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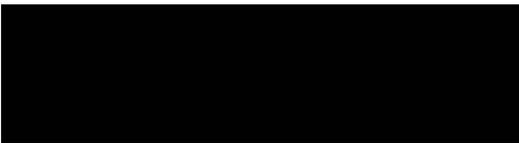
U.S. Department of Homeland Security
20 Mass. Ave, N.W., Room. 3000
Washington, DC 20529



U.S. Citizenship
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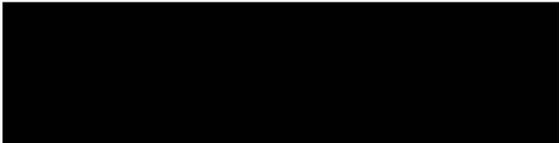


File: WAC 08 062 50241 Office: CALIFORNIA SERVICE CENTER Date: **OCT 02 2008**

IN RE: Petitioner: 
Beneficiary: 

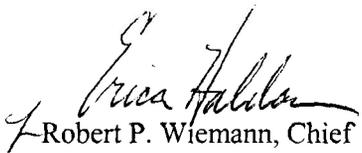
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, California 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 petitioner, a corporation organized in the State of California that claims to be an investment company, seeks to employ the beneficiary as the president and chief executive officer of its new office in the United States. The petitioner claims that it is the affiliate of Deepak Jewelers in Ahmedabad, India.

The director denied the petition concluding that the petitioner did not establish that the U.S. entity would be able to support the beneficiary in a primarily managerial or executive position within one year of the petition's approval. Specifically, the director found that the petitioner failed to submit adequate documentation to establish its proposed business plan, the amount of involvement of the claimed foreign parent, and the manner in which the beneficiary would be relieved from performing non-managerial or non-executive duties by the end of the first year of operations.

On appeal, counsel for the petitioner asserts that the petitioner fully complied with the evidentiary requirements for a new office. He further asserts, in response to the director's conclusion that the beneficiary will not be employed in a qualifying capacity by the end of the first year of operations, that the beneficiary will be acting as a function manager for the petitioner. In support of these contentions, counsel submits a detailed brief.

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 U.S. entity will be able to support a managerial or executive position within one year after the petition's approval; and (2) whether the petitioner complied with the evidentiary requirements of 8 C.F.R. § 214.2(l)(3)(v)(C) by providing evidence of the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals; 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 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 AAO will first review the evidence submitted by the petitioner in support of the contention that the petitioner will in fact support the beneficiary in a primarily managerial or executive position by the end of the first year of operations. As stated above, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) requires specific evidence to support such a conclusion. Specifically, the petitioner is required to submit 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.

In a letter of support dated December 26, 2007, the petitioner claimed that the goals of the U.S. organization included creating business profits by identifying and acquiring business opportunities either through acquisition or startups. Furthermore, the petitioner claimed that its focus would be on commercial real estate properties.

Regarding the beneficiary's position and proposed duties, the petitioner states as follows:

The beneficiary will initially be responsible for acquiring office space and filling suitable personnel needs of the new office. As [the petitioner] is up and running the beneficiary will be assigned the responsibility of directing the management of the newly opened U.S. office and will establish its goals and policies. Additionally, the Beneficiary will exercise discretion in staffing, locating and negotiating office space and leading, supervising, and controlling the work of other managers.

* * *

An approximate breakdown of [the] Beneficiary's job duties are as follows:

- Set strategies and deploy tactics that will ensure performance, targets and goals are met. **(50% of work week).**
- Strengthen and expand [Petitioner's] portfolio companies with the goal of acquiring additional business opportunities. **(30% of work week).**
- Lead, coach, and develop a team of managers[.] **(10% of work week).**
- Conduct relationship reviews with real estate brokers and business prospects. **(5% of work week).**
- Coordinate with Banks and other lending institutions to support the quality, profitability, and managed risk exposure of proposed expansion portfolio. **(5% of work week).**

The petitioner further claimed that the beneficiary had already identified two professional employees who he would ultimately hire, manage, and control. Specifically, they were identified as [REDACTED], vice president/business manager and [REDACTED], treasurer/accounts manager. Both employees possessed bachelor's degrees and, according to the petitioner, would be directly supervised by the beneficiary.

