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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 02 227 51049 Office: NEBRASKA SERVICE CENTER Date: AUG 10 2004

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 is engaged in the development of commercial and residential real estate. It currently employs the beneficiary as its president, and seeks to continue the beneficiary's employment for an additional three years. The petitioner filed a petition to extend the beneficiary's classification as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary has not and would not be employed in the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director mischaracterized the petitioner's business and the beneficiary's position in the U.S. company. Counsel also claims that the beneficiary "meet[s] all the criteria required for an L-1A petition." Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) 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 management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue is whether the beneficiary would be employed in the United States in a primarily managerial or executive capacity.[1]

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) 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;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) 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), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(1) Directs the management of the organization or a major component or function of the organization;

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[1] Because the present petition pertains to the extension of a petition involving a new office, the beneficiary was not required to be employed in a primarily managerial or executive position during the first year following the approval of the visa petition. *See* 8 C.F.R. § 214.2 (l)(3)(v).

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On the petition for a nonimmigrant visa, the petitioner described the beneficiary's job responsibilities as: (1) overseeing all aspects of the business to ensure compliance; (2) establishing the business' procedures and operations; (3) analyzing market activities for development and construction projects; and, (4) training the professional staff.

In an appended letter, the petitioner explained that "after the September 11, 2001 tragedy," the petitioning company took a "wait and see" approach to its initial investment plans, and instead focused exclusively on the development of its sole project and apartment complex. The petitioner further explained that the beneficiary returned to his position as managing director of the foreign corporation, "with his primary responsibilities focused more on managing existing and new projects in the United Arab Emirates, and less on overseeing [the petitioner's] U.S. operations." The petitioner stated that the beneficiary remained responsible for overseeing the remodeling of the U.S. project, but spent only a limited time on-site. The petitioner explained that presently, the beneficiary "has been assigned to direct and oversee all aspects of [the petitioning organization's] expansion," including project approval, acquisition negotiations, and strategic management decisions, and reports directly to the foreign company's board of directors.

In an attached business plan for the U.S. company, the petitioner's "management team" was identified as: the beneficiary as president and chief executive officer; a vice-president of marketing and operations; an office manager; an attorney; and a real estate employee.

In a notice dated August 23, 2002, the director requested that the petitioner provide evidence supporting the criteria for the extension of a petition involving a new office as outlined in the regulation at 8 C.F.R. § 214.2(l)(14)(ii). Specifically, the director asked for a statement of the duties performed by the beneficiary the previous year, and the duties that the beneficiary would perform under the extended petition, as well as a description of the U.S. company's organizational structure and the job duties of each employee.

In response, the petitioner submitted a statement prepared by the beneficiary in which he outlined the following job duties in the U.S. entity:

- Directly manage over [thirty-two] people on [a] daily basis.

- Sign all official documents:
  - Sign contracts with the client's [sic]
  - Sign all major sub-contract agreements
  - Sign all financial documents including Bank drafts, Cheques, Letter of credits [sic]
  - Sign all payroll [and] approve payroll actions/activities
  - Sign all legal documents [and] direct legal department in the group
  - Approve staff appointment
  - Review all technical, legal, financial [and] administrative reports

- Approve all payments in excess of U.S. $20,000/-

- Approve business plans [and] Forecast [and] report the same to Board of director[s] [and] obtain necessary approvals from the board.

The beneficiary also stated that the petitioning organization is currently adding thirteen storage units to the apartment complex project, and is negotiating the purchase of two additional apartment complexes.

Additionally, the petitioner provided a chart of the U.S. company's "team," which reflected seven individuals in the following positions: president, legal counsel, real estate acquisition, real estate management, office manager, engineer, and accountant.

In his decision, the director determined that the beneficiary has not and would not be employed in the United States in a primarily managerial or executive capacity. The director stated that the record does not establish that the beneficiary functions at a senior level within the organization, or that the beneficiary has been or would be managing or directing the management of a department, function, or component of the organization. The director also noted that the record does not demonstrate that the petitioner's other employees are professional, managerial, or supervisory personnel who would relieve the beneficiary from performing non-qualifying job duties. Consequently, the director denied the petition.

On appeal, counsel asserts that the director "mischaracterized" the business of the petitioner, as well as the beneficiary's position in the U.S. company. In an attached brief, counsel explains that as president, the beneficiary is responsible for all strategic management decisions, including project approval, acquisition negotiations, and investment commitments, for directing and overseeing the expansion of the U.S. company, and selecting and training the petitioner's "professional level staff." With regard to those employed by the U.S. company, counsel states that the petitioner's staff includes three full-time employees - the beneficiary, an office manager, and an engineer - and four independent contractors: legal counsel, a real estate agent, an accountant, and an individual in charge of property maintenance.

Counsel also disputes the director's finding that the beneficiary "would be doing nothing more than managing an apartment complex." Counsel notes that the management of the apartment complex "is left to others within the organization." Counsel states that the beneficiary is responsible for identifying strategically sound development projects, negotiating favorable terms for the petitioner's investment opportunities, expanding the petitioner's business ventures, and building a "sound, market-responsive company" thorough utilization of the foreign company's policies, goals, and techniques.

