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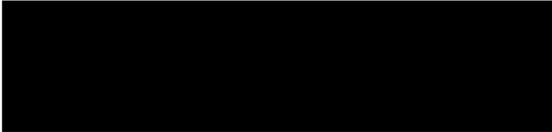
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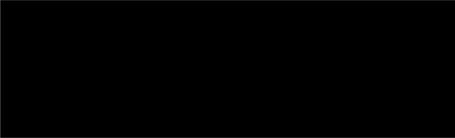


File: EAC 07 044 52835 Office: VERMONT SERVICE CENTER Date: OCT 02 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

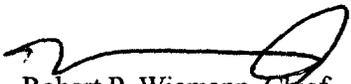
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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

6

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 Florida corporation, states that it intends to operate an interior design, remodeling and decorating business. It claims to be a subsidiary of Favser Laboratorios Limitada, located in Colombia. The petitioner seeks to employ the beneficiary as president of its new office in the United States for a three-year period.¹

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity within one year.

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 evidence previously submitted fulfilled all legal requirements for the requested visa classification. Counsel contends that the beneficiary's functions will be purely executive in nature, with daily tasks left to the company's employees. Counsel submits a brief in support of the appeal.

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

¹ Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) also provides 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 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 involves 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 (1)(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 sole issue addressed by the director is whether, within one year, the petitioner will employ the beneficiary in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(1)(3)(v)(C).

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 one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low level 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 that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. 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. *See generally*, 8 C.F.R. § 214.2(1)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

The nonimmigrant petition was filed on December 5, 2006. The petitioner indicated on Form I-129 that the beneficiary would be employed as president of the petitioner's interior design, remodeling and decorating business, which intends to hire five employees. In a letter dated November 20, 2006, counsel for the petitioner indicated that the position "involves the management of the business enterprises operations" including, but not limited, to, the following duties:

- The supervision of the employees and future employees employed with the company;
- Training of Employees (hiring and firing of employees);

- Managing the Sales and finances;
- Planning, developing and implementing company strategy;
- Planning the future expansion of the business and the possibility of franchising the said business;
- Developing and implementing policies and new procedures for sales company;
- Determining mark-up percentages necessary to insure profit, based on estimated budget, profit goals and average rate of client acquisition;
- Developing policies and procedures for procurement of services;
- Oversee the negotiating of contracts with clients;
- Authorizing purchase of contract services based on estimates;
- Formulating pricing policies for sales;
- Review statements, invoices, bills of lading and insurance certificates;
- Supervising the contact with the different purchasers;
- Coordinate and develop the public relations policies design to improve the business's image and relations with customers, the community and the public;
- Evaluate market for new profitable opportunities in order to attain established policies and objectives of the company;
- Plan and implementing new operating procedures to improve efficiency and reduce costs;
- Review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions;
- Direct and coordinate formulation of financial programs to provide funding of new or continuing operations to maximize returns on investments and increase productivity.

Counsel further stated that the position is "at the executive level since he formulates policy and has the ultimate discretionary authority to make necessary changes in the structure of the business." Counsel noted that the beneficiary's functions are "purely executive" and stated that he "leaves the daily tasks to the company employees."

The petitioner's supporting evidence included a letter from Wachovia Bank confirming that the U.S. company had \$13,700 in its checking account as of November 22, 2006. The petitioner did not provide evidence related to the proposed nature of the office or describe the scope of the entity, its organizational structure, and its financial goals, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(1).

On December 11, 2006, the director issued a request for additional evidence to establish how the U.S. company will require the beneficiary's services in a primarily managerial or executive capacity within one year. Specifically, the director instructed the petitioner to submit an organizational chart which clearly specifies the beneficiary's proposed subordinates and to provide complete position descriptions for the beneficiary's proposed subordinates, including a breakdown of the number of hours to be devoted to each employee's job duties on a weekly basis.

