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U.S. Citizenship
and Immigration
Services

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[REDACTED]

File: EAC 07 177 50325 Office: VERMONT SERVICE CENTER Date: FEB 08 2008

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)

IN BEHALF OF PETITIONER:

[REDACTED]

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 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 company organized under the laws of the British territory of Gibraltar, claims to have a qualifying relationship with the proposed United States operation, a New York limited liability company, and is allegedly a consulting business.

The director, declining to treat the United States operation as a "new office," denied the petition concluding that the petitioner failed to establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive position; or (2) that the petitioner and the United States operation are qualifying organizations as it was not established that either entity is "doing business."

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 is a "new office" and that it has established that it is eligible for the benefit sought.

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as:

[A]n organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

Moreover, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

A threshold issue in this matter is whether the director correctly declined to treat the petitioner as a "new office" in adjudicating the petition.

In this matter, the petitioner indicated in the Form I-129 that the beneficiary is coming to the United States to open a "new office" described as a "newly-formed US Company." The petitioner repeats this claim in the letter dated May 18, 2007. The petitioner also submitted a copy of the United States operation's articles of organization dated April 23, 2007 and operating agreement dated April 24, 2007. Furthermore, counsel indicated in his letter dated August 1, 2007 that, while the beneficiary has "occasionally" provided services in the United States on a "non-continuous basis, when on a business trip," he will provide services to clients "on a continuous basis" once the "new office" is in operation. While the petitioner claims to have been in operation since 2000 and to have six employees in the Form I-129, this apparently applies to the petitioner, i.e., the beneficiary's foreign employer, and not to the United States operation. As the record as a whole indicates that the petitioner has *not* been doing business in the United States through a parent, branch, affiliate, or subsidiary, the director should have applied the "new office" criteria in 8 C.F.R. § 214.2(l)(3)(v) to the instant petition. Consequently, the petitioner was not obligated to establish that the beneficiary would be employed in a primarily managerial or executive capacity immediately upon his arrival in the United States nor was it obligated to establish that the petitioner was doing business at the time the petition was filed. Therefore, to the extent the director denied the petition on these bases, the director's denial shall be withdrawn.

Accordingly, the primary issue in the present matter is whether the petitioner has established that the foreign employer is currently "doing business" and, thus, is a qualifying organization.

A petition filed on Form I-129 shall be accompanied by evidence that the petitioner and the organization which employed or will employ the beneficiary are "qualifying organizations." 8 C.F.R. § 214.2(l)(3)(i). To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (*i.e.*, one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). If a firm, corporation, or legal entity owns half of the entity and controls the entity, the organizations are related as "parent and subsidiary." *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(I) and (K). The petitioner must also establish that the foreign employer "[i]s or will be doing business." 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

In this matter, the petitioner asserts that it owns 50% of the United States operation, a limited liability company. While the petitioner submitted articles of organization and an operating agreement for the United States operation as well as its Gibraltar certificate of incorporation, the record is devoid of evidence of any business activity being conducted by the petitioner abroad other than representations made in the petitioner's letter dated May 18, 2007 and in a letter from a Gibraltar chartered accountant.

On June 15, 2007, the director requested additional evidence. The director requested, *inter alia*, documentary evidence establishing the ownership and control of both the petitioner and the United States operation such as stock certificates, stock ledgers, and pertinent agreements; photographs of the interior and exterior of the petitioner's premises which clearly depict the organization and operation of the entity; and evidence establishing that the petitioner has been engaged and is presently engaged in the regular, systematic, and continuous provision of goods or services.

In response, counsel submitted a letter dated August 1, 2007 in which he explains that the only document

which indicates the ownership of the United States operation is the previously submitted operating agreement, which states that the petitioner and beneficiary each own a 50% interest. Counsel did not address the ownership and control of the petitioner. Furthermore, counsel responded to the director's request pertaining to evidence of business activity abroad as follows:

The Petitioner stated that Petitioner had been in business since 2001 and also enclosed a copy of its web site which makes reference to five-year consulting arrangements with The Virgin Group, Arcadia Group and Debenhams.

Counsel also submitted letters from both the petitioner's accountant and its solicitor collectively asserting "that the Company is engaged in the business of establishing international franchise networks for companies with worldwide trade names." However, the petitioner did not submit any invoices, contracts, agreements, marketing materials, work product examples, audited financial statements, or other documents specifically illustrating its past, current, or future business activity. Finally, the petitioner submitted two photos of its purported business operation in the United Arab Emirates. One photo is of an office building. The second photo is of a desk, laptop computer, and two chairs. Neither photo contains any characteristics specifically tying the subjects in the photos to the petitioner.

On August 9, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that it is "doing business" abroad.

On appeal, counsel submitted a letter dated September 4, 2007 in which he asserts that the petitioner "has been retained to date by about 40 international companies, for which [the petitioner] has assisted in establishing new retail outlets accounting for annual revenues of about \$20 million, currently resulting in revenues to [the petitioner] of about one million dollars annually." Counsel also asserts that the petitioner has existing contracts with clients which will "generat[e] fees to [the petitioner] of about \$20 million annually." Finally, while counsel lists some of the petitioner's purported clients, he notes that confidentiality prohibits him from naming additional clients. Counsel did not submit any "existing contracts" or other evidence of business activity.

