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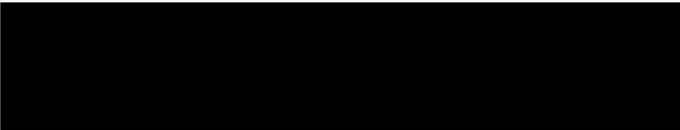
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
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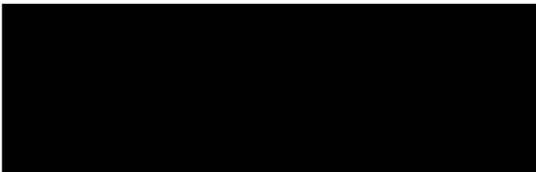
File: EAC 06 176 50460 Office: VERMONT SERVICE CENTER Date: **AUG 01 2008**

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 State of Florida, is allegedly in the audiovisual production business.¹

The director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position 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 asserts that the petitioner has established that the beneficiary will perform qualifying duties within one year of petition approval.

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(1)(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 (1)(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.

¹According to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 14, 2007. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, the company can no longer be considered a legal entity in the United States. *See Fla. Stat. 607.1405 (2006)*. Therefore, if this appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought.

- (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.

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 primary issue in this matter is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

The petitioner asserts in the Form I-129 that the beneficiary is coming to the United States to open a new office which will provide "audio-visual productions services." The petitioner projects that the United States operation will employ seven workers. Counsel describes the beneficiary's proposed duties in her letter dated May 18, 2006 as follows:

[The beneficiary] will be responsible in terms of strategic associations to create internal procedures and select qualified managerial and non-managerial personnel to coordinate the day-to-day operations of the business. Analyzes unit-operating practices, such as record-keeping systems, forms control, office layout, suggestion systems, personnel and budgetary requirements, and performance standards to create systems or revise establishes procedures such as: Sale of the services and products offered, setting marketing guidelines, developing new external markets for the sale of products and evaluating the performance of employees.

The petitioner did not submit a business plan, did not specifically identify the "services and products" to be offered, and did not describe any of the seven proposed employee positions claimed in the Form I-129.

On September 18, 2006, the director requested additional evidence. The director requested, *inter alia*, evidence establishing that, within one year of commencing operations, the beneficiary will be relieved from performing non-qualifying tasks, an organizational chart for the United States operation, and job descriptions for each of the proposed employees.

In response, the petitioner submitted a letter dated December 8, 2006. The petitioner claims that, as part of his establishment of the United States operation, the beneficiary will "[e]xpand operations by giving consulting in this field, providing service and distribution and sales of audio/visual technology equipment between [the] United States and Latin America includ[ing] Venezuela." The petitioner also claims that it will employ a production department manager, a sales and marketing department manager, a production supervisor, a post-production supervisor, two editors, and three camera operators. The proposed organizational chart shows the beneficiary at the top of the organization directly supervising the sales and marketing department manager, the production department manager, and contracted providers of accounting and legal services. The production department manager is, in turn, portrayed as supervising the production supervisor and the post-production supervisor, who, in turn, are each portrayed as supervising subordinate camera operators and editors.

Finally, the petitioner submitted a breakdown of the beneficiary's proposed duties in the United States. The petitioner asserts that the beneficiary will devote 25% of his time to planning, ordering, and controlling "all operational/production activities," 20% of his time to analyzing and controlling "financial matters," 10% of his time to managing equipment, supplies, and products, 10% of his time to planning upcoming projects, 5% of his time to hiring and promoting employees, 15% of his time to supervising sales and service, 10% of his time to overseeing training and conducting presentations, and 5% of his time to reporting to the "parent company."

On May 3, 2007, the director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year.

On appeal, counsel asserts that the petitioner has established that the beneficiary will perform qualifying duties within one year of petition approval.

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.

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.

For several reasons, the petitioner in this matter has failed to establish that the United States operation 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 specifically describe the beneficiary's proposed duties after the petitioner's first year in operation; has failed to establish that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to the operation of the business by a subordinate staff within the petitioner's first year in operation; has failed to establish that a sufficient investment has been made in the United States operation; and has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C).

First, as correctly noted by the director, the record is not persuasive in establishing that the United States operation will support an executive of managerial position within one year. The job descriptions for both the beneficiary and his proposed subordinate workers fail to credibly establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis after the petitioner's first year in operation. For example, the petitioner states that the beneficiary will devote most of his time to planning and

controlling "all operational/production activities;" managing equipment, supplies, and products; planning upcoming projects; and establishing and conducting training programs. However, the petitioner fails to specifically describe these "operational/production activities," "upcoming projects," or "training programs and materials." The petitioner also fails to explain what, exactly, the beneficiary will do in managing unspecified equipment, supplies, and products. Overall, the petitioner has provided so few details regarding its proposed business that it cannot be discerned what the beneficiary will do on a day-to-day basis. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary will actually perform managerial duties after the first year in operation. Specifics are clearly an important indication of whether a beneficiary's duties will be 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).