Moreover, counsel asserts that in his decision, the director focused solely on the number of individuals employed by the petitioning organization and the initial acquisition of the apartment complex, "without considering the external impact of September 11th, [the foreign company's] impressive track record, [its] financial strength and technical expertise, and the other professionals who are part of the [petitioning organization's] team.

On review, the record does not support a finding that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. When examining the managerial or executive 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial

services to be performed by the beneficiary. *Id.* In addition, pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(D), when requesting an extension of a visa petition involving a new office, the petitioner must submit a statement describing the beneficiary's job duties during the previous year and those to be performed under the extended petition, and the staffing of the new operation, including the number of employees and type of position held by each.

In the present matter, the petitioner has failed to demonstrate that following the first year of the beneficiary's employment as president of the U.S. entity, the beneficiary would be functioning in a primarily managerial or executive capacity. While the petitioner provided a description of the beneficiary's job responsibilities in the petitioning organization, the record supports a finding that the beneficiary was not employed solely in the U.S. company during the past six months. In fact, both the petitioner and counsel acknowledge that following the beneficiary's arrival in the U.S., the beneficiary resumed his position as managing director of the foreign corporation, and "was only able to spend a limited period of time on-site [in the United States] during the latter period of 2001 and early 2002." The regulations do not require that the beneficiary be employed in a primarily managerial or executive capacity during the first year of operations of a new office. 8 C.F.R. § 214.2 (l)(3)(v)(C). However, it may be assumed, and is required in the regulations, that the beneficiary's work during the first year would lead to his employment in the U.S. entity as a manager or executive within one year of approval of the petition. *Id.* As the beneficiary's "primary responsibilities" during the first year were "focused more on managing existing and new projects in the United Arab Emirates," it is impossible to assume, and has not been proven otherwise, that the beneficiary would be employed in a primarily managerial or executive position in the U.S. entity.

Additionally, the petitioner's description of the staffing of the U.S. entity contains many inconsistencies. Although the petitioner's business plan identified five employees, including the beneficiary, who make up the corporation's "management team," two additional documents submitted by both the petitioner and the foreign employer indicate seven and four employees, respectively. In addition, in response to the director's request for evidence, the petitioner stated that one of the beneficiary's job duties is to "directly manage over 32 people on a daily basis." In his brief on appeal, counsel states that the petitioner employs three full-time employees and four independent contractors. Furthermore, the U.S. company's Employer's Quarterly Federal Tax Return identifies only one employee for the quarter ending March 31, 2002. The petitioner has not accounted for the thirty-two people managed by the beneficiary. Nor has the petitioner offered any explanation as to the inconsistencies in the claimed number of employees. 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).

Moreover, even if the AAO were to accept counsel's claim on appeal that the petitioner employs three individuals and four independent contractors, the record fails to sufficiently demonstrate that the beneficiary would be relieved from performing non-managerial or non-executive job duties. Although requested by the director, the petitioner neglected to describe the job duties performed by each employee, and submitted only their job titles. On appeal, counsel offers a brief, one sentence description of each individual's job responsibilities. Counsel also states that the beneficiary directs the management of the company, and that the task of managing the apartment complex "is left to others within the organization." However, counsel fails to specifically identify who manages the apartment complex. None of the job descriptions provided by counsel include the responsibility of managing the petitioner's apartment complex. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of*

Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Also, the 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).

Furthermore, contrary to counsel's claim on appeal, the AAO, while sensitive to the disastrous effects of September 11th, is not required to consider the impact of world tragedies or market conditions on the beneficiary's employment in the U.S. entity as a manager or executive. Nor is the AAO obligated to consider "the impressive track record" of the foreign company. The regulation at 8 C.F.R. § 214.2(l)(14)(ii) clearly outlines the requirements for the extension of a visa petition involving a new office.

Based on the evidence provided, the AAO concludes that the beneficiary would not be employed in the U.S. entity in a primarily managerial or executive.

Beyond the decision of the director, the record does not adequately establish the existence of a qualifying relationship between the foreign and U.S. companies. The petitioner stated that the U.S. company is a subsidiary of the beneficiary's foreign employer, Trust Construction Corporation, U.A.E. However, the minutes of the U.S. entity's organizational meeting contains an inconsistency pertaining to the claimed parent-subsidiary relationship. Included in the document are two pages labeled "page two." One page identifies the beneficiary's foreign employer as the owner of 100 shares of petitioner's stock. The other identifies "Trust Group U.A.E." as the owner of 100 shares of the U.S. corporation's stock. The AAO acknowledges the petitioner's claim that the beneficiary's foreign employer is one of three organizations that make up the "Trust Group U.A.E." However, the petitioner has not provided sufficient evidence establishing the foreign employer's relationship with the Trust Group U.A.E., or more importantly, its relationship with the U.S. organization. Again, 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 191-192. For this additional reason, the appeal will be dismissed.

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).

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.