In further support of the petition, the petitioner submitted documentation of the petitioner's ownership, which showed that Mr. [REDACTED] owned 100,000 of the 1,000,000 shares authorized in the petitioner. The

petitioner also submitted an organizational chart for the foreign entity, as well as financial documentation such as Indian income tax returns for [REDACTED] and the beneficiary.

The director found that the evidence submitted in support of the initial petition did not satisfy the regulatory requirements. Therefore, the director issued an extremely detailed request for evidence on January 17, 2008. The request asked the petitioner to submit the evidence required in 8 C.F.R. § 214.2(l)(3)(v)(C), outlined above, as well as additional evidence pertaining to the proposed U.S. venture, including but not limited to a letter from the foreign entity detailing the need for a U.S. office; meeting minutes of the foreign entity resolving to open an office in the United States; a feasibility study; a comprehensive business plan; and proof of the foreign entity's business dealings abroad.

The petitioner submitted a detailed response, including original sales receipts for the foreign entity and copies of the foreign entity's tax returns and profit and loss statements. The petitioner also submitted a copy of the petitioner's initial bank statement, showing a wire transfer from the foreign affiliate in the amount of \$100,995.32, and a copy of a promissory note from the claimed owner of the two companies. The promissory note indicated that [REDACTED], sole owner of the petitioner and the foreign entity, a sole proprietorship, agreed to pay the U.S. petitioner \$150,000 in exchange for 50,000 shares in the petitioner in monthly installments beginning on July 1, 2008. Finally, the petitioner submitted an eight-page business plan outlining the goals of the U.S. organization.

Upon review of the submitted evidence, the director denied the petition, concluding that the petitioner did not establish that it would be able to support the beneficiary in a primarily managerial or executive position within one year of the petition's approval. Specifically, the director found that the petitioner failed to submit the following: (1) an original letter by the foreign entity explaining the need for the new office in the United States; (2) a feasibility study determining the need for and the proposed feasibility of the proposed U.S. entity; (3) copies of prior and current business plans for the U.S. entity; and (4) meeting minutes of the foreign entity illustrating the discussion to form the U.S. entity.

On appeal, counsel addresses these specific deficiencies cited by the record. Counsel asserts that the petitioner was required to satisfy the evidentiary requirements set forth at 8 C.F.R. § 214.2(l)(3)(v)(C), and the director's denial of the petition based on the petitioner's failure to submit evidence such as a feasibility study and meeting minutes demonstrating the resolution by the foreign entity to form the U.S. entity was erroneous. Upon review, the AAO agrees with counsel's assertions on appeal, yet concurs with the director's ultimate conclusion.

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 director made technical evidentiary demands that were somewhat inapplicable to the petitioner. For example, the petitioner claimed that the foreign entity was a sole proprietorship. However, the director requested meeting minutes from the foreign entity as evidence of the petitioner's eligibility, which counsel for the petitioner correctly notes are neither required nor common practice in a sole proprietorship. In addition, the director required a feasibility study from the foreign entity, and based the denial in part on the petitioner's failure to submit such a study. However, as counsel correctly points out, there is no requirement for a feasibility study in the regulations governing the evidentiary requirements for new office petitions.

Therefore, the AAO will focus on the evidentiary requirements set forth at 8 C.F.R. § 214.2(l)(3)(v)(C). Upon review, the AAO notes that while the petitioner complied with most of the evidentiary requirements of this regulation, the evidence pertaining to the petitioner's business plan and the size of the U.S. investment was insufficient. The AAO will first review the petitioner's 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.

The petitioner in this matter submitted a very shallow business plan, which essentially claimed that the petitioner intended to create business profits by identifying and acquiring business opportunities either through acquisition or startups, and further contended that it would focus on commercial real estate. The petitioner's plan provided no evidence that a market analysis was conducted, and failed to provide the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, or a description of the target market/prospective customers of the new commercial enterprise. The plan further omitted any mention of the marketing strategy of the business, including pricing, advertising, and servicing, and did not demonstrate that any contracts for its proposed real estate acquisitions had yet been executed.

