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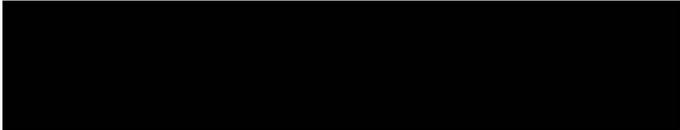
File: EAC 07 008 50390 Office: VERMONT SERVICE CENTER Date: JUL 03 2008

IN RE: Petitioner:
Beneficiary:



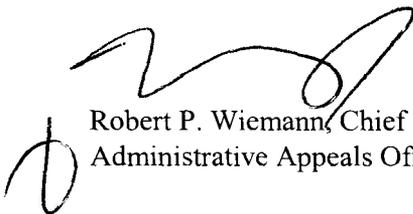
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 seeks to employ the beneficiary temporarily 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 U.S. petitioner, a corporation organized in the State of California, intends to provide management and consulting services and seeks to employ the beneficiary as the president of the new office in the United States. The petitioner claims that it is the subsidiary of Sargis Horhannisyann LLC, located in Yerevan, Armenia.

The director denied the petition concluding that the petitioner did not establish that the petitioner would be able to support the beneficiary in a primarily managerial or executive position within one year of the petition's approval.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision was arbitrary and capricious, and claims that the director did not properly review the petition. Specifically, counsel bases her argument on the fact that the petitioner should be afforded one year in which to commence a new office. In support of this assertion, counsel submits a brief and additional evidence.

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.

- (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:
 - (A) Sufficient physical premises to house the new office have been secured;
 - (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment 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 (1)(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.

This matter presents two related, but distinct, issues: (1) whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity; and (2) whether the U.S. entity will be able to support a managerial or executive position within one year after the petition's approval.

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.

In the initial petition, the petitioner claimed it would have a gross annual income of \$100,000. It also provided a general overview of the beneficiary's proposed duties in the United States, as well as an undetailed business plan discussing the potential growth of the U.S. entity, in a letter dated September 28, 2006. Specifically, the petitioner stated:

[The beneficiary] is coming to the United States to open a new business, therefore the U.S. entity has not yet been activated. The business . . . is in its setup stages and has completed all the preliminary steps in preparation to begin business activity. Premises suitable for the business have been secured, the U.S. entity has been registered and a business bank account has been opened. Upon [the beneficiary's] commencement of employment, the company will begin business activity. [The beneficiary] will act as the President of [the petitioner] and therefore will initiate all transactions and business activity.

[The beneficiary] will hold the position of President for the U.S. subsidiary. His duties will include planning, developing and establishing policies and objectives of the business. He will confer with hired employees to plan business objectives; develop organizational policies to coordinate functions and operations, and establish responsibilities and procedures for attaining objectives. He will review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with

current conditions. He will also direct and coordinate formulation of programs to increase productivity. He will plan and develop industrial, labor and public relations policies designed to improve company's image and relations with customers, employees, and public. He will evaluate performance of staff for compliance with established policies and our objectives and contributions in attaining objectives. He will preside over the board of directors. Upon his arrival he will hire the necessary employees and subordinate administrative personnel.

On October 20, 2006, the director requested additional evidence with regard to the manner in which the petitioner would need the services of a bona-fide manager or executive. The director requested an organizational chart showing the staffing of the organization as well as the position descriptions and duties of all proposed subordinates. In addition, the director requested a more detailed overview of the beneficiary's proposed position.

In a response dated January 10, 2007, the petitioner, through counsel, submitted a letter accompanied by an explanation of the petitioner's proposed business plan. Contrary to its plans set for in the initial petition, where the petitioner claimed it would provide management and consulting services, the petitioner now claimed that it would market and sell shoes. Counsel claimed that the petitioner expected to employ five persons by the end of the first year of operations (including the beneficiary), and that this process would be gradual and would take place over the course of the entire year. Regarding the beneficiary's duties, counsel claimed that the beneficiary possessed skills and experience commensurate with an executive position based on the position he held with the foreign entity. Counsel further claimed that the beneficiary would direct the U.S. operations to assure viability of the business and ensure profitability, and provided the following list of duties:

- Planning, developing and establishing policies and objectives of the business.
- He will confer with V.P. of marketing and company employees to plan business objectives and marketing strategies[.]
Develop organizational policies to coordinate functions and operations, and established [sic] responsibilities and procedures for attaining objectives.
- Review activity reports and financial statements to determine progress and status in attaining objectives and revised objectives and plans in accordance with current conditions.
- Direct and coordinate formulation of programs to increase productivity.
- Preside over the board of directors. Upon his arrival he will hire the necessary sales and marketing employees, and administrative personnel.

The petitioner also submitted an organizational chart, which outlined the proposed staffing of the company. Specifically, the beneficiary as president would oversee the vice president of marketing, who in turn would oversee a sales team and administrative personnel. None of these identified positions or teams were staffed at the time of submission of the chart. The petitioner also submitted a position description for all subordinate positions, and listed the educational requirements for each position. It should be noted that despite this organizational chart and the fact that none of these proposed positions were yet to be filled, the petitioner claimed on Form I-129 that the U.S. entity employed a staff of two persons.

