

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



**U.S. Citizenship
and Immigration
Services**

D7



File: EAC 07 115 50390 Office: VERMONT SERVICE CENTER Date: **OCT 02 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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 to open a new office in the United States as an L-1B nonimmigrant intracompany transferee with specialized knowledge 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 is a corporation established in the State of Oregon for the purpose of engaging in the wholesale of arts and antique furniture.

The director denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that it would be doing business as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H); and 2) the petitioner failed to establish that the beneficiary would be controlled by the petitioning U.S. employer.

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 director's decision is erroneous with regard to both grounds. A full discussion of counsel's arguments will be provided below.

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)(vi) states that if the petition indicates that the beneficiary is coming to the United States to be open or be employed in a new office in a specialized knowledge capacity, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The business entity in the United States is or will be a qualifying organization as defined in paragraph (l)(1)(ii)(G) of this section; and
- (C) The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

In the present matter, the first issue is whether the petitioner has established that it would be doing business, which is defined in 8 C.F.R. § 214.2(l)(1)(ii)(H) as the 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 or abroad.

In support of the Form I-129, the petitioner submitted a letter dated February 15, 2007, stating that the purpose of the U.S. branch office was to "promote Japanese arts and antiques, sell Japanese antiques and give lectures concerning Japanese arts and Nishiura Style in the United States." The petitioner also provided a photocopied rental lease and photographs of the interior of the leased premises. The petitioner claimed that it purposely leased a residential property in order to house the antiques in a home environment, where potential buyers could see the antique items on display and where such items would be more secure than they would be in a commercial property.

On April 2, 2007, the director issued a request for additional evidence (RFE) in light of various observations that were made during the course of examining the petitioner's record of proceeding. First, the director noted that the petitioner's antiques would be displayed in a residential rather than in a commercial area. Second, the director observed that the beneficiary would primarily reside in Japan and would make only occasional trips to the United States in order to provide arts lectures and to promote Japanese arts and Nishiura Style. In light of these observations, the director questioned how the petitioner would provide goods and/or services in a continuous manner at its new U.S. office. Accordingly, the director instructed the petitioner to provide a detailed description of the type of business to be conducted by the U.S. entity on a daily basis. The petitioner was asked to identify the products it intended to sell and to specify the location of established and prospective customers who would buy the petitioner's goods. The petitioner was also asked to discuss who would perform its daily tasks and to disclose whom it employed and the job descriptions of its employees, if any.

In response, the petitioner provided a letter dated April 20, 2007 in which the petitioner clarified that the purpose of the U.S. branch office is to "promote Japanese arts and antiques, sell Japanese antiques and give lectures concerning Japanese arts and Nishiura Style in the United States." The petitioner also stated that its customers are primarily collectors and wholesalers, many of whom would be referred by [REDACTED], the owner of the petitioner's leased business premises. The petitioner speculated that other customers may be individuals who would attend the beneficiary's seminars and may be interested in knowing the Japanese arts.

The petitioner further explained that [REDACTED] is a collector of Japanese antiques and will therefore be charged with promoting and selling the petitioner's merchandise by meeting with prospective clients and explaining the meaning and value of the antiques to be sold. The petitioner stated that [REDACTED] would be its only employee indefinitely until such time as the petitioner experiences sufficient expansion in its business.

Additionally, the petitioner provided a business plan, which includes projections of the petitioner's activities from April 2007 until April 2008. The petitioner stated that from April until June 2007, it expected to inform clients of the beneficiary's transfer to the United States, set up a website and create product catalogues of the petitioner's merchandise, contact institutions that may be interested in sponsoring the beneficiary's seminars, and schedule the various seminars. From June to July 2007, the beneficiary planned to meet with existing and potential clients to gauge their interests and select additional items to be shipped from Japan to the United States. The petitioner clearly indicated that during the beneficiary's absences from the United States, Mr. [REDACTED] would maintain the petitioner's merchandise and schedule the beneficiary's seminars with interested institutions.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish that it would be engaged in the regular, systematic, and continuous provision of goods and/or services. The director therefore issued a denial dated May 17, 2007.¹

On appeal, counsel submits an appellate brief arguing that the petitioner would import and sell Japanese antiques and coordinate and manage the beneficiary's seminars, which constitute business activity.