In a response dated January 12, 2007, counsel for the petitioner stated that the petitioner's initial staffing requirements would include the beneficiary, an engineering-construction manager, a sales supervisor, an interior designer, an accountant, and a secretary, as well as independently contracted services in the areas of legal, sales and construction. Counsel described the beneficiary's proposed role as follows:

President: Supported by the personnel of each and every area, develops the management and control of the whole company; he plans, develops and implements the corporate strategy for marketing; performs the architectonic design for the construction, remodeling and decoration; supervises the financial, sales and administrative areas; plans the business expansion; drafts the corporation budget preparation of the corporation budget; develops the price policy to guarantee the business profits and proceedings of services; approves and supervises the contracts with clients and providers of raw material; supervises the financial statements and billing system; maintains permanent communication with the providers of construction materials; defines the contracting personnel policies; coordinates and develops the public relation policies to generate an appropriate image of the company before the clients, the providers and the community in general; evaluates the market seeking for opportunities to fulfill the objectives and goals of the corporate budget; directs and coordinates financial programs to expand the operations, maximize the profits and increase the productivity; and reviews the information and reports of the corporate activity against the corporate budget.

The petitioner indicated that the construction manager would be responsible for: structure calculations; development, execution and supervision of civil construction works; materials logistics; coordination with providers; employee supervision; evaluation of duration and costs of work; coordinating contract fees; and making recommendations related to financial and material resources.

The petitioner stated that the proposed sales supervisor position would control and supervise teams of sales agents working on commission, collaborate with the president in the drafting of marketing policies, budget development, and in "the diffusion of the services offered by the company." The proposed interior designer position was describing as performing "the interior architectonic design for construction, remodeling and decoration." Specific duties attributed to this position include budget preparation, acquiring and coordinating materials requested by clients, and coordinating fulfillment of projects within budget guidelines. The petitioner also provided brief position descriptions for the proposed accountant and secretary positions. In addition, the petitioner included position descriptions for a "decoration manager," "works foreman," and salespersons, although these positions are not included in the petitioner's outline of its "administrative structure" for the first three years of operation.

The petitioner submitted a brief business plan outlining the company's financial projections and anticipated organizational structure for the first four years of operation. The petitioner also submitted evidence that it placed a recruitment advertisement for the positions of construction manager and interior designer as of January 2007.

The director denied the petition on January 24, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity within one year. The director determined that the petitioner had not established the need for professionals or managers to fill the proposed positions subordinate to the beneficiary's position and therefore concluded that the beneficiary would not qualify as a manager on the basis of his supervisory duties. The director also found insufficient evidence that the company would require the beneficiary to perform primarily managerial or executive duties as of the end of the first year of operations.

On appeal, counsel for the petitioner asserts that all requirements for the requested nonimmigrant visa classification have been established. Counsel notes that the statute bars the number of persons supervised as a

sole basis for denying L-1A visa classification. Counsel recites portions of the statute and regulations and concludes that the petitioner believes that "the officer is not convinced of his final determination of our application stated on his final decision."

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year.

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). 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.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the petitioner provided a lengthy, but vague, description of the beneficiary's proposed duties that fails to identify with any specificity what he would do on a day-to-day basis as president of the petitioning company. For example, statements indicating that the beneficiary will be responsible for "planning, developing, and implementing company strategy," "planning the future expansion of the business," "developing and implementing policies and new procedures," "developing policies and procedures for procurement of services," "formulating pricing policies," coordinating and developing "public relations policies," "planning and implementing new operating procedures, and "directing and coordinating formulation of financial programs," are non-specific, repetitive and essentially paraphrase portions of the statutory definitions for managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. 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 provide any detail or explanation of the beneficiary's proposed activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Other responsibilities included in the petitioner's initial description of the beneficiary's position have not been described in sufficient detail to establish the executive or managerial nature of the beneficiary's assigned duties. For example, the petitioner stated that the beneficiary's role would involve "managing the sales and finances," overseeing the "negotiating of contracts with clients," "supervising the contact with different purchasers," evaluating the market, and "reviewing statements, invoices, bills of lading and insurance certificates." The petitioner did not identify the beneficiary's specific role with respect to sales and financial matters, indicate the types of contract negotiations in which he would be involved, identify any "purchasers" to be employed by the company, or explain how the beneficiary would "evaluate the market." Furthermore, it does not appear that the petitioner would be involved in any import activities, which raises questions as to why the beneficiary would be required to review bills of lading. 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. at 1108.

