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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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File: EAC 07 104 53887

Office: VERMONT SERVICE CENTER

Date: SEP 03 200

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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as its marketing 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 corporation organized under the laws of the Commonwealth of Virginia and is engaged in the export and wholesale of automotive parts. The petitioner seeks to employ the beneficiary from July 1, 2007 until June 30, 2010.

The director denied the petition on the basis of two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying capacity; and 2) the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying capacity.

On appeal, counsel disputes the director's findings, reiterating the list of duties and responsibilities previously provided by the petitioner and asserting that such duties are managerial and executive in nature.

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.

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 two primary issues in this proceeding call for an analysis of the beneficiary's job duties. The first issue is whether the beneficiary was employed abroad in a qualifying capacity, and the second issue is whether the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

In support of the Form I-129, the petitioner provided a letter dated February 26, 2007 in which the company president stressed that the beneficiary's marketing management services would be crucial to the U.S. entity.¹ The following description of the beneficiary's proposed employment was provided:

¹ On page three of the support letter, the petitioner indicated that it seeks to employ the beneficiary as an L-1B nonimmigrant, which is an individual employed in a specialized knowledge capacity. However, the remainder of the

[The beneficiary] will provide consulting services to [the petitioning] organization and [the petitioner's] management staff in order to improve the operating and economic performance by implementing a proactive sales force He will review corporate structure, assess and resolve strategic and operating challenges, thereby improving [the] overall goals, objectives, policies, strategies, administration, organization, and operation. He will apply his knowledge in both the industry and [the] customer's specific businesses, and thereby will be able to assess the demand for products and services by [the] customers and identify potential customers by maintaining existing business and generation of new business from existing customers.

[The beneficiary] will advise management on means of obtaining new customers and retaining existing customers and staff. He will analyze [the] company's annual revenues, employment policies and expenditures, and will develop solutions for increased profitability. He will also interview our employees, observe our operations, and prepare reports to management to improve our organization during this critical transition period. He will meet with the executives of our company and conduct studies and surveys to obtain data and recommend solutions including initial development of business plans, strategic/creative briefings and work closely with all of [the company's] departments to effectively implement [the] budgets and goals and policies.

Although the petitioner states that the beneficiary has been employed by its parent entity in Dubai, United Arab Emirates since 1991, a job description for the beneficiary's position abroad was not provided.

Accordingly, in a notice dated May 22, 2007, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) seeking to determine the nature of the beneficiary's employment abroad and in the United States. More specifically, the petitioner was instructed to provide the following with regard to the beneficiary's foreign and proposed employment: 1) a comprehensive description of the beneficiary's job duties with an indication as to the amount of time allotted to managerial or executive job duties; 2) information regarding each company's management and personnel structures, including subordinate employees' job titles and job duties, and a discussion of how the beneficiary was relieved of having to primarily perform non-qualifying duties during his employment abroad and how he would be relieved of such duties in his proposed U.S. position; and 3) each entity's organizational chart with a depiction of the beneficiary's position and where that position fits in the respective organization's hierarchy.

In response, the petitioner provided a letter dated August 3, 2007 in which the following list of duties and responsibilities was provided to describe the beneficiary's employment abroad:

- Develop pricing strategies, balancing firm objectives and customer satisfaction.

record, including the Form I-129, clearly indicate that the petitioner intends to employ the beneficiary in a managerial or executive capacity, thereby seeking to classify the beneficiary as an L-1A nonimmigrant. This apparent typographical error is merely noted for the record and has no bearing on the AAO's findings with regard to the petitioner's eligibility for the benefit sought herein.

- Identify, develop, and evaluate marketing strategy based on knowledge of establishment [sic] objectives, market characteristics, and cost and markup factors.
- Evaluate the financial aspects of product development, such as budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections.
- Formulate, direct and coordinate marketing activities and policies to promote products and services, working with advertising and promotion managers.
- Direct the hiring, training, and performance evaluations of marketing and sales staff and oversee their daily activities.
- Negotiate contracts with vendors and distributors to manage product distribution, establishing distribution networks and developing distribution strategies.
- Consult with product development personnel on product specifications such as design, color, and packaging.
- Compile lists describing product or service offerings.
- Use sales forecasting and strategic planning to ensure the sale and profitability of products, lines, or services, analyzing business developments and monitoring market trends.
- Select products and accessories to be displayed at trade or special production shows.

With regard to the beneficiary's proposed employment with the U.S. entity, the petitioner provided the same job description that had been previously provided in the February 26, 2007 support letter. It is further noted that the petitioner also failed to comply with the portion of the RFE that requested organizational charts for the foreign and U.S. entities, information about the beneficiary's subordinates within each entity's organizational hierarchy, and an explanation of how the beneficiary was relieved abroad and would be relieved in the United States from having to primarily perform non-qualifying job duties. 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).

