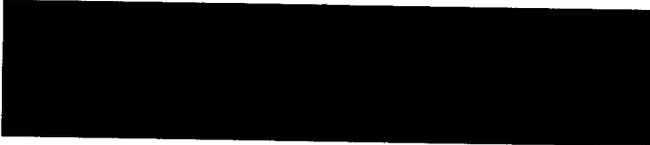




U.S. Citizenship
and Immigration
Services

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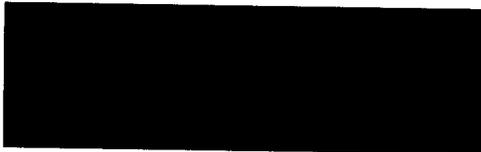
FILE: WAC 98 060 51555 Office: CALIFORNIA SERVICE CENTER Date: JUL 12 2005

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)

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 nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] avers that it is a wholly-owned subsidiary of [REDACTED] District [REDACTED], located in China. The petitioner plans to operate an import and export business. The U.S. entity was incorporated in the State of California on January 13, 1997. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office.¹ Accordingly, in December 1997, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for four years. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's president.

On May 7, 1998, the director determined that the petitioner was not a new office. The director also determined that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, the petitioner's counsel claims that the petitioner is considered to be a new office because it has been doing business for less than one year.²

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. 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. Furthermore, 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.

Pursuant to 8 C.F.R. § 214.2(i)(3), an individual petition filed on Form I-129 shall be accompanied by:

¹ The AAO notes that on Form I-129, the petitioner failed to indicate its current number of employees, gross annual income, and net annual income. However, in a supporting November 30, 1997 letter, the petitioner stated, "At present time, there are four employees." It is incumbent upon the petitioner to diligently complete Form I-129. The failure to provide the required information may cast doubt upon the petitioner's remaining evidence offered in support of the visa petition.

² Although counsel claims that the petitioner is a new office, counsel did not refute the director's conclusion that the beneficiary will not be employed in a primarily executive or managerial capacity. However, the AAO will adjudicate this matter as a new office petition pursuant to the regulation at 8 C.F.R. § 214.2(i)(3)(v).

- (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.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates 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;
- (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 (l)(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.

The first issue in this proceeding is whether the petitioner has been doing business less than one year to qualify as a new office. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) and (H) define “new office” and “doing business” as:

“New office” means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

“Doing business” means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

On December 26, 1997, the petitioner submitted Form I-129. On Form I-129, the petitioner indicated that the petitioner is a new office. The petitioner submitted its articles of incorporation showing that the U.S. entity was incorporated on January 13, 1997. The petitioner also submitted evidence to indicate that the petitioner was in its preliminary stages of development.

On February 5, 1998, the director requested additional evidence to show how the U.S. entity has sufficient resources to do business in the United States. The director also requested a copy of the petitioner’s original bank statements. However, the petitioner failed to comply with the director’s request and did not submit the additional evidence. 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).³

On May 7, 1998, the director denied the petition. The director determined that that the petitioner was not a new office because the evidence indicated that the business was established in 1996. The director found that the petitioner did not comply with the request for additional evidence to submit bank statements to show continuous business since 1996. The director also determined that the petitioner submitted evidence that indicated that the U.S. entity had not been engaged in the regular, systematic, or continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H).

On appeal, counsel claims that the petitioner is a new office that has been “registered for more than one year but has actually commenced business for less than one year.” Counsel also asserts that the petitioner submitted the requested bank statements.

On review, the petitioner is considered a new office that has been doing business less than one year. The petitioner filed its petition on December 26, 1997. The U.S. entity was not incorporated

³ The AAO acknowledges counsel’s claims that the petitioner submitted a response to the request for evidence. However, the record indicates that no response was received by the service center. On appeal, the petitioner submits no evidence to establish that it submitted a timely response to the director’s request, nor does it provide copies of documents which were purportedly submitted. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

until January 13, 1997. Therefore, at the time of filing the visa petition, the petitioner was established less than one year. In addition, as correctly stated by the director, the evidence indicated that the petitioner has not been engaged in the regular, systematic, or continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H).

After careful consideration of the evidence, the AAO withdraws this portion of the director's decision and concludes that the petitioner has established that the U.S. entity has been doing business less than one year to qualify as a new office. Therefore, the AAO will adjudicate this matter as a new office petition.

The second issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity in the United States. 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;
- (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.

In a supplemental statement submitted with Form I-129 and in a November 30, 1997 supporting letter, the petitioner described the beneficiary's proposed duties in the United States as:

[P]lan, organize, oversee the subsidiary to conduct daily operations, confer with company officials to plan business objectives, administer activities regarding maintenance of the customer's contracts, exercise complete day-to-day discretionary authority over the work, such as recruit and train staffs, determine mark-up and mark-down percentages necessary to ensure profits based on estimated budget, profit goals, review activity reports and financial statements to determine progress and revise plans in accordance with current conditions, evaluate performance of employees.

The petitioner indicated that it currently employs four employees, including a general manager, a business trading/export employee, a market research/promotion employee and a finance/account employee.

