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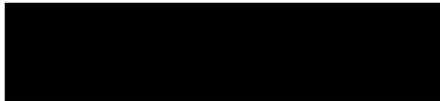
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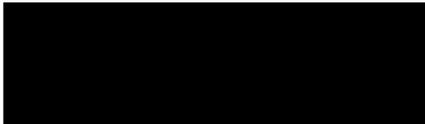
File: EAC 04 264 54127 Office: VERMONT SERVICE CENTER Date: OCT 03 2007

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, Vermont 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 general manager 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 Commonwealth of Pennsylvania, claims to operate a retail food market.

The director denied the petition concluding that the petitioner 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.

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 that the record sufficiently establishes that the United States operation will expand and will support an executive or managerial position within one year.

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 primary 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 as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

In support of its petition, the petitioner submitted a letter dated September 24, 2004 which describes the intended United States operation as follows:

[The petitioner] has entered into a long term lease for commercial property at 1500 Church Street in Philadelphia, PA 19124. Also at that location is a food market called Family Deli, for which [the petitioner] has entered into a purchase agreement. It is the goal of [the petitioner] to purchase various retail businesses throughout the United States. The Family Deli is the first business we seek to open.

[The beneficiary] will be functioning as the General Manager of [the petitioner]. In that capacity, [the beneficiary] will be responsible for managing [the] corporate goals, negotiating

and securing new business investments, and coordinating and managing the set up of Family Deli, our first business venture.

The petitioner, however, did not provide any details regarding what other "retail businesses" it plans to purchase.

The petitioner also submitted a copy of a "Commercial Lease Agreement" between the landlord and the petitioner for 1500 Church Street, Philadelphia, Pennsylvania. This lease has a 15-year term and, for the first 5 years, the petitioner has agreed to pay the landlord \$1,200 per month in base rent.

Furthermore, the petitioner submitted a copy of an "Agreement of Sale for Business and its Assets." This document allegedly represents the terms governing the petitioner's acquisition of the business physically located at 1500 Church Street, Philadelphia, called "Family Deli." Under the Agreement of Sale, the petitioner has agreed to pay \$100,000 for the business. The petitioner agreed in paragraph 2 to pay \$6,000 at the time of signing the agreement and \$94,000 "at settlement in cash, certified [o]r cashier[']s check." However, the Agreement of Sale is silent as to when or where "settlement" will occur, if ever, and, according to paragraph 3, the \$6,000 "deposit" was to be paid to [REDACTED]. Moreover, paragraph 15 states as follows:

Seller shall give the Buyer possession and occupancy of the subject business and leased premises at the time of settlement with no exceptions.

While the petitioner submitted evidence that it made a \$ [REDACTED] payment on September 22, 2004 to the landlord (Neighborhood Deli LLC), the record is devoid of any evidence that the petitioner has made any payments to the seller of the business assets [REDACTED] or has made final settlement on its acquisition of the business assets.

On October 7, 2004, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the intended United States operation; evidence that the United States operation will grow to be of a sufficient size to support a managerial or executive position within one year; a business plan; a description of the investment made in the United States operation; and photographs of the business.

In response, the petitioner submitted evidence that the foreign entity wired approximately \$25,000 to the petitioner on or about October 20, 2004, 13 days after the director issued the Request for Evidence. While the petitioner submitted evidence that both the first month's rent of \$1,200 plus the \$6,000 initial deposit have been paid, the petitioner does not explain the source of these funds. The petitioner also submitted a document titled "Business Overview and Business Strategy" which contains vague, uncorroborated income and expense projections for the United States operation and an organizational chart indicating that the petitioner will employ the beneficiary and a "vice president." Finally, the petitioner submitted photographs of the United States operation which reveals that the business is a small neighborhood grocery store and delicatessen.

On November 29, 2004, the director denied the petition. The director concluded that the petitioner 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 to the petitioner asserts that the record sufficiently establishes that the United States operation will expand and will support an executive or managerial position within one year.

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. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

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

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

Id.

In this matter, the petitioner has 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. As correctly noted by the director, the record does not establish that the petitioner's business will grow to the point that it will support a managerial or executive employee within one year. The petitioner claims that it is operating a single location grocery store and delicatessen and that it will employ the beneficiary and a "vice president." The record is devoid of any objective evidence that the petitioner will expand its business beyond this single location or that

it will hire additional employees. As a whole, the record indicates that, after one year, the beneficiary will be performing the administrative or operational tasks necessary to the provision of a service or the production of a product and/or will be working as a first-line supervisor. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. See sections 101(a)(44)(A)(iv) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.¹

Also, the petitioner has failed to sufficiently describe the scope of the United States operation and its financial goals as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(1). The petitioner has submitted a vague, non-specific business plan which fails to include any analyses or to disclose the bases for the income and expense projections. The plan also completely ignores the petitioner's obligation under the Agreement of Sale to purchase the Family Deli. Absent a credible business plan or detailed description of the intended United States operation, it cannot be confirmed 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.

