1, 2005, the director denied the petition concluding that the petitioner failed to establish that an investment had been made in the United States operation and, thus, failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

On appeal, counsel asserts that the petitioner need not establish that the foreign entity has actually transferred funds to the United States in order to establish that an investment has been made in the United States entity so long as the petitioner demonstrates that the foreign entity has the intent and ability to do so following the approval of the petition and the transfer of the beneficiary to the United States.

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.

The petitioner has failed to present evidence sufficient to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. The petitioner admits that an investment has not been made in the United States operation. The fact that the foreign entity may have the ability and intent to make an appropriate investment in the United States entity will not establish that the foreign entity is able to commence doing business in the United States or that an investment has been made in the enterprise. Therefore, absent evidence of an investment in the United States operation, the petitioner has failed to establish that the foreign entity can commence doing business in the United States upon approval of the petition. Therefore, the petition must be denied for this reason.

Beyond the decision of the director, the petitioner has also failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position by failing to credibly define the scope of the United States operation or to describe the organizational structure of the foreign entity. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(1) and (3).

In response to the director's Request for Evidence, the petitioner provided a "business plan" for the United States operation. 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 failed to provide a credible business plan which defines the scope of the United States entity. While the petitioner defines its financial goals and explains that it intends on entering the Atlanta real estate rental market, the plan is not corroborated by any objective evidence or analyses and its financial predictions appear to be based on pure speculation. Moreover, while the plan calls for over \$1 million in financing to supplement the initial investment, the plan is silent as to the source of this financing. Absent such key information, the petitioner has failed to credibly define the scope of the United States operation, and the petition may not be approved for this additional reason.

Also, as the petitioner has provided no explanation of the organizational structure of the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(3), 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. While the petitioner did provide a letter dated August 2, 2005 explaining that the beneficiary and one other individual operate the foreign entity as a partnership, and that the partnership employs between eight and twelve people, the petitioner failed to provide any organizational information regarding the management, structure, or job duties of the partners or the subordinate employees. For this additional reason, the petition may not be approved.

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).

The second issue in this matter is whether the beneficiary had been employed abroad for one continuous year in the three year period preceding the filing of the petition.

In the Form I-129, the petitioner asserts that the beneficiary has been employed with the foreign entity since April 1, 2002. However, in the letter dated August 2, 2005, the foreign entity asserts that the beneficiary "has

been directing and overseeing the affairs of [the foreign entity] since 1992." The petitioner also provided a copy of the foreign entity's "partnership deed" explaining that, in 2002, the foreign entity was reformed into a partnership consisting of two partners -- the beneficiary and one other individual. The beneficiary was identified in this "partnership deed" as a "working partner." The petitioner also provided a variety of Indian financial and tax documents relating to the foreign entity, including a document titled "Form No. 3 CD" which states that the beneficiary received a salary during the 2003-2004 tax year.

On September 1, 2005, the director requested additional evidence. The director specifically requested clarification regarding the correct commencement date of the beneficiary's employment with the foreign entity. The petitioner failed to answer the director's query in its response to the Request for Evidence, thus implicitly asking that the director make a decision based on the record. *See* 8 C.F.R. § 103.2(b)(8)(ii).

On December 1, 2005, the director denied the petition concluding that the petitioner failed to establish that the beneficiary had been employed abroad for one continuous year in the three year period preceding the filing of the petition. The director stated as follows:

The petitioner fails to address the issue of the discrepancy in the date of hire of the beneficiary. And, as no evidence of the beneficiary's employment with the foreign entity is submitted, it is unknown how long the beneficiary has been employed. As such, the petitioner fails to establish that the beneficiary has been employed with the foreign entity for one continuous year in the previous three years prior to the filing of this petition, as is required by L regulations.

On appeal, counsel to the petitioner recognizes the discrepancy and argues that "in either case, the period of employment was for at least one year within the three years preceding the date the petition was filed." Counsel also asserts that tax and financial documentation appended to the initial petition establish that the beneficiary had been employed by the foreign entity for at least one year preceding the filing of the petition. Finally, the discrepancy in dates was explained by the reformation of the Indian partnership in 2002, a fact present in the documents submitted with the initial petition.

Upon review, the AAO agrees that the director erred in concluding that there is no evidence in the record of the beneficiary's employment abroad and that the petitioner failed to establish that the beneficiary has been employed abroad for one continuous year in the three-year period preceding the filing of the petition. This determination by the director is hereby withdrawn. The evidence in the record sufficiently establishes that the beneficiary had been employed abroad by the foreign entity in some capacity for the requisite period of time. Moreover, the discrepancy regarding the beneficiary's dates of employment was adequately explained.

