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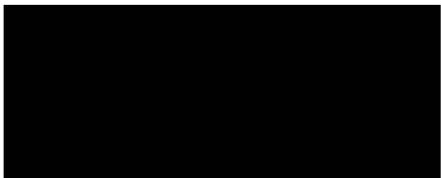
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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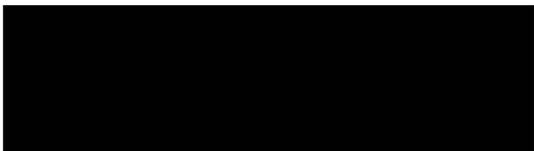


File: EAC 06 099 52537 Office: VERMONT SERVICE CENTER Date: **AUG 07 2008**

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)

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 AAO will dismiss the appeal.

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 New York corporation, states that it intends to engage in “construction materials and related products wholesale,” but has yet to commence active business operations since its establishment in 2001. It claims to be a subsidiary of LLC DPI-Project located in Moscow, Russia. The petitioner seeks to employ the beneficiary as the president and chief executive officer of its new office in the United States for a one-year period.

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 be employed in a primarily managerial or executive capacity within one year. Counsel contends that the director failed to address the evidence submitted, and instead based the decision on unsubstantiated conclusions. Counsel submits a brief, but no 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.

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

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 nonimmigrant petition was filed on February 21, 2006. In a letter dated February 17, 2006, counsel for the petitioner described the beneficiary's proposed duties as follows:

The beneficiary will be employed as the President & CEO of the US affiliate. He will direct and coordinate the activities of the US affiliate, including but not limited to technical, sales, marketing and administrative personnel in accordance with the established policies to further achievement of the company goals and policies.

* * *

The beneficiary will function as a higher-level manager/executive. He will:

- a) Direct the management of an organization or a major component or function of an organization as primary duties.
- b) Establish organizational goals and policies; exercise wide latitude of discretionary decision-making.
- c) Receive only general supervision or direction from higher-level executives, the board of directors, or shareholders of the company.
- d) Personally manage the organization.

- e) Supervise and control the work of other supervisory, professional, or managerial employees and will manage essential functions within the organization.
- f) Have authority to hire and fire or recommend personnel actions and function at a senior level and exercise discretion over day-to-day operation of the activity or function.

The petitioner did not submit evidence to establish that it met the regulatory requirements at 8 C.F.R. § 214.2(1)(3)(v)(A) or (C). Accordingly, on February 28, 2006, the director issued a request for additional evidence. The director instructed the petitioner to submit: (1) a detailed business plan for the petitioner's first two years of operation; (2) copies of bank wire transfers or other evidence that the foreign entity has invested funds in the new office; (3) evidence to show how the company will grow to be of sufficient size to support a managerial or executive position; and (4) a description of the proposed staff of the new office, including job titles, job duties and proposed salaries and wages.

In response, petitioner submitted a letter from the foreign entity dated May 23, 2006, and supporting documentary evidence. With respect to the funding of the United States entity, the foreign entity indicated that there has not yet been a need to transfer funds to the U.S. company, but that such funds would be transferred "upon approval of this visa petition and prior to the beneficiary's arrival to the United States." The petitioner provided evidence in the form of a letter from Raiffeisen Bank indicating that the foreign entity has funds in excess of \$360,000 in its account. The foreign entity indicated that the funds "are available for immediate financing of operations of [the petitioner] in the United States."

The petitioner provided the following expanded position description for the beneficiary's proposed position as president and chief executive officer:

- Responsible for the development of [the petitioner's] operations in the United States;
- Directs management of the subsidiary, establishes goals and policies of the organization, exercise wide latitude in discretionary decision-making;
- Determines and formulates policies and business strategies and provides overall direction of the subsidiary with regard to sales, installation and provision of technical service of the automatic door systems (components and controls), all-glass & aluminum structures, facades, tempered glass entrances, shop-fronts and other related products in the Tri-State Area . . .;
- Plans, directs and coordinates operational activities at the highest level of management with the help of subordinate executives;
- Confers with the company's professional employees to plan business objectives, develop organizational policies to coordinate functions and operations between departments;
- Establishes responsibilities and procedures for attaining objectives;
- Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions;
- Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity;

- Plans and develops industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and public;
- Evaluates performance of executives for compliance with established policies and objectives of firm and contributions in attaining objectives.