On January 24, 2007 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States by the end of the first year of operations. Specifically, the director noted that one of the proposed subordinate positions, namely, the vice president of marketing, seemed to describe a bona-fide professional position. Since by the petitioner's own admission, the company had not yet commenced operations, the director concluded that the proposed organization would not be able to support two bona-fide managerial and/or executive positions by the end of the first year of operations.

On appeal, counsel for the petitioner alleges that the director's decision ignored the regulations, and points out that the petitioner must only show that it supports the beneficiary in a qualified managerial or executive position at the end of the first year of operations. Counsel asserts that the petitioner need not demonstrate this factor at the time of filing, and thus should be afforded one year in which to commence operations and solidify the beneficiary's position as president.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the proposed organizational chart, it appears that the petitioner has failed to establish that it will be able to support the beneficiary in a capacity that is primarily managerial or executive at the end of the first year of operations. The intent to hire a full-time vice president of marketing, who must have a bachelor's degree or five years of experience and who will refrain from performing day-to-day operations, renders it unlikely that this newly-established entity will have the required staff to relieve the beneficiary and the other executive from engaging in daily tasks crucial to the business. In addition, the AAO notes that the descriptions of duties provided both with the petition and in response to the request for evidence were too vague to ascertain whether the beneficiary will be acting in a primarily managerial or executive capacity.

Other than the organizational chart and the expectation that it will gradually hire up to four employees, in addition to the beneficiary, during the first year of operations, the petitioner provides no concrete business plan. 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 staffing requirements and contain a timetable for hiring, as well as a job

description 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.

In this case, no such document has been submitted, and the petitioner's organizational chart and statements in its letters of support was quite vague and lacked detail with regard to the petitioner's planned objectives and timeline for achieving its goals. The petitioner omits any discussion of market strategy and the relative strengths and weaknesses of the petitioner. Although counsel on appeal submits articles pertaining to the marketing strategies and successes of other companies, these documents do not pertain to the petitioner and its proposed business. The petitioner provides no specific timeline for hiring subordinate employees, no financial projections, and no contracts currently in place. As a result, the petitioner has failed to submit a detailed and credible business plan. 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)).

In addition, the AAO notes numerous discrepancies pertaining to the petitioner's business plan and intended operations. Although the petitioner initially claimed it would provide management and consulting services, it altered its proposed business plan in response to the request for evidence when it claimed that it would market and sell shoes. No explanation for this change was provided. In addition, while it claimed on Form I-129 that it employed two persons at the time of filing, no mention of this alleged staffing was made throughout the petition. Instead, the petitioner merely claimed that it intended to hire a staff of four persons, in addition to the beneficiary, by the end of the first year of operations. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Finally, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2) provides that when a 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 the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position supported by information regarding 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. Upon review of the record, it is noted that the petitioner did not provide any documentation to support the size of the U.S. investment. 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). Moreover, it is noted that the projected gross annual income of the petitioner will be \$100,000. It is unclear, without additional financial information, how the petitioner intends to employ a staff of five persons, including the beneficiary, with a gross annual income of \$100,000. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

These deficiencies in the record, coupled with the vague job description of the beneficiary, prohibit a finding that the petitioner will be able to support a managerial or executive position at the end of the first year of operations. While the beneficiary is the intended president of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment and that such capacity will be unwavering after the first year of operations.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In this case, the petitioner vaguely described the beneficiary's duties and seems to merely paraphrase the regulatory definitions of managerial and executive capacity. In addition, the descriptions provided fail to explain how the beneficiary's duties will interact and/or change with the hiring of the proposed subordinates. The petitioner consistently claims that the U.S. business *will not* commence until the petition is granted and the beneficiary arrives in the United States. With a one-year limit during which it must establish a new office and support the beneficiary in a bona-fide managerial or executive position, it is unclear why the petitioner is unable to present a viable business plan outlining the steps the company will take each month to get the business underway. As discussed above, no definite hiring plan or timeline was submitted which would demonstrate when and how the beneficiary would be relieved from performing these non-qualifying duties. Merely claiming that it will "gradually" hire staff and that the beneficiary will plan develop, and establish policies, without clearly specifying how and when he will do so, makes the instant petition less than credible.

Furthermore, absent a hiring plan and based on the petitioner's contention that the beneficiary will be the only employee for at least part of the first year of operations, it is clear that the beneficiary will be performing non-qualifying tasks. It is clear, therefore, that his proposed duties include many practical obligations that would normally be delegated by a manager or supervisor to a subordinate staff. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). While the AAO recognizes the need for a managerial or executive employee to undertake such duties in the wake of a new company's establishment, the petitioner has failed to show how, if at all, the beneficiary will eventually be relieved from performing these tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Secondly, the description of his duties is vague and not specific enough to clearly establish the beneficiary's role in the company. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108.

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 the reason discussed above, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity, or that the petitioner will grow to the point where it will require the services of a full-time manager or executive at the end of its first year of operations. For this reason, the petition may not be approved.

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.