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to "primarily" perform the non-qualifying tasks inherent to his duties and to the operation of the business in general or that he will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. 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; *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* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

In this matter, the petitioner failed to submit any evidence addressing this issue even though the director specifically requested such evidence in the September 18, 2006 Request for Evidence. 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). While the petitioner claims that the petitioner will hire ten employees, including five subordinate managers in three tiers, during its first year in business, these claims are entirely unsubstantiated by evidence. The record does not include a business plan, a marketing strategy, or projected financial data, and fails to specifically identify a single product, service, or business relationship related to its proposed "audiovisual production business." The petitioner's unsubstantiated claims that the newly formed business entity will adopt a complex organizational structure and hire 10 or more workers does not establish that the United States operation will truly grow and mature into an active business organization which will reasonably require the services of an employee who will primarily perform managerial or executive duties. Rather, the petitioner must clearly define the scope and nature of a United States operation and establish that it has, and will continue to have, the financial ability to support the establishment and growth of the business. However, the record in this matter is devoid of any such evidence. Furthermore, the petitioner has failed to establish that the United States operation, vaguely described as an audiovisual production business, will reasonably need the services of two subordinate tiers of managers, supervisors, or professionals. Again, boldly stating that the beneficiary will supervise two subordinate tiers of managers, supervisors, and professionals is not

sufficient in the absence of evidence that the petitioner's business will acquire a complex organizational structure and evidence that the petitioner is, or will be, able to employ such a workforce.²

Accordingly, the petitioner has failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity within one year, and the petition may not be approved for that reason.

Second, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to establish that a sufficient investment was made in the enterprise. 8 C.F.R. § 214.2(l)(3)(v)(C)(2). In this matter, the petitioner submitted bank documents indicating that it has opened an account with Bank of America. However, these documents do not indicate whether the petitioner has any money in this account, and the record is generally devoid of evidence establishing that the petitioner has any assets. Once again, 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. Absent evidence that the foreign employer has made an investment in the United States operation, it cannot be concluded 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. Accordingly, the petition may not be approved for this additional reason.

Third, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because the petitioner has failed to sufficiently describe the nature, scope, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C)(1). As explained above, the petitioner vaguely describes the petitioner's proposed business as an "audiovisual production business." However, the petitioner failed to submit a "business plan" which specifically describes the petitioner's proposed products, services, customers, or competitors. The petitioner also fails to make any projections regarding revenue, income, expenses, or financial goals. The record does not contain any independent analysis, contracts, business contacts, or purchase orders. Absent a detailed, credible description of the petitioner's proposed United States business operation addressing the petitioner's proposed product, marketing plan, customers, and income/expense projections, it is impossible to determine whether the proposed 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.

²It is further noted that the petitioner's description of the proposed subordinate workers fails to establish that any of the workers will be a "professional." In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for the above reasons.

Beyond the decision of the director, the petitioner has failed to establish that it has secured sufficient physical premises to house the new office. 8 C.F.R. § 214.2(l)(3)(v)(A).

In support of its petition, the petitioner submitted a copy of a document titled "Virtual Services Agreement" between the petitioner and the "Intelligent Office." This Agreement, which pertains to the petitioner's "membership" with the "Intelligent Office" in Coral Gables, Florida, entitles the petitioner to the receipt of telephone answering services, reception services for the petitioner's visitors to 4000 Ponce de Leon Boulevard, and mailbox services. Under the agreement, if the petitioner wants to reserve a conference room or office, it must make arrangements with the "Intelligent Office" and pay "an extra charge." The agreement is devoid of any customary lease terms regarding physical space and possession of premises.

Title 8 C.F.R. § 214.2(l)(3)(v)(A) requires that the petitioner submit evidence that "sufficient physical premises to house the new office have been secured." While the regulations do not define what type of premises could be considered "sufficient" for purposes of the "new office" regulations, the regulations do clearly require the petitioner to secure "physical" premises. In this matter, the petitioner is not leasing an office or any physical space to house the new office. The petitioner's agreement with the Intelligent Office is not a lease and does not entitle the petitioner to use any physical space for its business. The agreement only entitles the petitioner to telephone, reception, and mailbox services. The petitioner may only use an office or conference room if it chooses to reserve one 24 hours in advance and pay an additional fee, which is not dissimilar from renting a conference room at a hotel or community center. Therefore, for this reason alone, the petition may not be approved.

Regardless, even if the petitioner's "membership" permitting it to have limited access to these shared facilities could be considered to be the securing of "physical" premises, the record is devoid of any evidence that these premises would be "sufficient" to house the new office. Given that the petitioner plans to hire additional employees and presumably to have clients, the petitioner did not submit any documentation which establishes that the "Intelligent Office" would be "sufficient" for the "new office." Once again, 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.

Accordingly, as the petitioner has failed to establish that it has secured sufficient physical premises to house the new office, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years. 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner failed to specifically describe the beneficiary's job duties abroad as "general manager." Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103,

aff'd, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for Citizenship and Immigration Services (CIS) to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary has been employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, the petitioner claims to be 100% owned and controlled by the foreign employer which is allegedly majority owned and controlled by the beneficiary. As a purported owner of the petitioning organization, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. 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).

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, 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.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.