Nevertheless, and beyond the decision of the director, the AAO will dismiss the appeal because, upon review, the petitioner failed to establish that the beneficiary's employment abroad was primarily in an executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

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.

The foreign entity provided a list of job duties for the beneficiary in the letter dated August 2, 2005 appended to the initial petition. As this letter is in the record, the totality of the job description will not be reproduced here. Generally, the beneficiary is described as primarily "managing and directing business operations" of the foreign entity, which is described as a "highly respected and successful builder and developer, specializing in the construction of residential property." The beneficiary is ascribed broad duties such as establishing and implementing policies, procedures, and strategies.

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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner's description of the beneficiary's job duties fails to establish that the beneficiary has acted in a "managerial" capacity overseas. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the beneficiary is described as establishing and implementing policies, procedures, and strategies. However, the petitioner does not explain what policies, procedures, and strategies have been implemented, established, or evaluated. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description does not establish that the beneficiary has actually been primarily performing managerial duties. 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). 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). Therefore, absent a credible and specific breakdown of the beneficiary's duties and those duties performed by his subordinates, it cannot be determined that he has been "primarily" engaged in performing managerial duties. 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).

The petitioner has also failed to establish that the beneficiary has supervised and controlled the work of other supervisory, managerial, or professional employees, or has managed an essential function of the organization. While the foreign entity states in the letter dated August 2, 2005 that it employs "between eight and twelve personnel, primarily engineers," the record is otherwise devoid of any credible, objective evidence regarding these employees' job duties, skill levels, or educational backgrounds. Without detailed job descriptions for the subordinate employees and information regarding the organization of the foreign entity, it cannot be concluded that the beneficiary has been supervising and controlling other supervisory, managerial, or professional employees. At most, the beneficiary has been established to be a first-line supervisor of personnel, a provider of actual services, or a combination of both. A managerial 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. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.<sup>1</sup>

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<sup>1</sup>Moreover, while the petitioner has not specifically argued that the beneficiary managed an essential function of the foreign entity, 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

Similarly, the petitioner has failed to establish 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 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary had been acting primarily in an executive capacity. As explained above, the vague job description fails to clearly define what the beneficiary did on a day-to-day basis overseas. Therefore, the petitioner has not established that the beneficiary has been employed primarily in an executive capacity.

Accordingly, the petitioner did not establish that the beneficiary had 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.

Beyond the decision of the director, the petitioner did not 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).

In the initial petition, the petitioner provided a copy of a "Commercial Property Lease" as evidence that the petitioner had secured sufficient physical premises to house the proposed United States operation. The lease is dated June 21, 2005. Item 3 of the lease, which originally called for a 12 month term commencing on October 1, 2005, was changed to state as follows:

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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 has managed an essential function. As explained above, the petitioner's vague job description fails to document what proportion of the beneficiary's duties had been managerial functions, if any, and what proportion had 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 had 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).

The space is leased for a term of 12 months, to commence on approval of L-1A visa or Jan 1, 2005, whichever occurs first and to continue from month to month thereafter until cancelled upon 30 days prior notice by either party.

Upon a review of the lease, it is concluded that the petitioner has failed to secure sufficient physical premises to house the United States operation as required by 8 C.F.R. § 214.2(l)(3)(v)(A). As is clear by the edited terms of the lease, the petitioner had not yet secured physical premises as of the day of the filing of the petition. In fact, commencement of the lease was made contingent upon the approval of the instant petition or, depending on its interpretation, upon the issuance of an L-1 visa to the beneficiary or his admission to the United States in L-1 status. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, as the petitioner failed to establish that it had secured sufficient physical premises to house the new office as of the date of the filing of the petition, the petition may not be approved for this additional reason.<sup>2</sup>

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.

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<sup>2</sup>It is noted that the edited lease states that it will "commence on approval of L-1A visa or Jan 1, 2005, whichever occurs first." It is also noted that January 1, 2005 predates the filing of the instant petition. However, as the lease was originally written to commence on October 1, 2005, and the lease was signed on June 21, 2005, it is clear that the intent of the scrivener was for the lease to commence upon approval of the L-1A visa or on January 1, 2006, whichever occurs first, and that the date as it appears in the lease was simply a clerical mistake.