

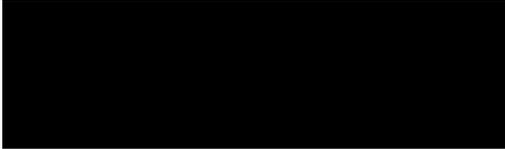
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave, N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

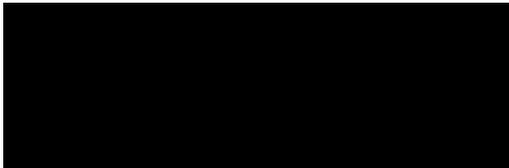
File: EAC 04 087 53499 Office: VERMONT SERVICE CENTER Date: DEC 01 2005

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, Director
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 seeks to employ the beneficiary temporarily in the United States as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The U.S. petitioner, a corporation organized in the State of New Jersey that is engaged in the wholesale and distribution of automobile parts, seeks to employ the beneficiary as its vice president. The petitioner claims that it is the subsidiary of [REDACTED] located in Surat, India.

The director denied the petition concluding that the petitioner did not establish that the petitioner would be able to support the beneficiary in a primarily managerial or executive position within one year of the petition's approval.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision "does not refer to any shortcoming in terms of the requirement of the statutory prescription [and/or] requirement in terms of related regulation referred to by the notice or otherwise." In support of this assertion, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

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

- (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:
 - (A) Sufficient physical premises to house the new office have been secured;
 - (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
 - (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

This matter presents two related, but distinct, issues: (1) whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity; and (2) whether the U.S. entity will be able to support a managerial or executive position within one year after the petition's approval.

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 the initial petition, the petitioner provided a general overview of the beneficiary's proposed duties in the United States as well as an undetailed business plan discussing the potential growth of the U.S. entity. Specifically, the petitioner stated:

As planned by the overseas Promoters, [the beneficiary] is being deputed to USA to establish, commence and conduct the business of the US subsidiary company. He will commence business activities dealing in the products already being handled by him for the overseas principals in India and to develop the same. Initially, he will contact potential buyers of the services and products. [The beneficiary] will first focus his attention and use his energies in establishing the company's business to ensure that the company in USA operates as a self supporting Unit and as a profit center.

The petitioner further went on to state the principals of the U.S. petitioner and their role in the new entity and confirmed that the petitioner would engage in the wholesale and distribution of automobile parts. The petitioner stated that the beneficiary would engage the services of freight forwarders on a contract basis and that eventually the beneficiary would hire a secretarial/commercial staff with more hiring in the future as necessary. No timeline was proposed or designated for the hiring of these individuals or for the establishment of the U.S. business. A basic financial projection statement was provided for the first and second year of the

business, with no explanation or supporting documentation to support the figures contained therein. Finally, A brief "Action Plan" included the following lists of things to be done to establish the U.S. business:

- (a) To apply for and request Immigration and Naturalization Service of United States of America to grant intra-company transferee, L-1 in favor of [the beneficiary];
- (b) Employ staff as required for the operations and increase the same with the development of [the] business;
- (c) Direct approach to the buyers through mailing of circulars and other materials. The required listings area wise will be obtained from reliable sources;
- (d) Establish contacts with shipping and clearing agents of repute to handle the incoming cargo, storage, dispatch and exports on contract service basis;
- (e) Identify and establish relationship with US sources of products dealt with by the company and the related products for supplies to the new and potential buyers AND
- (f) Take suitable steps for business development here in USA and plan for expansion of the business activities in overseas markets at a suitable later date.

Finally, with regard to the beneficiary's duties, the petitioner and counsel categorized his duties into six distinct categories: (1) corporate planning; (2) general administration; (3) finance; (4) marketing-sales; (5) business development; and (6) purchases-contracts. A brief description of each of these duties was included as a supplement to the record.

On February 13, 2004, the director requested additional evidence with regard to the overall business plan of the petitioner, its primary purpose, and its current financial status. In a response dated February 28, 2004, the petitioner, through counsel, submitted a letter accompanied by an updated business plan which addressed the petitioner's intended growth on a monthly basis through 2005. Specifically, the pages entitled "Action Plan" were updated to include a month-by-month analysis of how the petitioner would expand over the coming year.

