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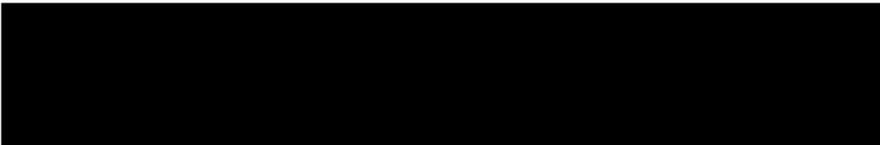
File: EAC 06 245 50175 Office: VERMONT SERVICE CENTER Date: FEB 28 2008

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 president/CEO 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 California, is allegedly in the business of importing and wholesaling industrial pipes and related products.

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(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.

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.

In support of the petition, the petitioner submitted a letter dated August 18, 2006 which describes the United States operation as "importing for [sic] wholesale industrial pipes and related products." The petitioner also asserts that it "has already secured leased premises and the parent company has transferred to its U.S. subsidiary more than \$250,000 to begin start up operations." Finally, the beneficiary's proposed job duties are described as follows:

[The beneficiary] will establish corporate goals and objectives, will oversee initial hires, determine staffing levels, and will establish necessary lines of credit. Once staff is in place, he will delegate and coordinate responsibility and insure an aggressive marketing strategy is adopted.

However, the petitioner did not describe the proposed staffing of the United States operation or explain how, exactly, this subordinate staff will relieve the beneficiary of the need to perform non-qualifying tasks after one year in operation.

On September 7, 2006, the director requested additional evidence.

In response, counsel to the petitioner submitted a letter dated September 12, 2006 which describes the proposed staffing of the United States operation as follows:

Over the next year, petitioner intends to hire an Office Administrator whose duties will include the supervision and coordination of the activities of the clerical and warehousing staff, reporting directly to [the beneficiary]. A secretary will also be hired whose job duties

will be to answer telephones, schedule appointments, prepare correspondence, and arrange conferences. The secretary will report directly to the Office Administrator. Within its first year of operations, the company will also employ a Shipping/Receiving Clerk who will verify and keep records on incoming and outgoing shipments, working under the direct supervision of the Office Administrator. Petitioner plans to immediately hire at least one salesperson who will be trained by [the beneficiary] on the company product line. It is anticipated that within one to two years, the company will employ a Sales Manager who will supervise a sales staff or two to four workers. The Sales Manager will report directly to [the beneficiary] with the subordinate staff reporting to the Sales Manager. The U.S. entity also plans to hire a Marketing Manager within the next year. The individual will be responsible for analyzing, recommending, and implementing marketing strategies and setting up a marketing program that will include a company website. The Marketing Manager will report directly to the President/CEO who will make the final decision on marketing strategies and programs. In addition, the U.S. entity will utilize the services of an outside accounting firm for its financial and bookkeeping needs. The company already utilizes the services of an outside customs agent and will continue to do so.

It is anticipated that on a weekly basis, [the beneficiary] will spend roughly 24 hours each week with the Sales Manager and sales personnel discussing sales incentives, pricing, and customer product requirements. He will spend approximately 4-6 hours each week with the Marketing Manager to review recommendations and develop a marketing program in conjunction with his sales team. Four hours a week will be spent reviewing the work of the Office Administrator to insure that work is being completed in an efficient and timely manner. The remainder of his time will be spent meeting with clients to promote the goodwill of the company and in communication with the parent company to insure that corporate goals are being met.

Counsel also submitted a proposed organizational chart showing the beneficiary at the top of the organization directly supervising, within one year, "outside services," an office administrator, a sales manager, and a marketing manager. The office administrator and the sales manager are, in turn, portrayed as supervising one or more subordinate workers.

On September 21, 2006, 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's descriptions of the proposed duties of both the beneficiary and the subordinate staff are not persuasive in establishing that the beneficiary will be primarily performing qualifying duties after the petitioner's first year in operation; the petitioner has failed to sufficiently describe the nature, scope, and financial goals of the new office; and the petitioner has failed to sufficiently describe the organizational structure of the foreign entity. 8 C.F.R. § 214.2(l)(3)(v)(C).

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 non-specific description of the beneficiary's proposed duties that fails to persuasively establish that, within one year, the beneficiary will primarily perform qualifying duties. For example, the petitioner states that the beneficiary will spend a majority of his time "with the Sales Manager and sales personnel discussing sales incentives, pricing, and customer product requirements." However, while the petitioner indicates that it intends to immediately hire one or more salespersons during its first year in operation, it does not appear that the petitioner has any plans to hire a subordinate supervisor, i.e., a sales manager, until after its first year in operation. Specifically, the petitioner states that "it is anticipated that within one to two years, the company will employ a Sales Manager who will supervise a sales staff or two to four workers." Therefore, based on the petitioner's description, it appears that the beneficiary will spend a majority of his time performing first-line supervisory tasks which do not rise to the level of being managerial or executive. 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. 593, 604 (Comm. 1988). 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. at 604.¹

