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U.S. Citizenship
and Immigration
Services

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FILE: SRC 05 046 50195 Office: TEXAS SERVICE CENTER Date: AUG 30 2006

IN RE: Petitioner:
Beneficiary: [redacted]

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:

SELF-REPRESENTED

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, Texas 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 summarily dismissed.

The petitioner is limited liability company organized in the state of Florida and claims to be engaged in the travel/tour operator business. 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 two years. The petitioner seeks to employ the beneficiary's services as the manager/executive of its new office in the United States.

On March 14, 2005, the director denied the petition on the grounds that the petitioner failed to establish: (1) that the beneficiary has at least one year of continuous employment abroad in a managerial or executive capacity within the three years immediately preceding the filing of the petition; and (2) that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company within one year.

The petitioner subsequently filed an appeal on April 11, 2004. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. The petitioner submitted a letter of support for the appeal and additional documentation.

To establish 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 firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary 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.

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition. Petitioner's general objections to the denial of the petition, without specifically identifying any errors on the part of the director, are simply insufficient to overcome the well-founded and logical conclusions the director reached based on the evidence submitted by the petitioner.

In the denial, the director indicated that the petitioner submitted pay stubs for the period of February 2004 to January 2005 as evidence of the beneficiary's one year of continuous employment with the foreign company. However, the beneficiary has been present in the United States since November 2004. Although the petitioner submitted a letter of support for the appeal, the letter fails to adequately address the director's conclusions. In the brief, the petitioner fails to present evidence that he was employed by the petitioner abroad in a managerial or executive position for one year within three years prior to applying for admission into the United States. Instead, the petitioner asserts:

> One of the reasons stated [in the decision] was that I have been physically in the US since 11-24-04 and therefore the pay studs [sic] I sent were irrelevant. Yes I have been residing in the US since said date but also I do not possess a work visa, therefore I do not work and obviously I am not producing money here in the US. Yet I have been paying

> mortgage for the property I purchased, paying all utility bill, vehicle loan and vehicle insurance etc.

The petitioner also indicated that even though he has been present in the United States since November 2004, he is still working for the parent company abroad. The petitioner states:

> Although both owners/managing directors are not physically in the head office does not mean that we cannot operate the business through live chat, web cam, telephone, fax and email. You can freely verify that I am indeed running my business successfully from the US by calling the Trinidad Express Newspapers, Aeropostal Airlines and any of my banks...Aeropostal Airlines can verify that we have operated 3 chartered flight to Margarita Venezuela since being physically in the US.

The petitioner failed to submit evidence of his employment with the foreign company for one continuous year but rather explains that he has been present in the United States since November 2004 and has worked for the parent company from the U.S. 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 by the director, 8 C.F.R. Section 214.2(l)(3)(ii) states that "Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement..." Thus, the petitioner failed to submit evidence that he was employed abroad for one continuous year since he indicated on his appeal that he has been present in the United States since November 2004 and did not submit evidence that he worked for a continuous year abroad prior to that date.

In addition, the director noted that the submitted evidence does not establish the beneficiary was employed in a managerial or executive position for the foreign entity. The petitioner submitted an organizational chart for the foreign entity indicating the beneficiary and his wife were employed as partners and managing directors who supervise two employees in marketing/sales and one operations manager who in turn supervises three tour guides. The petitioner did not submit a job description for the duties performed by the beneficiary as managing director for the foreign entity.

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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the instant matter, the petitioner did not submit a job description of the duties performed by the beneficiary at the foreign company and thus AAO cannot determine if the beneficiary was employed by the foreign entity in a managerial or executive capacity. 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)). The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

In addition, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. 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 addition, if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business "for the previous year" through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

Furthermore, 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 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. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

Upon review, the petitioner has not submitted sufficient evidence to establish that the intended United States operations, within one year of approval, will support an executive or managerial position.

The petitioner failed to provide a comprehensive description of the beneficiary's proposed role as the managing director/owner of the U.S. company. The petitioner indicated on the Form I-129 that his duties as manager/executive will be "Management, training staff, operations, sales." The petitioner failed to provide a detailed description of the beneficiary's duties that demonstrates what the beneficiary will do on a day-to-day basis. The petitioner did not define the beneficiary's goals and policies, or clarify the role of the marketing, sales and management operations that the beneficiary will supervise. 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

Furthermore, the petitioner submitted a vague economic plan for the U.S. entity. The petitioner indicated on the plan that a suitable location will be leased for the office and at least two people will be employed to be trained in sales and reservations of vacation packages. The plan also indicates that two cars will be purchased for the business. In addition, the business plan states the following:

> The website: www.latintours.com would be updated with packages promoting Orlando making sales readily available to all our clients. Apart from the many service providers in the US, Latin Tours have worked with travel agencies such as Action Travel Orlando, Liberty Travel New York and Travel Span New York. There are also plans to invest in property in the Kissimmee/Orlando area as vacation homes. There are also plans for a chartered flight from Trinidad & Tobago to Orlando from the summer vacation, 2005 [sic].

The submitted plan fails to outline how the U.S. entity will reach the listed goals and plans and if it is financially feasible to do so. The plan is vague and not credible. 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 addition, the petitioner indicated on the proposed structural organization of the U.S. company that it will hire at least two sales representatives and at least two tour guides. On appeal, the petitioner asserts "it was also mentioned that the foreign entity had few employees and the proposed US entity only was

going to have 4 employees. The size of a business does not show its success, by hiring 2 US employees to begin does not mean that the company will not grow." This statement does not adequately address or overcome the deficiencies discussed by the director. A critical analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary will supervise subordinate employees who would relieve him from performing non-qualifying duties. It appears that the sales representatives and the tour guides will be performing the sales functions and providing the tours. Thus, it appears from the record that the only individual who would any marketing, finance operations, administrative and business development activities is the beneficiary himself. As the petitioner plans to only hire sales representatives and tour guides, it can only be assumed, and has not been proven otherwise, that the beneficiary would be all other marketing functions and financial development, and all of the various operational tasks inherent in operating a business on a daily basis, such as negotiating with airlines for travel deals, advertising, paying bills, managing the office, supervising personnel issues and handling routine customer transactions. Based on the record of proceeding, the beneficiary's job duties will be principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role.

Accordingly, the director reasonably concluded that the beneficiary will be performing the day-to-day operations and directly providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International* 19 I & N Dec. at 604. Since the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity, the appeal will be dismissed.

Beyond the decision of the director, the petition indicates that the beneficiary and his spouse each own 50 percent of the foreign entity, and thereby of the petitioning company. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. In addition, the fact that both owners of the original foreign corporation reside in the United States raises the question of whether the parent organization will continue to do business so that a qualifying relationship will be maintained pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A). For these additional reasons, the appeal must be dismissed and the petition 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).

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

> An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

The petitioner will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Inasmuch as counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the petitioner has not sustained that burden. Therefore, the appeal will be summarily dismissed.

ORDER: The appeal is summarily dismissed.