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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

[redacted]

File: SRC 06 111 53094 Office: TEXAS SERVICE CENTER Date: APR 05 2007

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:

[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, 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 dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 petitioner, a Florida limited liability company, states that it intends to engage in the design, distribution and sale of contemporary furniture. The petitioner claims to be a subsidiary of Essebici Comunicazioni Integrate SRL, located in Milan, Italy. The petitioner seeks to open a new office in the United States and has requested that the beneficiary be granted a three-year period in L-1A classification to serve as its general manager.[1]

The director denied the petition concluding that the petitioner failed to establish that the foreign entity had provided funding or capitalization for the U.S. company prior to the filing of the petition.

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 petitioner provided ample evidence of an investment in the U.S. company, and contends that the petitioner did in fact provide evidence of wire transfers from the foreign entity to the U.S. entity which pre-dated the filing of the petition. Counsel contends that as of June 2006, the foreign entity has invested approximately $150,000 in the U.S. company. Counsel submits a brief and additional documentary evidence in support of the appeal.

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.

[1] Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

(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)(3)(v) also provides that 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 involves 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 (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 sole issue addressed by the director is whether the U.S. company was funded at the time the petition was filed. When filing a petition for a beneficiary who is to be employed in a new office in a managerial or executive capacity, the petitioner is required to submit evidence to establish the size of the United States investment and the financial ability to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*).

The nonimmigrant petition was filed on February 22, 2006. The petitioner stated on Form I-129 that it is a majority-owned subsidiary of Essebici Comunicazioni Integrate SRL. In support of the petition, the petitioner submitted a business plan for the U.S. company, which indicated that the anticipated start-up requirements for the business will be $84,000, including $25,000 in cash and $59,800 to cover costs associated with the petitioner's legal expenses, insurance, equipment purchases, office supplies, leasehold improvements, and showroom samples. The petitioner submitted a letter, dated February 8, 2006, confirming that the petitioner had opened a business checking account at Washington Mutual Bank. The petitioner did not provide copies of bank statements or other evidence of funding of the U.S. entity.

In a request for evidence dated February 28, 2006, the director instructed the petitioner to submit evidence of sufficient funding for the U.S. entity such as copies of wire transfers showing transfers of funds from the foreign organization, evidence of financial resources committed by the foreign company, copies of bank statements for checking and savings accounts, profit and loss statements, or other accountants' reports.

In a response dated May 17, 2006, counsel for the petitioner stated:

> We enclose proof of payment by the parent/foreign company to the suppliers for inventory merchandise to be received in the US subsidiary company. This merchandise is expected to arrive at Miami during the second week of the coming June. We are enclosing invoices showing the merchandise and the catalogue which shows the furniture.

The petitioner submitted un-translated copies of bank statements for the foreign entity; all of which appear to be dated in 2005. The petitioner also provided a copy of a letter from the foreign entity, dated April 15, 2006, addressed to the petitioner, which states the following:

> Please note that based on your request dated 29th March 2006, I can confirm that I have provided payment for the following Purchase orders:
>
> * * *
>
> The total amount of €53.000,00 have been paid to Divani Group Italia and I am enclosing copy of confirmation of the transfer.

The petitioner also submitted a letter from the foreign entity, addressed to the Banca di Roma, requesting that the bank send to Divani Group Italia a total of €53,000.00 as payment for four orders, referenced as "BC Miami LLC [the petitioner]." The petitioner provided copies of the four reference purchased orders to "D Group," identifying the petitioning company as the purchaser. The purchase orders are dated "1 *Maggio* 2006" or May 1, 2006.

Finally, the petitioner submitted a copy of a letter from the foreign entity, dated May 1, 2006, addressed to petitioner's counsel, which referenced "deposits to [the petitioner's] bank accounts," but no bank statements or other documentary evidence showing the contribution of funds to the petitioner from the foreign entity were submitted in support of the petitioner's response to the request for evidence.

The director denied the petition on June 1, 2006, concluding that the petitioner had failed to establish that the foreign entity made an investment in the United States entity as of February 22, 2006, the date of filing of the petition. The director acknowledged that the letter from the foreign entity, dated April 15, 2006, "indicates the foreign entity procured goods and/or services for the United States entity, but fails to indicate any deposits and/or wire transfers were received by the United States entity from the foreign entity as of February 22, 2006."

On appeal, counsel for the petitioner asserts in a brief dated June 29, 2006, that in addition to the evidence acknowledged by the director, the petitioner submitted the following evidence:

> The company showed a signed and stamped (on the right hand side of paper) computer statement issued by the bank showing all of the deposits and counter deposits in the Wachovia Bank account for the US Subsidiary Company.
>
> The company showed a letter from Bank of America stating that there were wire transfers received in the Miami account from before the date of the letter on February 28, 2006.
>
> The total amount up to date of the Italian company's investment in the Miami company has been approximately $150,000.00, such as wire transfers in the amount of $19,946.00 (see evidence in file), inventory in the amount of $70,000.00, plus monies specifically invested on the leases and equipment.