In addition, the petitioner provided the requested information regarding its anticipated personnel structure, noting that it intended to hire the following employees within the first year of operations: a vice president of business operations; a chief financial officer; a vice president of installation and technical services; an installation and service manager; an executive administrative assistant; a production facility/warehouse supervisor; and one production facility worker. The petitioner also indicated that it would hire independent contractors to serve as installation specialists and service technicians.

The petitioner submitted position descriptions for all proposed employees, as well as a proposed organizational chart, which identifies the above-referenced positions as well as a commission-based sales department, and two additional employees to be hired during the second year of operations. The petitioner also provided a chart outlining the company's anticipated milestones for the first two years of operations. The chart indicates that the company intends to obtain business licenses in June 2006, publish a catalog in August 2006, launch its website and place advertisements in an industry magazine in September 2006, secure its first installation contract in October 2006, secure premises for its production facility and warehouse and acquire associated equipment and supplies in November 2006, implement its first installation contract in December 2006, hire production facility staff in December 2006, install equipment at its production facility in January 2007, and have a fully operational production facility by February 2007.

In addition, the petitioner submitted a business plan, which included an overview of the company's products and services, a list of the foreign entity's customers, the above-referenced hiring plan and milestone chart, and project profit and loss statements for the periods February 2006 to February 2007, and February 2007 to February 2008. The evidence also included a list of equipment to be purchased for the petitioner's production facility, which had an anticipated cost in excess of \$225,000.

The director denied the petition on June 1, 2006, concluding that the petitioner had failed to establish that the U.S. company would support a managerial or executive position within one year of the approval of the petition. Specifically, the director determined that "the record lacks the required evidence of financial ability to support the United States company. The perceived business plan has not convinced the Service that the United States company will be operating at the required level to support the requested position."

On appeal, counsel for the petitioner asserts that the director denied the petition "without any substantiation." Specifically, counsel states that the director provided to explanation as to why the "400,000 in cash . . . is not sufficient to support the US operations of the company." Counsel further notes that the director failed to identify any specific deficiencies in the business plan submitted. Finally, counsel highlights the evidentiary requirements for new office petitions at 8 C.F.R. 214.2(l)(3)(v), states that the petitioner fulfilled each and every requirement, and asserts that the petitioner "clearly established the bona-fide employment opportunity for the beneficiary to work in the United States in [an] executive/managerial capacity."

Upon review, the petitioner's assertions and additional evidence are not persuasive in establishing that the United States operation will support a primarily managerial or executive position within one year.

As a preliminary matter, it is noted that, when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Upon review of the director's decision, the AAO agrees that the reasons given for the denial are conclusory with few specific references to the evidence entered into the record.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Therefore, the AAO will herein address the petitioner's evidence and eligibility.

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.

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 sufficiently describe both the beneficiary's duties after the petitioner's first year in operation; and has failed to establish that a sufficient investment has been made in the United States operation. 8 C.F.R. § 214.2(l)(3)(v). The petitioner has also failed to demonstrate how the company will immediately commence doing business in the United States upon approval of the petition.

First, as correctly noted by the director, the petitioner has failed to 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 company's first year in operation. The initial position description provided by counsel merely paraphrased the statutory definitions of managerial and executive capacity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The position description the petitioner submitted in response to the request for evidence is composed of similarly vague and overly broad responsibilities that fail to establish with any specificity what types of duties the beneficiary would perform as president of the company. The petitioner indicates that the beneficiary will "plan, direct and coordinate operational activities," "plan and develop industrial, labor and public relations policies," "plan business objectives," "develop organizational policies," and "determine and formulate policies and business strategies." While all of these duties have managerial or executive connotations, the description as a whole is vague, repetitive, and also closely resembles aspects of the statutory definitions. 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 within the context of the petitioner's business. The petitioner has failed to provide any detail or explanation of the beneficiary's 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).

