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U.S. Citizenship
and Immigration
Services

FEB 23 2005

FILE: EAC 00 107 51870 Office: VERMONT SERVICE CENTER Date:

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)

ON 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, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, revoked the nonimmigrant visa petition. The Administrative Appeals Office (AAO) withdrew the director's decision and remanded the case to the Vermont Service Center for review. The director subsequently revoked the petition for a second time. The matter is now before the AAO on appeal. The appeal will be dismissed.

According to the evidence contained in the record, the petitioner was established in 1999 and claims to be engaged in the production and distribution of Middle Eastern breads. In 2000 the petitioner sought to employ the beneficiary temporarily in the United States as the president and managing director of its new office. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the duties to be performed by the beneficiary are managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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 with 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 serves

> in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

In the instant matter, the intracompany transferee L-1A visa was initially granted from April 27, 2000 to April 26, 2001. The director issued a Notice of Intent to Revoke on April 19, 2001, based upon a memorandum received from the American Consulate General in Dubai where it was determined, subsequent to interviewing the beneficiary, that the beneficiary did not have experience or education sufficient to perform the duties of the position being offered by the petitioner in the United States. The director issued a Notice of Revocation on August 3, 2001. The petitioner appealed to the AAO and the AAO subsequently withdrew the director's decision and remanded the case to the Vermont Service Center for further consideration on November 4, 2002. The director subsequently revoked the petition on July 29, 2003.

Under CIS regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B). In the instant matter, the director noted that based upon a review of the memorandum received from the American Consulate General in Dubai, the beneficiary made statements that contradicted statements and documentation contained in the petition, which brought into question the legitimacy of the beneficiary's status. The director questioned whether the beneficiary possessed experience and education sufficient to perform the job duties of the position being offered by the U.S. entity. Counsel contends the consular officer failed to provide details as to how he/she arrived at the conclusion that the beneficiary lacked the experience and education sufficient to fill the position in the United States. Counsel also contends that the director wrongfully relied upon the consulate's decision in revoking the petition in violation of the regulation. Contrary to counsel's contentions, the consulate's reasons for initiating the memorandum were sound, and the director's grounds for initiating the Notice of Intent to Revoke were clearly described and rightfully invoked.[1]

The remaining issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity in compliance with eligibility requirements of classification as an L-1 intercompany transferee.

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—
>
> (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;

[1] The AAO notes that the director determined in the Notice of Revocation, dated July 29, 2003, that the petitioner had established the existence of a qualifying relationship between the U.S. and foreign entities, that the beneficiary appeared to have the required one year of experience abroad working in a managerial or executive capacity, and that the U.S. entity had $65.000.00 in its bank account.

(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), provides:

> The term "executive capacity" means 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.

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

> If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In the petition, the petitioner described the beneficiary's proposed duties as: "Overseeing the establishment of the US company, planning and developing the US investment, marketing and expansion of product. Hiring personnel, supervise all financial aspects and set policies and objectives for company."

In a letter of support, dated February 1, 2000, the petitioner described the beneficiary's proposed duties in part as: "staffing the business operations and sourcing, negotiating and contracting raw materials suppliers, distributors, advertising, packaging and other supporting operations."

The petitioner submitted a business plan for the U.S. entity in which the petitioner described the labor force and job duties as:

> PRESIDENT'S JOB DURING PREPARATION PERIOD:
> - Arranging preliminary works such as leasing and implementing necessary modification and improvement in the place.
> - Ordering, importing instalating [sic] and commissioning the machineries and equipments.
> - Interview and selecting the employees.
> - Sourcing and negotiating and contaracting [sic] raw materials suppliers, distrubuters, [sic] advertising agencies, packing designers and priniting [sic] companies, insurance companies and other supporting parties.
>
> PRESIDENT'S JOB DURING PRODUCTION PERIOD:
> - Planning, marketing and managing the business.
>
> PRODUCTION MANAGER'S JOB:
> - Production managing and quality control
>
> "LABOUR'S" JOB:
> - To pack items for sale, to clean and maintain appropriate environment for production.
>
> BOOK KEEPER/SECRETARY'S JOB:
> - Answering the telephone and keeping the accounting records.

