

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

D7

PUBLIC COPY



File: EAC 06 185 52552 Office: VERMONT SERVICE CENTER Date: SEP 06 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

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 California corporation, states that it intends to operate an import/export business. The petitioner claims to be a subsidiary of Giri Putra Persada, Ltd., located in Bali, Indonesia. The petitioner seeks to employ the beneficiary as the operations manager of its new United States office for a one-year period.

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 contends that the director "disregarded the true intentions of the petitioner" and improperly concluded that the company will not require the services of a bona fide manager or executive. Counsel submits a brief and additional evidence 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 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(l)(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 (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 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(l)(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 U.S. Citizenship and Immigration Services (USCIS) 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(l)(3)(v). 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 June 2, 2006. In a letter dated May 2, 2006, the petitioner stated that the beneficiary, as operations manager, would assist the U.S. company's managing director in the start up of the new U.S. office. His proposed duties were described as follows:

- Direct and coordinate the activities of businesses concerning pricing, sales, and distribution of products;
- Interview, hire, train and manage employees, prepare work schedules and assign specific tasks;
- Review financial statements, sales and activity reports to measure sales volume and goal achievement;
- Determine areas needing improvement and initiate appropriate policies targeting sales volume increase;

- Establish and implement departmental policies, goals, objectives, and procedures aiming to improve the overall operations of the business for profit maximization;
- Direct and coordinate the corporation's financial and budget activities to fund operations, maximize investments and increase efficiency.
- Determine goods and services to be sold, and set prices and credit terms, based on forecasts of customer demand.
- Manage the movement of goods into and out of the country and their timely delivery.

The petitioner stated that the U.S. company initially intends to import handcrafted furniture, jewelry, clothing and accessories from Indonesia. The petitioner stated on Form I-129 that it currently has two employees. The petitioner also submitted a business plan for the new office, in which its proposed staffing levels were described as follows:

Initially, until a need for more clerical and other help will be required, the operation of the business will be assumed by its incorporating officers. As the company grows to the extent that it will be too much for those officers to handle, the Corporation intends to hire a manager and a secretarial staff consisting of one full time secretary and 2-4 part-time secretaries, and the total salary cost for the first year will be approximately \$50,000.00.

The petitioner further stated that it "intends to obtain and maintain a sales force, placing its representatives in key cities throughout the United States."

The petitioner submitted a proposed organizational chart for the U.S. entity, which indicates that the organization will be headed by a president/managing director, who in turn will supervise a chief financial officer and a manager. The chart further shows that the manager will supervise a marketing employee, a sales person, a reception/front office employee, an accounting employee, a storekeeper, and employees identified as "furniture," "furnishings," and "apparel & accessories." Neither the beneficiary nor his offered position of "operations manager," were identified on the chart, although it appears that he would occupy the "manager" position.

The director issued a request for additional evidence on August 16, 2006, advising the petitioner that additional evidence would be required to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year. The director acknowledged the organizational chart submitted, but determined that it did not seem plausible that the company would require bona fide managers or professionals to fill the subordinate positions. The director requested a detailed explanation outlining the duties of each employee, and requested copies of educational credentials for any employees who had already been hired.

In a response dated October 4, 2006, counsel for the petitioner explained that the U.S. company's managing director, I [REDACTED], was issued an L-1 visa in February 2006 and had intended to set up the new office. Counsel stated that [REDACTED] had been able to come to the United States only a few times, for only short intervals, therefore, it was decided that the beneficiary should be transferred to the U.S. to "properly set up the company, hire the necessary workers, and perform the required marketing duties that are crucial for the start up of the company."

Counsel further stated that the petitioner anticipates that the beneficiary will hire a receptionist, warehouse and distribution manager, and marketing and sales representatives "at the beginning." Counsel explained that the petitioner would initially operate as an importer, exporter and wholesale distributor, and would eventually open its own showrooms for furniture and apparel. Counsel stated that the beneficiary would be responsible for locating and operating the showrooms upon his entry to the United States, oversee the expansion of the company and "hire the new employees at the proper time."

Counsel emphasized that the foreign entity had already imported a substantial amount of merchandise to the United States in January 2006, which remains in the petitioner's warehouse in California, and noted that the petitioner had already canceled its participation in a trade show in January 2006 because no one was able to attend.

The petitioner submitted a revised organizational chart, on which the beneficiary is depicted as "director of marketing & operations." The chart indicates that the beneficiary will hire a marketing manager, who will in turn supervise a sales representative, as well as a warehouse/distribution manager, who will supervise a store manager, a furniture sales clerk, a home furnishings sales clerk and an apparel and accessories sales clerk. The chart indicates that the chief financial officer position is already staffed, and that this position will supervise an accountant and a reception/front office manager.

The director denied the petition on October 6, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year. The director observed that the petitioner had not provided a detailed position description for the beneficiary's proposed subordinates as requested, and therefore it could not be determined whether he would supervise any professional or managerial employees. The director also found insufficient evidence that the beneficiary would manage or direct a function within the organization. The director acknowledged the position description submitted for the beneficiary, but found that the company had not shown a need for the beneficiary to perform such duties on a full-time basis.