Regardless, the description of the proposed duties of both the beneficiary and the subordinate staff are so vague that it cannot be discerned what, exactly, any of the employees will do on a day-to-day basis. The petitioner describes the beneficiary only as supervising the sales manager, the office manager, and the marketing manager. Not only is this an insufficient description for purposes of meeting the petitioner's burden of proof in these proceedings, the petitioner has not established that the proposed United States entity within one year will have an organizational and business complexity compelling the employment of a

¹The petitioner has also failed to establish that the sales staff will be "professional" workers. In evaluating whether the beneficiary will manage 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). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee will be employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the work of any of the proposed subordinate employees, including the salespersons.

managerial or executive employee. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As explained *infra*, the record is devoid of any evidence specifically addressing the nature, scope, or organization of the proposed United States operation. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary will likely perform managerial or executive duties after the first year of operations or that the reasonable needs of the organization will compel the employment of an employee performing qualifying duties. 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).

Second, 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, organizational structure, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C)(I). While the petitioner vaguely describes the proposed United States entity as importing and wholesaling "industrial pipes and related products," the record is otherwise devoid of any specific information about the proposed enterprise. The petitioner fails to specifically describe the petitioner's proposed products, services, customers, competitors, or its projected revenue, income, or financial goals. While the petitioner projects start-up costs of \$250,000.00, the petitioner fails to corroborate this projection with any data. The petitioner did not submit a business plan, and the record does not contain any independent analysis, contracts, 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, staffing, 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. Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year 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 failed to describe the organizational structure of the foreign entity. 8 C.F.R. § 214.2(l)(3)(v)(C)(3). Other than a list of employees and job titles, the record is devoid of any explanation of the foreign employer's organizational structure. The petitioner failed to describe the duties of the subordinate employees or to outline the foreign employer's supervisory hierarchy, if any.

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 the petition, the petitioner submitted a Commercial Lease Agreement for [REDACTED] Chino, California. In response to the director's Request for Evidence, the petitioner also submitted

photographs allegedly of the leased premises. Upon review, this evidence does not establish that the petitioner has secured "sufficient" physical premises to house the new office. First, neither the lease nor the photographs establish the size or character of the premises. Absent this evidence, the petitioner has not established that these premises will permit the enterprise 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. Second, as explained above, the record is devoid of evidence specifically describing the nature and scope of the proposed enterprise. Absent such evidence, it cannot be determined whether the premises will be sufficient.

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 employer for one year within the preceding three years. 8 C.F.R. § 214.2(l)(3)(v)(B).

In support of its petition, the petitioner describes the beneficiary's duties abroad in a letter dated August 18, 2006 as follows:

[The beneficiary] has been General Manager of [the foreign employer] since its inception in March 2001. In that capacity, he plans[,] develops and establishes policies and objectives of the company. He also delegates responsibilities and sets procedures for attaining those objectives. He reviews the company's activity and financial reports to determine business growth and oversee[s] the marketing strategies for new and existing products sold both nationally and internationally. He reviews personnel evaluations completed by his Department Managers and has final authority over staffing decisions.

The petitioner also submitted a list of 15 employees of the foreign employer, including the beneficiary. While the beneficiary is assigned the title "general manager," the remaining employees are described only by job title. The petitioner did not describe the job duties of the other employees or submit a chart describing the organizational hierarchy of the foreign employer.

Upon review, the petitioner failed to establish that the beneficiary was employed in a primarily managerial or executive capacity abroad. In support of its petition, the petitioner submitted a vague, non-specific description of the beneficiary's duties that fails to establish what the beneficiary did on a day-to-day basis. For example, the petitioner asserts that the beneficiary established "policies and objectives." However, the petitioner failed to define these policies and objectives or to explain what, exactly, the beneficiary did to perform his duties. The fact that the beneficiary was given a managerial or executive title and was ascribed a vague job description which includes inflated duties does not establish that the beneficiary "primarily" performed managerial or executive duties. Furthermore, the petitioner did not submit a breakdown of how much time the beneficiary devoted to each of his vaguely described duties or to establish that he supervised and controlled other managerial, supervisory, or professional employees. The petitioner did not describe the duties of the other employees or the organizational hierarchy of the foreign employer. 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 (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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190)).

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 in the Form I-129 that the foreign employer is "owned principally by [the beneficiary]" and that the foreign employer owns 100% of the petitioner. Therefore, as the beneficiary is allegedly an owner or major stockholder of the company, 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. 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 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.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the foreign entity.

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). The petitioner must also establish that the organizations are or will be "doing business." "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services."

In this matter, the petitioner has failed to establish that the foreign employer is currently "doing business," and, consequently, has failed to establish that the foreign employer is a qualifying organization. While the petitioner submitted financial data from 2005 and a few company brochures, this evidence does not establish that the petitioner was engaged in the regular, systematic, and continuous provision of goods and/or services

at the time the petition was filed on August 29, 2006. The record is devoid of evidence of any current business activity abroad.

Accordingly, the petitioner has failed to establish that the foreign employer is a qualifying organization, and the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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.