Further, the petitioner provided a somewhat different position description in response to the director's request for evidence which included new duties, some of which have not been shown to be managerial or executive in nature. For example, the petitioner stated that the beneficiary will perform the "architectonic design for the construction, remodeling, and decoration." If the beneficiary will actually be designing construction and remodeling projects, he will be directly providing the services of the company and these duties will not be considered managerial or executive in nature. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The beneficiary's responsibilities for supervising the petitioner's billing system and communicating with construction materials providers have also not been described with sufficient specificity and have not been shown to be at the managerial or executive level.

Overall, the petitioner has identified approximately two dozen responsibilities to be performed by the beneficiary during a forty-hour workweek, but has failed to indicate how the beneficiary's time would be allocated, such that it would be feasible to determine what his primary duties would be. Based on the current record, the AAO is unable to determine whether the claimed managerial and executive duties would realistically constitute the majority of the beneficiary's duties, or whether the beneficiary would perform primarily administrative or operational tasks. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

As noted above, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. In this case, the AAO's review of this issue is restricted by the petitioner's submission of minimal evidence or information regarding the proposed nature of the office and the anticipated scope of the entity, as required by 8 C.F.R. § 214.2(1)(3)(v)(2). 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 therefore. Most importantly, the business plan must be credible.

Id.

Based on the petitioner's representations, the U.S. company intends to operate an interior design, remodeling and decoration business. The company has a lease agreement for "commercial business," and had \$13,700 in the bank as of the date of filing. There is no evidence that the petitioner has acquired any licenses required to operate a construction and remodeling business or that it has purchased any equipment. The petitioner indicates that it requires "no more than \$15,000" to cover its start-up costs, yet provides no explanation as to how it derived this figure. The petitioner has provided four years of financial projections, but has not provided a business or marketing plan that would allow the AAO to determine whether such projections are realistic. 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).

The AAO acknowledges the petitioner's claim that it intends to hire a construction manager, interior designer, sales supervisor, interior designer, accountant, and secretary within the first year of operations. However, the minimal evidence submitted regarding the petitioner's business plans prohibits a finding that the petitioner would hire all of these employees within one year, that these positions would require the services of professionals, or that any of the beneficiary's subordinates would be employed as supervisors or managers within one year. Although the petitioner implies that the services of the company will be primarily performed by subcontracted employees, the petitioner projects that it will be paying \$1,690 per month to subcontractors at the end of the first year of operations, an amount that would be insufficient to compensate two full-time employees earning minimum wage. The AAO questions whether such a small staff of contractors could plausibly provide the petitioner's proposed services. The petitioner has identified job duties for the positions of decoration manager, works foreman and salesperson, but does not list these positions in its projected hiring plans for the first three years of operation. The petitioner indicates that it will hire an accountant who will oversee "accounting assistants," but does not indicate that it intends to hire such assistants. 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).

The AAO does not doubt that the beneficiary will exercise supervisory authority over the petitioner's start-up operations. However, the definitions of executive and managerial capacity have two separate requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Overall, the vague job description provided for the beneficiary, the petitioner's statements that the beneficiary will be responsible for design activities, and the deficiencies and inconsistencies discussed with respect to the petitioner's business and hiring plans, prohibit the AAO from concluding that the beneficiary will perform primarily managerial or executive duties within one year. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that the petitioner has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner has not described its anticipated space requirements for its proposed

remodeling, interior design and decorating business and the lease agreement submitted does not identify the size or intended use of the leased property, other than stating that the premises are for "commercial use." Moreover, the petitioner provided a lease agreement for physical premises located at [REDACTED] the petitioner stated on Form I-129 that the address at which the beneficiary would work is [REDACTED]. The petitioner did not provide a commercial lease agreement for this address. 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 at 165. For this additional reason, the petition cannot 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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.