On appeal, counsel for the petitioner reiterates that the petitioner wishes to transfer the beneficiary to the United States because the company's president has been unable to perform his intended responsibilities in L-1A status due to ongoing obligations outside the United States. Counsel emphasizes that the petitioner has imported merchandise, but has been unable to commence business activities due to the president's inability to remain in the United States to properly set up the company. Counsel asserts that the petitioner explained in response to the request for evidence "what the company's business plans were and why [the beneficiary] was needed." Counsel re-states portions of his letter dated October 4, 2006, and states that it was clearly stated that the petitioner will not merely be operating an import/export company, as noted by the director. Counsel asserts that the USCIS "has disregarded the true intentions of the petitioner and has made their own self-drawn conclusions that 'the company does not appear to require a bona fide manager or executive who would perform the tasks.'"

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 has described the beneficiary's proposed position in very broad terms, noting his responsibility to "direct and coordinate the activities of the business," "establish and implement departmental policies, goals and objectives and procedures," "direct and coordinate the corporation's financial and budget activities," and "review financial statements, sales and activity reports." 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).

While the duties described by the petitioner would generally fall under the definitions of managerial or executive capacity, the petitioner initially indicated that the beneficiary would be assisting the managing director with the company's start-up activities, not serving as the petitioner's chief executive, as suggested by the described duties. It therefore becomes questionable whether the petitioner reasonably requires two employees to primarily focus on the broad policies and goals of the new company. The AAO acknowledges counsel's subsequent explanation that the petitioner's managing director has not been able to undertake his proposed role due to other obligations. However, the managing director's absence from the United States has not been documented, and the beneficiary's proposed level of authority remains uncertain. The petitioner also claims to employ a chief financial officer, which raises questions regarding the beneficiary's proposed responsibilities for reviewing financial statements and coordinating financial and budget activities, and the need for two executives to oversee this function. Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity.

The petitioner has the burden to establish that the U.S. company would realistically develop to the point that it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, 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.

Upon review, the supporting evidence does not provide a clear explanation of the petitioner's proposed hiring plan. According to the petitioner's business plan, the company's incorporating officers would initially operate the company without additional assistance. The petitioner noted that it would hire "a manager and secretarial staff" but provided no timeline for these personnel actions. 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)). The proposed \$50,000 salary cost proposed for the first year of operations, assuming that it includes the beneficiary's \$33,800 salary, suggests that the company anticipates only minimal staffing. Although a nationwide "sales force" is mentioned in the business plan, there is no indication as to when such staff would be hired.

The petitioner's initial proposed organizational chart identified a total of eight employees to be hired, in addition to the beneficiary, the managing director and the chief financial officer, and bears little resemblance to the anticipated staffing discussed in the petitioner's business plan. 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).

In response to the director's request for evidence, the petitioner provided yet another proposed organizational structure, adding a warehouse and distribution manager and sales clerks. Although the director specifically requested that the petitioner provide job descriptions for each of the beneficiary's proposed subordinates, the petitioner failed to provide this information. 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 petitioner once again failed to provide a proposed timeline for hiring staff, other than stating that the beneficiary would hire a receptionist, a distribution and warehouse manager, and marketing and sales representatives "at the beginning," and noting that the beneficiary would hire employees "at the proper time."

The petitioner also changed the beneficiary's job title from "operations manager" to "director of marketing and operations" when responding to the director's request for evidence, yet provided no explanation for this change. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

Overall, even if the AAO were convinced that the petitioner intended to fill the positions identified on the more complex organizational chart submitted in response to the director's request for evidence, the record does not establish that these positions would be filled within the first year of operations. The evidence submitted does not assist the AAO to determine how many employees the company would support at the end of the first year of operations, nor does it clarify who would be performing the day-to-day, non-managerial functions of the company. 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. The AAO recognizes that the petitioner intends to expand beyond its initial import, export and wholesale distribution operations, but the regulations require the petitioner to provide a clear picture of where the company will stand in exactly one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within one year. The company's long-range plans beyond the first year of operations are not relevant to a determination of the beneficiary's proposed employment capacity for the purposes of a new office petition.

The AAO does not doubt that the beneficiary will have some degree of managerial authority over the petitioner's start-up operations in the absence of the managing director, and would eventually supervise the

day-to-day operations of the business once it is operational. 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). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to non-managerial and non-executive duties.

Overall, the vague job description provided for the beneficiary, considered in light of the petitioner's ambiguous hiring plan for the first year of operations, prohibits a determination as to whether the petitioner could realistically support a managerial or executive position within one year. The petitioner has not submitted any additional evidence on appeal to clarify these deficiencies. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the evidence of record does not establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner indicated that the beneficiary, as operations manager, is responsible for "the direction and coordination of all activities of the business concerning pricing, sales and goods distribution," "conducts marketing research," performs "deep market analysis and competition activities response," and "manages staff effectively." The petitioner did not provide an organizational chart for the foreign entity, as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and it is unclear what staff he manages in his current role. The AAO cannot conclude based on this limited job description what the beneficiary actually does on a day-to-day basis, nor has it been established that his market research and market analysis duties are managerial in nature. 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). Although the foreign entity appears to be a large, well-established organization, the petitioner is still obligated to describe the beneficiary's duties as well as his place within the organizational hierarchy, rather than relying on his managerial job title to establish eligibility for the benefit sought. The actual duties themselves reveal the true nature of the employment. *Id.* at 1108. For this additional reason, the petition cannot be approved.

Finally, although not addressed by the director, the AAO finds insufficient evidence to establish that the petitioner had secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner submitted a lease agreement for 220 square feet of office space; however, the term of the lease ended on June 1, 2006, one day before the petition was filed. Since the record does not contain a valid lease agreement, the AAO cannot determine whether the petitioner had any physical premises as of June 2, 2006. 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.