On January 17, 2008, the director issued a decision denying the petitioner's Form I-129 on the basis that the petitioner failed to establish that the beneficiary has been employed abroad and would be employed in the United States in a qualifying capacity. While the director referred to diagrams previously submitted by the petitioner and suggested that such diagrams depicted a hierarchy of employees that were under the beneficiary's direct supervision in the foreign entity, the director's observation is not an accurate reflection of the documentation on record. Rather, the petitioner's only mention of an organizational hierarchy included the U.S. entity's personnel plan, which was submitted in support of the petition and resubmitted in response to

the RFE. The personnel plan listed the following staff positions within the petitioning entity: the company's president, four facility staff (whose names and job titles were not provided),² and two sales staff (whose names also were not provided). Contrary to the director's comments, which suggest that the petitioner submitted information regarding the foreign entity's organizational hierarchy, no such documentation was provided. As such, the AAO can make no definitive observations as to the foreign entity's ability, or lack thereof, to relieve the beneficiary from having to primarily perform tasks of a non-qualifying nature. Additionally, while the petitioner asserts on appeal that the beneficiary supervises nine employees in his position abroad, this claim is not supported by the documentation on record. It is noted that 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 the present matter, the record does not corroborate the petitioner's claims. A thorough review of the record does not reveal any previously submitted information regarding the foreign entity's organizational hierarchy and the beneficiary's position therein.

On appeal, the petitioner asserts that the beneficiary has been employed abroad and would continue to be employed in the United States in a qualifying capacity where the services he has and would continue to render are managerial in nature and involve specialized knowledge. The AAO notes, however, that the petitioner's claim that the beneficiary's foreign and proposed employment involves specialized knowledge is a new claim, which was not previously asserted and in support of which no evidence or information was submitted. Rather, the petitioner initially indicated in Part 2 of the Form I-129 that the classification it was seeking for the beneficiary's proposed U.S. employment was that of an L-1A nonimmigrant, not an L-1B nonimmigrant whose position would involve specialized knowledge. As such, the petitioner's request to amend the petition on appeal and to alternatively consider it as a petition for L-1B classification is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The request to reconsider the original petition on appeal as a petition for L-1B classification is, therefore, rejected.

Moreover, the petitioner previously referred to the beneficiary's foreign and proposed employment as being within an executive rather than managerial capacity. In light of these anomalies regarding the beneficiary's employment classification, the AAO notes that the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner

² It is noted that the beneficiary's name appears in parentheses next to the listing of facility staff. However, it is unclear whether the four facility staff included the beneficiary or whether the beneficiary would be the fifth facility staffer under an approved petition.

chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Based on the submissions on record, it is not apparent that the petitioner fully appreciates the distinction between the two statutory definitions and is able to identify the beneficiary in either classification or in both classifications, whichever may apply.

The petitioner also provides on appeal a list of the beneficiary's proposed duties and responsibilities in the United States as well as additional information about the beneficiary's proposed subordinates and their respective duties and responsibilities, all of which were issues the RFE previously asked the petitioner to address. It is noted that the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). As stated above, 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the additional job descriptions and information regarding the petitioner's organizational structure submitted on appeal.

Accordingly, the AAO finds that the record in the present proceeding supports the director's adverse findings. With regard to the beneficiary's employment with the foreign and U.S. entities, the petitioner has provided broad statements, which primarily address the beneficiary's job responsibilities. The director expressly specified the extent of detail being sought with regard to the beneficiary's job duties and the organizational hierarchies of the foreign and U.S. entities. The petitioner was asked to provide charts illustrating where the beneficiary falls within each organization in order to allow the director to gauge the beneficiary's position with respect to other employees in each entity. Neither the vague job description nor the personnel plan that the petitioner previously provided properly conveyed the necessary information with regard to the beneficiary's proposed employment with the U.S. entity. Likewise, the description of the beneficiary's foreign employment also failed to convey a thorough understanding of the actual job duties the beneficiary has been performing on a daily basis in his allegedly managerial or executive position. For instance, the petitioner stated that the beneficiary develops pricing strategies, develops and evaluates marketing strategies, and formulates and coordinates marketing activities and policies. However, the underlying tasks entailed in meeting these objectives have not been disclosed. Moreover, the petitioner broadly stated that the beneficiary negotiates contracts with vendors and distributors, consults with product development personnel regarding product specifications, and compiles lists of product and service offerings. Without further explanation of the beneficiary's duties as well as the duties of any underlying subordinate employees regarding these functions, the AAO cannot conclude that these job responsibilities fall within the parameters of a managerial or executive capacity position. As the petitioner has not specified the beneficiary's job duties

or the amount of time allotted to specific duties, it cannot be concluded that the beneficiary was employed abroad and would be employed by the U.S. entity in a qualifying managerial or executive capacity.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, 8 C.F.R. § 214.2(l)(3)(i) states that an individual petition filed on Form I-129 shall be accompanied by 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. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. In the present matter, the petitioner has submitted its own articles of incorporation. However, this document does not establish who owns and controls the U.S. entity. Despite the claim that the petitioner claims to be a subsidiary of the foreign entity that currently employs the beneficiary, the petitioner has not provided evidence in support of this assertion. As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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. 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.