Therefore, based on the petitioner's failure to provide the required detailed description of the beneficiary's proposed duties, the petitioner has not established that the beneficiary will be employed primarily in a managerial or executive capacity after the petitioner's first year in operation.

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(1)(3)(v)(C)(2). Evidence of the investment is critical in this matter, as the petitioner's business plan and profit and loss statement suggest that the company requires a substantial investment in order to become fully operational within one year, given that equipment costs alone are expected to amount to \$225,000. Furthermore, while the petitioner's projected business plan and hiring plan suggest that professional and/or supervisory staff would be hired within the first year of operation, the company's ability to actually carry out its plans largely depends on whether it has the resources to do so. As indicated in the business plan, the company does not plan on implementing its first installation contract before December 2006, quite late in the first year of operations, and does not anticipate having a fully functional production facility until February 2007. At the same time, the petitioner indicates that it will have a payroll in excess of \$325,000 by the end of its first year.

The only evidence submitted with respect to the U.S. company's finances is a bank statement dated November 2005, showing a balance of \$652.53. As noted by the director, the record as presently constituted contains no evidence of any funds already provided to the U.S. entity for the purpose of establishing the new company. The AAO acknowledges the evidence in the record that the foreign entity has a bank account

balance of approximately \$360,000 as of April 2006, two months after the petition was filed. However, the foreign entity's letter dated May 23, 2006 does not indicate how much of this amount would be available for investment in the United States entity. Rather, the foreign entity simply states that it has the ability to remunerate the beneficiary and to "commence doing business in the United States." Unsupported assertions indicating that the foreign entity is willing and able to provide all necessary funds are insufficient. 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)).

Overall, the evidence submitted does not clearly establish the size of the foreign entity's investment in the United States entity, nor does it demonstrate that the company had or would have sufficient funds to meet its anticipated start-up costs at the time the petition was filed. The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue.

Finally, it should be noted that if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business "for the previous year" through the regular, systematic, and continuous provision of **goods or services**. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (**defining the term "doing business"**). According to the petitioner's business plan, as of the date of filing, the petitioner was still months away from obtaining business licenses, purchasing equipment, locating and setting up a production facility, performing initial marketing or advertising activities, or being in a position to consummate its first sale and complete an installation project. In fact, the petitioner anticipates that it will complete one project near the end of its first year. The evidence submitted does not establish how the petitioner would meet the requirement of immediately engaging in the regular, systematic and continuous provision of goods or services.

Based on the foregoing discussion, the petitioner has not established that the U.S. company will support the beneficiary in a primarily managerial or executive position within one year. Accordingly, the appeal will be dismissed.

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).

At the time of filing, the petitioner indicated that the beneficiary would be working at [REDACTED] [REDACTED] New York. When asked to provide photographs of the interior and exterior of all premises secured for the U.S. entity, the petitioner submitted photographs of the interior of an office with several desks, computers, empty bookcases, and a copy machine. The petitioner indicated that the photographs depict the company's office located at [REDACTED] [REDACTED] New York. The petitioner noted that it also has a "corporate/ mailing address" located at [REDACTED] [REDACTED]. The record of proceeding contains no lease agreement for either office location, and thus it can not be concluded that the petitioner has secured sufficient physical premises. Based on the

petitioner's statement on Form I-129 that the beneficiary would be physically located at the company's "corporate/ mailing address," there is some question as to whether any physical premises had been secured at the time the petition was filed. There is no mention of the Long Island City location in the initial petition filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Therefore, absent evidence that the petitioner had purchased or leased physical premises sufficient to house the company's business prior to filing the petition, the petition cannot be approved. Again, 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.

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.