Upon review, counsel's assertions are not persuasive in establishing that the petitioner is "doing business" as defined by the regulations.

As noted above, in order to establish that it is a "qualifying organization," the petitioner must establish that it is or will be "doing business," which is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H). In this matter, the record is devoid of any credible evidence establishing that the petitioner is or will be doing business. The petitioner failed to submit any objective evidence of it engaging in the regular, systematic, and continuous provision of services to clients even though this evidence was specifically requested by the director. 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). The petitioner did not submit any invoices, contracts, agreements, marketing materials, work product examples, audited financial statements, or other documents specifically

addressing its past, current, or future business activity. The petitioner only submitted letters from itself, its attorneys in the United States and Gibraltar, and its Gibraltar accountant. However, the unsupported assertions of counsel do not constitute evidence and will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, neither the letters nor the photos provide any specificity regarding the petitioner's purported business activities abroad. Uncorroborated, self-serving statements "confirming" that the petitioner is engaged in providing services as well as generic photos of commercial buildings and offices do not establish that the petitioner is engaged in the regular, systematic, and continuous provision of goods and/or services.

Finally, the petitioner also failed to establish its ownership and control even though this was specifically requested by the director. While the petitioner submitted evidence addressing the ownership and control of the United States operation, the record is devoid of evidence establishing the ownership and control of the petitioner, a company organized under the laws of the British territory of Gibraltar. Once again, 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). As the ownership and control of the foreign employer, the petitioner, is a legitimate and material line of inquiry, the petitioner's failure to respond to this part of the Request for Evidence is grounds for denying the petition.

Accordingly, the petitioner has failed to establish that it is a "qualifying organization," and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner also failed to establish that it has secured sufficient physical premises to house the new office or that the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year. 8 C.F.R. §§ 214.2(l)(3)(v)(A) and (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.

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.

In this matter, the petitioner has failed to establish (1) that it has secured sufficient physical premises to house the new office; or (2) that the beneficiary will be employed in a primarily managerial or executive capacity within one year.

As correctly noted by the director, the record does not establish that the United States operation has secured sufficient premises to house the new office. In support of the petition, the petitioner submitted photographs and a letter from counsel dated August 1, 2007 in which counsel describes the United States operation's premises as follows:

The location of the United States entity is a residential apartment at [REDACTED] on the Upper East Side of Manhattan in which Beneficiary will live as well as work. The location comprises a bedroom, bathroom, kitchen and living room, the latter being the room in which the operations of the United States Entity will be carried out. The inside photograph shows the equipment to be used (computer, printer, telephone, fax, etc.). Because the activity of the United States Entity will be the provision of services, the

United States Entity does not require a large office or extensive furnishings or fixtures. Its clients will generally either be communicated with by telephone or email or visited by Beneficiary at their own locations.

However, upon review, it is concluded that the petitioner has failed to establish that the physical premises will be sufficient for the new office to 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. It is simply not credible that a one-bedroom, residential unit will permit the business to grow into an organization which would require the beneficiary to primarily perform managerial or executive duties within one year. Furthermore, as the petitioner failed to submit a copy of its lease for the apartment, it cannot be concluded that the United States operation would even be permitted to conduct a home occupation business in the residential unit. It also cannot be concluded that the United States operation or the petitioner is the lessee. 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)).

Second, the petitioner's description of its proposed operation in the United States fails to establish that the beneficiary will perform primarily managerial or executive duties within one year. The petitioner described the beneficiary's proposed role with the United States operation in the letter dated May 18, 2007 as follows:

In the event that this [petition] is granted, [the beneficiary] will initially run the office of [the United States operation] in New York without any employees other than himself. That is possible because the business of [the United States operation] will be the provision of services and because technological advances make it possible to carry on a large volume of such business using computers, email and cell phones, even when not physically at his office. Nevertheless, it may eventually be desirable for [the United States operation] to employ one or more clerical employees.

As previously stated, [the beneficiary's] daily activities will include consulting with and advising existing and new North American clients of [the petitioning organization] concerning expansion activities abroad for which [the beneficiary] will travel not only throughout the United States and North America but also in Europe. His effectiveness will be significantly enhanced by being based in the United States. In order to achieve the objectives of having a U.S. presence, [the petitioning organization] considers it necessary to be represented by an individual having special experience and contacts, which [the beneficiary] possesses, and who is fully familiar with our methods and capabilities.

Upon review, it is concluded that the petitioner has failed to establish that the beneficiary will primarily perform qualifying duties within one year of petition approval. As indicated above, the beneficiary will primarily provide consulting services to the petitioning organization's clients. The provision of consulting services constitutes the performance of tasks necessary to provide a service or to produce a product. It appears that this will be the beneficiary's primary duty during the United States operation's first year in business as well as in the future. It does not appear that the petitioning organization has any plans to hire a

subordinate staff which will relieve the beneficiary of the need to primarily perform these consulting services. 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).

Accordingly, the petitioner has failed to establish that it has secured sufficient premises to house the new office or 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), and the petition may not be approved for the above additional reasons.

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. 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, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the beneficiary's duties abroad even though this evidence was specifically requested by the director. Once again, 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). Absent detailed descriptions of the duties of both the beneficiary and his 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 that the United States operation is 50% owned and controlled by the beneficiary. As a purported owner of the United States operation, 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. at 165 (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.