Upon review, counsel's assertions are not persuasive.

In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to submit documentation to establish its ability to remunerate the beneficiary and to commence doing business in the United States investment. See 8 C.F.R. § 214.2(l)(3)(vi)(C). In the present matter, the petitioner has provided general information about the nature of the petitioner's business and has provided no specifics as to how it plans to attract clients to purchase its merchandise. Moreover, the petitioner specifically stated in its response to the RFE that its goal was to be selective in the type of clientele it would seek and that it was therefore expected that information about the petitioner's business would spread slowly. Although the petitioner indicated that some clientele would result from the beneficiary's anticipated lectures and seminars, no documentation was provided to establish sufficient interest in such lectures or to suggest that such lectures would occur frequently enough such that the petitioner could realistically expect to obtain sufficient buyers who would enable the petitioner to sell its goods on a regular, systematic, and continuous basis. 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)). As the petitioner has

¹ The AAO notes for the record that counsel's appellate brief referred to the date of the director's decision as March 17, 2007, rather than May 17, 2007. This appears to have been a typographical error and will have no bearing on the AAO's decision in the present matter.

not provided sufficient documentation to establish that it would meet the definition of doing business under an approved petition, this petition cannot be approved.

The second issue in this proceeding is whether the beneficiary would be controlled by the petitioning U.S. employer. The director observed that the beneficiary would not be primarily stationed at the worksite of the petitioning U.S. employer, which resulted in his ultimate finding that the petitioning employer would not control and supervise the work of the beneficiary.

On appeal, counsel asserts that the beneficiary would give informal lectures and seminars, which are not part of the curriculum of the universities where the lectures and seminars would take place and students would not get university credits for attending these lectures and seminars. Counsel explains that the universities and cultural centers would merely serve as a venue for the seminars and lectures, which the beneficiary would use as a tool to advertise the petitioner's antiques and the Nishiura style. In support of counsel's assertions, the petitioner provides a copy of a flyer, which advertised one of the beneficiary's seminars.

The AAO finds that counsel's explanation coupled with the advertising flyer are persuasive in determining that the beneficiary would not be controlled and supervised by an unaffiliated employer. Therefore, the second ground for the director's denial is hereby withdrawn.

Notwithstanding the favorable finding above, the petitioner has failed to overcome the first ground for the director's denial. As such, this petition cannot be approved.

Additionally, while not expressly addressed by the director, the record indicates that the petitioner failed to establish that the beneficiary's prospective position requires the employment of an individual possessing specialized knowledge. In part 5, item 10 of the Form I-129, the petitioner indicated that the type of business it plans to operate is that of an arts and antique furniture wholesaler. The petitioner has also maintained that the beneficiary would only occasionally travel to the United States and that in his absences, [REDACTED] who owns the furniture that would be sold, would be responsible for showing the merchandise to potential clients. Although the petitioner claims that the beneficiary would give lectures and seminars in order to advertise the petitioner's merchandise, there is no indication that the primary portion of the beneficiary's time in the U.S. position would be spent giving lectures and seminars. Furthermore, the petitioner has not established that giving lectures and seminars in order to promote the petitioner's antiques involves and requires specialized knowledge.

That being said, in examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties and the weight of the evidence supporting any asserted specialized knowledge. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed job description of the services performed and to be performed sufficient to establish specialized knowledge. In the present matter, the petitioner has not established what the beneficiary would primarily do during his employment in the United States. Due to the petitioner's failure to provide this essential information, the AAO cannot conclude that the beneficiary's proposed employment with the U.S. entity would be in a capacity that involves and requires specialized knowledge. 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.