On April 8, 2004 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States and that the petitioner had failed to show that the petitioner would grow to the point where it could support a primarily managerial or executive position within the first year of operations. Specifically, the director concluded that the duties of the beneficiary and the petitioner's proposed business plan, as presented by counsel, were vague and general and thus failed to present an accurate picture of the intended U.S. operation and the beneficiary's duties within that operation.

On appeal, counsel for the petitioner alleges that the director's decision ignored the facts of record and contends that the purpose of the U.S. operation as well as the duties of the beneficiary were clearly defined by the evidence submitted prior to adjudication. In the appeal brief, counsel restates portions of the previously submitted business plan and paraphrases other sections, which it relies upon as satisfying the burden of proof in these proceedings.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the updated business plan, it appears that the petitioner has failed to establish that it will be able to support the beneficiary in a capacity that is primarily managerial or executive at the end of the first year of operations. In addition, the AAO notes that the description of duties was too vague to ascertain whether the beneficiary will be acting in a primarily managerial or executive capacity.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's staffing requirements and contain a timetable for hiring, as well as a job description for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

In this case, the initial business plan submitted by the petitioner was quite vague and lacked detail with regard to the petitioner's planned objectives and timeline for achieving its goals. The supplemental business plan submitted on appeal essentially classified the previously stated objectives into a monthly timeline without expanding on their exact nature. The petitioner omits any discussion of market strategy and the relative strengths and weaknesses of the petitioner. Although it contends that it will hire a secretarial/operational staff, no specific timeline for hiring is provided, nor is there a detailed description of the position(s) to be created and what their duties would be. Finally, although a one-page statement financial projection sheet is included, it provides no explanations or bases upon which those numbers were calculated. As a result, the petitioner has failed to submit a detailed and credible business plan.

This deficiency in the record, coupled with the vague job description of the beneficiary, indicates that the petitioner will not be able to support a managerial or executive position at the end of the first year of operations. While the beneficiary is the intended vice-president of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment and that such capacity will be unwavering after the first year of operations.

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). In this case, the petitioner vaguely described each of the beneficiary's duties under the above-referenced headings: (1) corporate planning; (2) general administration; (3) finance; (4) marketing-sales; (5) business development; and (6) purchases-contracts. For example, under the heading "Finance," the petitioner stated that "[the beneficiary] will oversee matters related to Finance. He will be assisted by an Accountant and his team for due performance of his job functions in this area of operation." This description of duties did little to define the beneficiary's financial obligations to the company and, as discussed above, the petitioner did not definitively indicate in this letter or otherwise in the record when this accountant and his staff would actually be hired.

Additionally, under the heading "Purchases / contracts," the petitioner states:

[The beneficiary] is responsible for purchase. He is required to ensure regular and continued flow of materials, supplies and services for the operations of the company. He compares catalogues, listings, examine[s] samples, attend[s] demonstration of products, conventions &c. [The beneficiary] will review competitive offers from alternative sources. He will negotiate contract terms and finalize the same. His responsibilities also include contract administration.

The other four headings were similarly supplemented with vague and generalized duties, and essentially attributed all tasks and functions essential to the petitioner's operations to the beneficiary alone. As discussed above, no definite hiring plan or timeline was submitted which would demonstrate when and how the beneficiary would be relieved from performing these non-qualifying duties.

On appeal, counsel seeks to liken each of the six defined duty categories of the beneficiary with the regulatory requirements of managerial and executive capacity. Counsel contends that each of these areas specifically confirms to the regulatory definitions and thus establishes that the beneficiary will be working in a qualifying capacity. The AAO disagrees.

There are two problems with the beneficiary's stated duties. First, the beneficiary's proposed duties include numerous non-managerial tasks that are essential to the daily operations of the business. Specifically, the assertions that the beneficiary will be responsible for purchasing, visiting trade shows, handling publicity as needed and entering into contracts suggests that he will be performing many undertakings that would normally be delegated to sales representatives or other non-managerial personnel. In this case, it is clear that the proposed duties include many practical obligations that would normally be delegated by a manager or supervisor to a subordinate staff. 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). While the AAO recognizes the need for a managerial or executive employee to undertake similar duties in the wake of a new company's establishment, the petitioner has failed to show how, if at all, the beneficiary will eventually be relieved from performing these tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Secondly, the description of his duties is vague and not specific enough to clearly establish the beneficiary's role in the company. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108.

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(1)(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. On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity, or that the petitioner will grow to the point where it will require the services of a full-time manager or executive at the end of its first year of operations. For this reason, the petition may not be approved.

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.