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U.S. Citizenship
and Immigration
Services

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File: EAC 07 065 52087 Office: VERMONT SERVICE CENTER Date: OCT 31 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.

for
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 visa petition seeking to extend the employment of its general manager 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 is a Florida corporation claiming to be a consulting services provider.¹ The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not establish that it can support the beneficiary in a position that is within a managerial or executive capacity.

On appeal, counsel for the petitioner disputes the director's conclusion and submits an appellate brief and additional documents in support of his statements. Both the brief and additional documents will be fully addressed in the discussion 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

¹ It should be noted that, according to the Florida Department of State, Division of Corporations, the petitioner has been administratively dissolved due to its failure to satisfy the state's annual report requirements. Therefore, regardless of whether the petitioner's annual report issues in Florida can be easily remedied or not, it raises the critical issue of the company's continued existence as a legal entity in the United States. See § 607.1421, Fla. Stat. (2006).

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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 support of the Form I-129, counsel for the petitioner provided a letter dated January 3, 2006 in which he provided the following list of the beneficiary's responsibilities under an approved petition:²

- Decisions, direction and budgets;
- Formulating and implementing administrative and financial policies and procedures;
- Directing the activities of employees;
- Evaluating the performance of the company and staff and to determine areas of cost reduction and program improvement;
- Engaging in long-range planning and identify business opportunities in the U.S.;
- Cash-management [sic];
- Acquisition of new clients and business relationship;
- Hiring and training professional[s] to work to work [sic] in the company and establishing their duties and responsibilities;
- Analyzing financial information, such as price, future trends and investments [sic] risks, make investment decisions, estimating forecast of business and preparing plans of action;

² It is noted that counsel's letter is dated 2006 even though it was submitted in support of a petition that was filed in 2007. The AAO acknowledges that this is likely a typographical error, and it has no bearing on the petitioner's eligibility.

- Supervising employees and reviewing records, policies and procedures;
- Maintaining and reviewing account records; and
- Overlooking the shipment operations.

The petitioner also provided a number of sales invoices showing that the petitioner was selling cosmetic products and providing general cleaning services. It is noted, however, that the petitioner did not include a discussion to explain who was providing the services and why there is no evidence that the petitioner is engaged in the provision of consulting services as it previously indicated in Part 5, Item 10 of the Form I-129 filed on January 5, 2007.

After reviewing the petitioner's submissions, the director determined that additional evidence and/or information would be required to determine the petitioner's eligibility for the immigration benefit sought. Therefore, the director issued a request for additional evidence (RFE) dated April 16, 2007. The director restated the regulatory requirements for a new office petitioner seeking to extend the beneficiary's employment in the United States and instructed the petitioner to provide a statement of the beneficiary's specific duties to explain exactly what the beneficiary has been doing and what he would be doing under an approved petition. The director indicated that the petitioner should discuss the extent of the beneficiary's involvement in daily operational tasks. The petitioner was also asked to provide a position description for Roberto Pereira, the petitioner's only employee aside from the beneficiary. The director asked that an organizational chart be submitted establishing where Mr. Pereira's position falls within the petitioner's hierarchy. Lastly, the director instructed the petitioner to provide documentary evidence establishing that it has developed to a point where it can support the beneficiary in a managerial or executive capacity.

In response, counsel provided a letter dated July 9, 2007, which included the following statements regarding the beneficiary's continued employment with the U.S. entity:

As the [g]eneral [m]anager, the [b]eneficiary has been responsible for the monthly review of financial statements, sales and activity reports, using performance data to measure productivity and goal achievement, determining areas in need of cost reduction and improvement.

He supervises managerial employees, assigns specific duties, establishes and implements departmental policies, goals, objectives, and procedures, and confers with board members, as necessary.

He has and will continue to determine staffing requirements, [sic] for current and future needs[; he] will continue to interview and hire employees (including managers); [and he will] engage in long-range planning, planning expansion possibilities, and identify[ing] business opportunities in the U.S.A.

He has and will continue to direct and coordinate the organization's financial and budget activities to fund operations, maximize investments, and increase efficiency.

He will continue to plan strategies for the acquisition of new clients and business relationships; be responsible for cash management; oversee activities directly related to providing services; and monitor businesses to ensure that the company efficiently and effectively provides needed services while staying within budgetary limits.

The [b]eneficiary meets with managerial subordinates to hear and discuss their concerns, provides superiors within written reports, and overlooks the overall activities of the [p]etitioner making final decisions on different operational and financial matters.

To accomplish these tasks, the [b]eneficiary will continue to use different financial tools current[ly] available and analyze reports produced by subordinates or contractors such as an accountant. He will continue to review and compare monthly reports, balances, data and will identify possible financial opportunities such as merging possibilities.

All of the [b]eneficiary's duties will remain managerial in nature, and he will not perform the company's day-to-day tasks in order for the [p]etitioner to provide or perform its services. The day-to-day tasks, [sic] will be performed by the current subordinates or those to be hired.

The [b]eneficiary will not call customers, close contracts, receive payments, buy products, deposit money in the bank, and engage on [sic] the selling or performance of the services offered by the [p]etitioner. However, the [b]eneficiary will speak to clients if requested.

Additionally, the petitioner provided an organizational chart, which depicts the U.S. entity as a four-tiered hierarchy with the beneficiary at the top of the hierarchy and a secretary, a controller, and an operational manager as his direct subordinates. It is noted that the position of controller is indicated as one that has not yet been filled. The third tier of the hierarchy is supervised by the operational manager and consists of a sales manager and contractors. Finally, the fourth tier consists of sales representatives to be managed by the sales manager. It is noted, however, that no contractors were named and no sales representatives had been hired at the time of the petitioner's response to this RFE. Additionally, while four employees are named in the organizational chart, the petitioner indicated at Part 5, Item 12, that it had only two employees at the time the Form I-129 was filed. Therefore, it appears that the organizational chart submitted in response to the RFE does not illustrate the petitioner's hierarchy at the time of filing.