Although the petitioner included a brief statement regarding the staffing of the proposed entity, it failed to outline a timetable for hiring, as well as a complete job description for all positions. For example, the petitioner contends that the beneficiary, as president and chief executive officer, will be "responsible for the oversight of all critical functions." It contends that within one year, the petitioner will hire qualified market/investment analysts, all of whom will possess a master's degree in business administration, as needed. At the same time, the petitioner contends that the beneficiary has identified two "managers" which he would like to hire; namely, a vice president and a treasurer. The vice president would identify and acquire business properties, whereas the treasurer would handle financial and accounting duties for the company. Again, no specific timeline for their hire was provided. Although the petitioner stated that such employees were already selected, the petitioner provided no evidence that they had actually been hired. Further, it is noted that the petitioner indicated on Form I-129 that it has a proposed staff of three employees.

Most importantly, there is no discussion or allocation for support staff, such as administrative or secretarial support to relieve the beneficiary from performing non-qualifying duties by the end of the year. Moreover, no sales or marketing personnel have been proposed, nor has the petitioner specifically outlined when and how the beneficiary will hire the proposed support staff to allow him to function in a primarily managerial or executive capacity. 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.

The minimal information contained in the petitioner's business plan and letter of support dated December 26, 2007 falls far short from providing a comprehensive and credible business plan as outlined above. Although the petitioner contends that the new entity will hire sufficient staff within a year, there is no discussion or outline with regard to the need for such staff, the manner in which the petitioner's business dealings will support such positions, or the proposed salaries for said persons and the manner in which they will be remunerated. Moreover, in direct contrast to the current business plan, the petitioner claims that the beneficiary will serve as a function manager and will thereby suffice as the petitioner's sole employee.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8

C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function.

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. For example, the description of the beneficiary's duties includes duties such as "lead, coach, and develop a team of managers." A task such as this clearly requires the beneficiary's direct participation and thus his performance, thereby negating the claim that he merely "manages" a function. Moreover, the record contains evidence that the beneficiary has chosen two professional employees to hire and supervise, and indicates that additional analysts will be hired in the future. Since the term function manager generally applies to persons who do not supervise a subordinate staff, the petitioner cannot establish that the beneficiary qualifies for this title without undermining its prior claims regarding the proposed organization structure of the petitioner.

In addition, the petitioner also claims that the beneficiary will "conduct relationship reviews with real estate brokers and business prospects" and "coordinate with banks and other lending institutions to support the quality, profitability, and managed risk exposure of proposed expansion portfolio." Based on these duties, it is clear that the beneficiary will be actively involved in the promotion and production of the beneficiary's services and not merely managing an essential function of the company. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

Moreover, the petitioner has failed to submit a sufficient business plan outlining the proposed expansion of the petitioner within the first year of operations. Therefore, it is impossible to conclude that the petitioner will be able to support the beneficiary in a primarily managerial or executive capacity by the end of the first year of operations.

Additionally, a further review of the record shows that the petitioner has failed to satisfy the requirements of 8 C.F.R. § 214.2(l)(3)(v)(C)(2). Specifically, the financial information submitted on behalf of the petitioner and the foreign entity is questionable and is not contemplated by the inadequate business plan discussed above. Therefore, the size of the United States investment and the manner in which the foreign entity would remunerate the beneficiary is unclear.

The record indicates that [REDACTED], owner of the foreign entity, owns 100,000 shares of the petitioner. Although the corporate documentation in the record evidences the stock transfer, no evidence of the price per share or the actual transfer of funds has been specifically noted by the petitioner. However, a copy of the petitioner's corporate bank statement with Wells Fargo Bank, dated January 25, 2008, indicates that [REDACTED] made a wire transfer in the amount of \$101,005.32 on December 28, 2007, thereby suggesting that this money represents consideration for his ownership interests.

However, the record also contains a copy of a promissory note signed by [REDACTED], wherein he promises to pay \$150,000 to the petitioner in monthly installments beginning July 1, 2008, in exchange for 50,000 additional shares in the U.S. entity. This agreement would suggest that the price per share, therefore, is \$3 per share, although it appears from the wire transfer noted above that he initially paid approximately \$1 per share.

Based on these discrepancies and unresolved inconsistencies, [REDACTED] s legitimate ownership interests and the intended use of these funds is unclear. 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. 582, 591-92 (BIA 1988).

Furthermore, the petitioner has not clearly outlined its anticipated start-up costs or financial projections for the first year of operations. This evidentiary deficiency further undermines the petitioner's claim that it will grow to support a manager or executive position within one year of the petition's approval.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.