¹It is noted that counsel to the petitioner cited the unpublished opinion in *Matter of Irish Dairy Board*, A28-845-42 (AAO Nov. 16, 1989), in support of her contention that the beneficiary will be primarily employed as an executive or manager. In that decision, the AAO recognized that the sole employee of the petitioner could be employed primarily as a manager or executive provided he or she is primarily performing executive or managerial duties. However, counsel's reliance on this decision is misplaced. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Second, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Services (CIS) employees in the administration of the Act, unpublished decisions are not similarly binding. Third, as explained above, the petitioner has not established that the petitioner will support an employee who will perform primarily executive or managerial duties within one year. This is paramount to the analysis, and a beneficiary may not be classified as a manager or an executive, even in a "new office" context, if he or she will not be primarily performing managerial or executive duties within one year regardless of the number of people to be employed by the petitioner. Therefore, as the petitioner has not established this essential element, the decision in *Matter of Irish Dairy Board* would be irrelevant even if it were binding or analogous.

Furthermore, counsel cited the Foreign Affairs Manual (FAM) in her appeal as authority. It must be noted that the FAM is not binding upon CIS. See *Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

Equally important, and as alluded to above, the evidence submitted by the petitioner does not even establish that it has acquired a business operation in the United States. As explained above, in the Agreement of Sale the petitioner has agreed to pay \$100,000 for the business. The petitioner has agreed to pay \$6,000 to [REDACTED] upon signing the Agreement and \$94,000 at settlement. Possession of the business shall be given at the time of settlement "with no exceptions." The record is devoid of any evidence that the petitioner has made any payments to the seller of the business assets [REDACTED] or has made final settlement on its acquisition of the business assets. Therefore, as of the date of the filing of the petition, the record does not establish that the petitioner owns, possesses, or operates the Family Deli. Without establishing that it has the right to possess and operate the intended United States operation, the petitioner has not established that the intended United States operation is ready and able to immediately begin doing business in the United States and, thus, will be able to support, within one year of the approval of the petition, an executive or managerial position. 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).

Moreover, the petitioner has not established that a sufficient investment has been made in the United States operation as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). While the petitioner has submitted evidence that the foreign entity wired approximately \$25,000 to it in October 2004, this alleged transfer of funds occurred after the filing of the petition. Again, 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. Therefore, this purported investment is not relevant to the analysis. Furthermore, the petitioner offered no evidence regarding the ultimate source of the \$7,200 allegedly paid by the petitioner to Neighborhood Deli LLC in September 2004. 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). Even assuming that the \$7,200 originated with the foreign entity or the beneficiary, this investment would not be 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. Under the Agreement of Sale, the petitioner has agreed to pay \$100,000 for the Family Deli and has agreed to delay its possession of said business until final settlement. Absent evidence that an investment has been made which could permit the immediate acquisition and operation of this business, the petitioner has not established that a sufficient investment has been made in the intended United States operation.

Accordingly, the petitioner has 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 as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary had been employed abroad in a primarily managerial or executive position 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.

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 performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.* In this matter, the petitioner does not clarify in the initial petition whether the beneficiary had 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 petitioner may not claim that a beneficiary was employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner described the beneficiary's duties abroad in the Form I-129 as follows: "As a Managing Partner, [the beneficiary] has been responsible for the day to day operations of the business. He has authority to negotiate with vendors, set prices, and handle the financial affairs of the company." Other than this vague

job description, the record is essentially devoid of any evidence regarding the beneficiary's specific duties, the organization of the foreign entity, or the duties of a subordinate staff. 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). 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). Absent a specific and credible description of both the beneficiary's job duties abroad and the organization of the foreign entity, the petitioner has not established that the beneficiary has been performing primarily executive or managerial duties for the requisite time period.

Accordingly, the petitioner has not established that the beneficiary had been employed abroad in a primarily managerial or executive position as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary, an owner of the foreign employer, will be transferred to an assignment abroad upon completion of his provision of temporary services in the United States as required by 8 C.F.R. § 214.2(l)(3)(vii).

In the Request for Evidence, the director specifically requested evidence that "the beneficiary's services are to be used for a temporary period in the United States and that the beneficiary will be transferred to an assignment abroad upon completion of these temporary duties." The petitioner, however, failed to submit any evidence responsive to this request other than to aver generally that the beneficiary will continue to play a role in the management of the foreign entity. 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 non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Accordingly, the petitioner has not established that the beneficiary will be transferred to an assignment abroad upon completion of his provision of temporary services in the United States as required by 8 C.F.R. § 214.2(l)(3)(vii), and the petition may not be approved for this additional 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.

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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.