The petitioner submitted an employment agreement, dated December 12, 1999, in which the beneficiary's proposed duties are described in an attached exhibit as:

> Subject to the control of the Board of Directors and within the scope of their authority and any committees thereof, the President shall:
>
> a. Have general and active management of all the business, property and affairs of the Corporation;
>
> b. See that all orders and resolutions of the Board of Directors and its committees are carried into effect;
>
> c. Have custody of the corporate seal, or entrust the same to the Secretary;
>
> d. Act as the duly authorized representative of the Board in all matters, except where the Board has formally designated some other person or group to act; and
>
> e. Perform al the usual duties incident to the office of President and those duties assigned by the Board of Directors.

In response to the director's request for evidence on this subject, the petitioner described the beneficiary's proposed job duties and the number of hours to be devoted to each on a weekly basis as:

- Implementing necessary modification & improvements in rented place in Bridgeworks/Allentown. Estimated time requirement: 3 weeks full-time.

- Arrange importing & instalating & commissioning the machineries & equipments. Estimated time requirement: 6 weeks.

- Interview & selecting the employees. Estimated time requirement: in average 2 hours per day for two weeks.

- Negotiating advertising agencies, packing designers & printing companies. Estimated time requirement: in average 3 hours per day for two weeks.

- Negotiating other supporting parties. Estimated time requirement: in average 1 hour per day for two weeks.

In response to the director's Notice of Intent to Revoke, counsel described the beneficiary's proposed duties in part as: "[the beneficiary's] duties will consist of planning and developing the US investment, staffing the business operations including hiring and individual with a food production background to serve as manager...." Counsel asserted that the beneficiary possessed a degree in architectural engineering. Counsel also asserted that the beneficiary's employment experience and formal training with the foreign entity directly related to the position duties in the United States. In a letter, dated May 8, 2001, the petitioner stated that the beneficiary had served as managing director for the foreign entity since 1995 and had attended more than 24 courses in business management, marketing management, and strategic management. The petitioner submitted a list of courses taken by the beneficiary from the institution to substantiate its claim.

In response to the director's third request for evidence, the petitioner described the beneficiary's proposed duties and that of other employees the petitioner expected to have within one year from the date the petition is approved. The petitioner described the duties as:

PRE-START PERIOD-PRESIDENT:

Site selection and design preparation. Estimated time requirement: 3 weeks

Equipment selection and ordering. Estimated time requirement: 6 weeks

Arranging fabrication, importing, installing, and commissioning the machinery and equipment. Estimated time requirement: 6 months

Renting the place and supervising modifications. Estimated time requirement: 2 months

Interview and selecting the employees. Estimated time requirement: in average 2 hours per day for two weeks.

Sourcing and Negotiating raw materials suppliers and distributors. Estimated time requirement: average 2 hours per day for two weeks.

Negotiating with advertising agencies, packing designers and printing companies. Estimated time requirement: in average 3 hours per day for two weeks.

Negotiating other supporting parties. Estimated time requirement: in average one hour per day for two weeks.

FIRST STAGE AFTER STARTING PRODUCTION:

PRESIDENT'S DUTIES: Business planning, staffing, coordinating and administrating.

PRODUCTION MANAGER'S DUTIES: Production managing and supervising, quality control, research and development of new and improved products.

PRODUCTION LABORER'S DUTIES: Placing the raw materials into the mixer, transferring dough from mixer to dough divider, transferring dough into "sheeter," handling the packing and store (for first 4 months), and cleaning the environment and equipment.

MARKETING AND COMMERCIAL MANAGER'S DUTIES: Market study and research and analysis, visiting the marketing and commercial managers of chain supermarkets, keeping the books and records (for first 9 months), and handling the wholesales.