Lastly, the petitioner provided documentation showing that it merged with another entity and that it was the surviving entity into which the other entity merged. It is noted that the petitioner provided photocopies of documents that indicate that the petitioner assumed the lease of the merged company. However, no. 17 of the lease contains specific provisions that must be met in order for the merged company to successfully sublet the leased premises to the petitioner. The petitioner did not provide evidence to establish that these conditions have been met.

In a decision dated March 28, 2008, the director denied the petition, finding that the petitioner failed to establish that it would be able to sustain and would employ the beneficiary in a qualifying managerial or executive capacity. The director explained that the beneficiary's job description was vague and failed to

disclose the beneficiary's overall level of executive authority. The director also noted that the managerial position titles (which were afforded to several employees listed in the organizational chart) do not establish that the positions the beneficiary would be overseeing are in fact managerial. Lastly, the director stated that the petitioner failed to explain the nature of its business in light of its recent merger.

On appeal, counsel provides yet another description of the beneficiary's duties and assigns the maximum percentage of time the beneficiary would perform each of the listed duties on a monthly basis. Although the director specifically cautioned the petitioner in the RFE against using vague terms such as establishing policies and procedures, the first set of duties, to which the greatest amount of time was allotted, did exactly that. Specifically, counsel stated that up to 40% of the beneficiary's time would be spent directing, planning, and implementing policies, objectives and company activities. Counsel provided no specifics as to the means by which the beneficiary would accomplish the directing, planning, and implementing; he gave no specific examples of objectives or company activities; and he failed to quantify the percentage of time that would be spent on these questionable tasks. Merely identifying the maximum amount of time that may be spent on a certain set of tasks does not reveal how much time would realistically be spent. "Up to" may mean that only 10% of the beneficiary's time would be spent on these tasks. Counsel's method of quantifying how much of the beneficiary's time would be allotted to certain tasks is inadequate.

Counsel also states that the beneficiary would review reports submitted by managers and that the beneficiary, together with the managers, would analyze operations to evaluate staff and company performances. However, counsel provides no explanation as to the types of reports that would be analyzed, nor does he explain what standard of measure the beneficiary would use to evaluate the staff and company performances. In addition to the vague nature of counsel's statements, there is also no indication as to how they apply to the petitioner's organizational structure at the time the Form I-129 was filed, as there is no documentation on record to establish that the petitioner had any managers in place for the beneficiary to oversee. 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)).

Next, counsel asserts that the petitioner's merger has enabled the company to acquire additional employees who can now relieve the beneficiary from various non-qualifying duties. However, the merger did not take place until July 9, 2007, which is six months after the petition was filed. It is noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Based on this established principle, the AAO cannot take into account the employees the petitioner has recently inherited from the merger for the purpose of establishing whether it was able to employ the beneficiary in a qualifying capacity at the time of filing.

Counsel also discusses how the petitioner has changed as a result of the merger. Specifically, counsel explains that the petitioner is now engaged in shoe sales. The AAO notes that, on page 2 of counsel's response to the RFE counsel stated that the beneficiary's job duties would remain the same as they were when the initial nonimmigrant petition was approved. However, in light of the petitioner's drastic change in the nature of its business, the AAO must question the validity of this statement. It is unclear how the beneficiary's job duties can remain unchanged when the means by which the petitioner now generates income

is completely different from when the petitioner first started doing business. While the AAO does not dispute counsel's claim that the beneficiary's services are essential to the petitioner's continued operation, the petitioner is not excused from the statutory and regulatory requirements that apply to all other petitioners seeking the same or similar immigration benefits as those sought in the present matter.

In summary, the petitioner has failed to specifically define the beneficiary's proposed job duties even though the director has expressly stated that this information is essential to determining the beneficiary's employment capacity. *See 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). The petitioner has also failed to establish how it would relieve the beneficiary from having to primarily perform non-qualifying job duties, particularly in light its limited support staff at the time the petition was filed. Combined, these significant shortcomings indicate that the petitioner had not advanced to a stage of development at the time of filing such that the primary portion of the beneficiary's time would be allotted to duties within a managerial or executive capacity. As such, the director's denial was warranted and will not be withdrawn.

Additionally, the record shows that this petition does not warrant approval based on other grounds that were not expressly addressed in the director's decision.

First, the AAO finds that the petitioner has failed to establish that it had been doing business for the previous year. *Id.*

A visa petition which involved the opening of a "new office" may be extended by submitting evidence that the petitioner "has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). "Doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H).

In this matter, the initial "new office" petition was approved from January 5, 2006 until January 5, 2007 (SRC 06 058 50039). However, as asserted by the petitioner, the petitioner did not begin "doing business" as defined in the regulations until June 1, 2006, almost five months after the approval of the initial "new office" petition. Despite any reasonable explanation for the petitioner's postponement of its commencement of doing business until well after the initial petition's approval, the regulations do not contain any exceptions from the requirement that the "new office" extension petition establish that the petitioner was engaged in the regular, systematic, and continuous provision of goods and/or services for the previous year.

Second, the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The petitioner provided only general statements discussing the beneficiary's employment abroad, failing to name any specific job duties or to name the beneficiary's position within the foreign entity's organizational hierarchy. The AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity based on the inadequate information provided in support of this petition.

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