Initially, the petitioner submitted a letter that incorporated the company's business plan. The petitioner described the planned project as:

There will be investment and employees in the company. The early stage of investment will be US\$50,000. The purpose is to import compatible and competitive products. If the business grows and reaches our target, the investment in the coming two years will be increased to \$500,000.

On February 5, 1998, the director issued a request for evidence. In particular, the director requested detailed documentary evidence for each of the elements under 8 C.F.R. § 214.2(l)(3)(v)(C)(1) and (2). As noted above, the director did not receive a response to the request for evidence.

On May 7, 1998, the director denied the petition because the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. On appeal, the petitioner did not refute the director's determination.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the description of the beneficiary's job duties to determine whether the beneficiary has been or will be employed in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fail to establish what the beneficiary has been doing or will do on a day-to-day basis. For example, the petitioner stated that the beneficiary's proposed U.S. duties include "plan[ning], organiz[ing], [and] oversee[ing] the subsidiary." However, these duties are generalities that fail to enumerate any concrete policies that the beneficiary will formulate, or how the beneficiary will plan, organize, or oversee the subsidiary. 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)).

As noted earlier, the petitioner's description of the U.S. entity was insufficient and the director requested additional information about the petitioner's business plan. In response, the petitioner failed to submit the additional requested evidence. 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).

In examining the business plan, the precedent decision, *Matter of Ho*, 22 I&N Dec. 206, 213 (Comm.1998), lists possible criteria for establishing an acceptable business plan. "The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions." The decision concluded, "Most importantly, the business plan must be credible." *Id.* at 213. Although *Matter of Ho, Id.*, addresses the specific requirements for the immigrant investor visa classification, the discussion of the business plan requirements is instructive for the L-1A new office requirements. On review, the petitioner's business plan lacks specificity and is vague. For instance, the business plan lists undefined goals as the "purpose is to import compatible and competitive products." Also, the petitioner plans to increase "the investment in the coming two years . . . to \$500,000" if the business grows and reaches its target. These goals are non-specific and broad. Additionally, the petitioner failed to provide the requested description of the proposed organizational structure, the types of employees it plans to employ, a detailed description of the type of business to be conducted, and the salaries that it will pay to its employees. The plan also does not indicate whether it applies to the first year of operation or subsequent years of the business. Again, 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. Thus, given the business plan's generalities, and lack of applicable information, it cannot demonstrate whether the new office will support a manager or executive within one year of filing this petition.

In sum, the petitioner has not established that the U.S. entity will support an executive or managerial position within one year of the approval of the petition. For this additional reason, the petition may not be approved.

Beyond the decision of the director, a third issue in this matter is whether the petitioner has secured sufficient physical premises to house the new office.⁴ The petitioner submitted a September 29, 1997 signed commercial lease for the term of October 1, 1997 through September 30, 1998 for the office space [REDACTED] or approximately 500 square feet. In addition, the lease states that the "Tenant shall use the premises only for trading company, office use, four adult employees only." However, this clause

⁴ The AAO notes that since the director did not adjudicate this matter as a new office petition, the director failed to examine whether the petitioner has secured sufficient physical premises to house the new office. Therefore, the AAO will examine this issue as part of the new office requirements pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A).

limits the growth of the business and would be violated upon the approval of the beneficiary's petition. In a supporting November 30, 1997 letter, the petitioner claims that the U.S. entity presently has "four employees." The U.S. organizational chart lists five employees including the proposed position of the beneficiary. Therefore, it appears as if sufficient physical premises to house the new office has not been secured to operate the petitioner's business. 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). Furthermore, the director requested original canceled checks to show that the petitioner had paid for the office lease, and the full name, address, and telephone number of the lessor. The petitioner did not provide the requested information. Again, 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).

The petitioner also submitted several copies of photographs of the leased premises. Specifically, the photographs illustrated the claimed front door of the office and alleged interior. However, although the U.S. entity's business name appears in a photograph, the pictures themselves depict generic scenes and are difficult to read. Thus, it is difficult to determine whether the photographs depict the petitioner's actual business location. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*.

In sum, the petitioner has not secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v). For this additional reason, the petition may not be approved

Another issue not raised in the director's decision is whether there is a qualifying relationship between the petitioner and foreign entity. In the director's request for additional evidence, the director requested that the petitioner submit original wire transfers or original canceled checks and original business bank statements to show that the parent company in China actually paid for the ownership and control of the U.S. entity.

On appeal, the petitioner claims that the director "fails to recognize all the evidence submitted and ignored the original money wire transfers and original bank statement enclosed with the additional document request."

On review, the petitioner has submitted insufficient evidence to establish that there is a qualifying relationship between the petitioner and foreign entity. Although the petitioner submitted a copy of a document appearing to be the remittance of \$50,000, the document is not original nor does it identify the foreign entity as the source of the funds transfer. Also, the petitioner submitted an original letter indicating the current status of an account with the Bank of America; however, this document is not an original bank statement. Therefore, the petitioner failed to comply with the director's request to submit original wire transfers and original canceled checks. 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). For this additional reason, the petition may be denied.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.