The director subsequently revoked the petition. The director noted that the petitioner had described a bakery with one production worker and three other employees with managerial or executive job titles. The director stated that he was not persuaded that the beneficiary would be engaged in primarily managerial or executive duties in a bakery of the size and nature described by the petitioner. The director further stated that it appeared the beneficiary would be engaged in primarily non-managerial and non-executive duties, with some first-line supervisory duties.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary's initial start-up duties will involve establishing the new business in the United States. Counsel also asserts that the beneficiary's duties will differ after the first year of operation in that he will be responsible for directing the management of the organization rather than performing tasks to produce the organization's product. Counsel further asserts that the beneficiary will not be managing or supervising employees. Counsel argues the fact that the U.S. entity does not employee a large number of individuals does not lead to the conclusion that the beneficiary will not be performing managerial or executive duties in the first year of operation. Counsel further argues that much of the U.S. entity's production is automated, thus eliminating the need for a large staff. Counsel contends that the beneficiary will not be managing the staff as much as he will be managing the operations of the business.

Counsel's assertions are not persuasive. On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial 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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. In the instant matter, the

petitioner claims that the beneficiary will be responsible for the start-up of the U.S. entity, business planning, marketing, staffing, coordinating, and administrating. Although the petitioner provided a break down in the number of days, weeks, or months it would take for the beneficiary to accomplish his duties, there is no evidence to demonstrate which will be managerial and which will be executive.

Furthermore, the petitioner's evidence is not sufficient in establishing that the beneficiary will be directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher level executives. The petitioner stated that the beneficiary's title in the United States would be president and managing director. The petitioner also provided a list of the beneficiary's proposed duties in which it is stated that the beneficiary's duties are: "Subject to the control of the Board of Directors and within the scope of their authority and any committees thereof." There has been no evidence presented to demonstrate that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title.

The petitioner is correct in its contention that the beneficiary is not expected to perform only managerial or executive duties where he will be establishing a new office. 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.

In this matter, the petitioner submitted a copy of its business plan, which indicated that the entity would hire the beneficiary as president, a production manager, laborer, and bookkeeper/secretary within the first year of operation. In the business plan the petitioner briefly described the employees' proposed duties. The business plan submitted by the petitioner fails to detail accurate, realistic projections to establish that the U.S. entity will realize growth within one year sufficient to support a managerial or executive position. Although the evidence demonstrates that the petitioner intends to hire new employees it has not provided detailed position descriptions to show that they will be employed in other than non-professional positions. Further, in response to the director's third request for evidence the petitioner indicates that it will employ a marketing and commercial manager, not a bookkeeper/secretary, who will take on the responsibilities of a bookkeeper. 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).

The business plan is not supported by independent documentary evidence that would show that its projections and assertions are adequate. There has been no evidence presented that details the time frame in which each new employee will be hired, what the new hires duties will consist of, or how the beneficiary's duties will interrelate with that of the new hires. There is no evidence to show that the beneficiary will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from

performing non-qualifying duties. Nor has there been evidence submitted to show that the beneficiary will be primarily directing the management of the organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Rather than the beneficiary functioning at a senior level within the organizational hierarchy within one year of operation in the United States, it appears from the record that he will continue to perform the functions of the organization and carry out the day-to-day services of the business. The actual duties themselves reveal the true nature of the employment. *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). A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Furthermore, a generic forecasted business plan does not suffice to explain how the new office plans to support a managerial or executive position within one year of operation. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based upon the evidence furnished, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity.

While counsel has presented additional clarifications and explanations, the record does not support a finding that the U.S. entity will be able to support a managerial or executive position within one year of operation. The petitioner has failed to submit sufficient documentary evidence to establish compliance with the regulatory requirements for a "new office" pursuant to 8 C.F.R. § 214.2(1)(3)(v). The record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed managerial or executive staff position. Reviewing the description given by the petitioner of the projected employees' duties, it appears that the entity will be staffed with non-professional, non-managerial personnel within one year of operation, and that the beneficiary will have to continue performing non-qualifying duties beyond the first year. Further, there has been no independent documentary evidence submitted to demonstrate that the approximations given by the petitioner is sufficient to accommodate the petitioner's start up and expansion needs. Although the record reflects initial funding in the amount of $65,000.00, there is no corroborating evidence from the foreign entity indicating the continued financial support for the start up project in the United States. Accordingly, the appeal will be dismissed.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.