Counsel asserts that the director incorrectly required that the investment in the U.S. entity be established only via wire transfers at banks, and contends that "this is not the only mechanism foreseen under the law." Counsel states that the evidence submitted "shows an overwhelming investment from the Italian company into the Miami company."

In support of the appeal, the petitioner submits a letter from Bank of America, dated June 28, 2006, confirming that the petitioner maintains two business checking accounts with the bank, and has received two wire transfers from Essebici SRL, totaling $19,946.00. The petitioner also submits a copy of a Wachovia Bank statement for a business checking account dated June 28, 2006. The account number is not the same as the one referenced on the February 8, 2006 letter submitted in support of the initial petition and the statement does not identify the name of the account holder.

Upon review, counsel's assertions are not persuasive. While counsel correctly asserts that the petitioner is not specifically required to submit evidence of wire transfers between the foreign and U.S. companies, the petitioner must still submit documentary evidence in support of its assertion that the foreign entity has made an investment in the U.S. company as of the date the petition was filed. Although counsel asserts that the petitioner submitted evidence that the foreign entity transferred funds in the amount of $19,946 prior to the filing of the petition, the record contains no documentary evidence to verify the claimed dates of the wire transfers. 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 only documentary evidence submitted in support of the petitioner's claims that the foreign entity has made an investment in the U.S. company relates to the purchase of furniture for the petitioner's showroom display. As noted by the director, this evidence post-dates the filing of the petition and is thus not probative of the petitioner's eligibility at the time of filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Furthermore, the evidence related to the foreign entity's purchase on behalf of the petitioning entity consists of letters from the petitioner and foreign entity and is not supported by evidence that the funds in the amount of €53,000.00 were actually deducted from the foreign entity's account, such as copies of the wire transfers or copies of the foreign entity's banks statements for the relevant month. Finally, as noted above, the purchase

orders referenced in the petitioner's March 29, 2006 and the foreign entity's April 15, 2006 letters are dated May 1, 2006, and the petitioner has not explained how the foreign entity paid for the purchases prior to the completion and submission of the purchase orders to the supplier. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Finally, the AAO notes that the petitioner's business plan indicates that the company anticipated receiving a $45,000 investment from its "owner" and a $39,800 investment from an "investor" to meet its stated start-up costs of $59,800 and its start-up cash requirements of $25,000. It is reasonable to expect the petitioner to provide evidence that it has received the required funding anticipated to commence operations in the United States, or to explain any deviation from its business plan, in order to determine whether the petitioner had sufficient funding as of the date of filing of the petition. The evidence submitted does not clearly establish the size of the foreign entity's investment in the United States entity, nor does it demonstrate that the company had sufficient funds to meet its anticipated start-up costs at the time the petition was filed. 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. Based on the foregoing discussion, the appeal will be dismissed.

Beyond the decision of the director, the evidence of record does not establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one continuous year within the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner stated that the beneficiary was employed as the executive manager of the foreign entity from September 2003 until September 2004, at which time he re-located to the United States in J-1 status. In two attached letters, both dated February 10, 2006, the foreign entity indicated that as executive manager, the beneficiary "has been in charge of the administration, management and supervision" of the Italian company; "controls the work of other employees and has the authority to hire or fire or recommend those actions as well as other personnel actions"; "exercises discretionary authorities over day-to-day operations"; and "devotes one hundred percent (100%) of his time to managerial duties and does not spend any time on a first line supervision of employees nor on hand-on productive labor."

First, the AAO notes that the record contains contradictory evidence that undermines the petitioner's claims that the beneficiary was employed by the foreign entity for one full year prior to his admission to the United States in J-1 status. Although the petitioner stated that the foreign company employed the beneficiary from September 2003 through September 2004, the petitioner submitted a copy of the beneficiary's Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status, indicated that the beneficiary was admitted to the United States in J-1 nonimmigrant status on August 3, 2004, only eleven months after he purportedly commenced employment with the foreign entity. 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 591-92. The petitioner's actual dates of employment with the foreign entity have not been resolved, and therefore the petitioner has not established that the beneficiary completed one year of continuous employment abroad within three years preceding the filing of the instant petition.

Furthermore, the brief job description submitted for the beneficiary's previous position of executive manager merely paraphrases the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Absent a detailed description of the beneficiary's actual duties while employed by the foreign entity, the AAO cannot determine that he was employed in a primarily managerial or executive capacity. For these additional reasons, the petition cannot be approved.

Beyond the decision of the director, the petitioner has not established that it had secured sufficient physical premises to house the new office as of the date the petition was filed, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). In support of the petition, the petitioner provided a copy of a commercial sublease contract between the petitioner and 10 Coral Gables, Inc., for "a portion of 10 Coral Gables, Inc.'s office location" at an "Intelligent Office" building in Coral Gables, Florida. The agreement is valid for one year commencing on February 2, 2006 and requires the petitioner to pay a fee of $355.00. The petitioner did not provide a copy of the original lease agreement between the sub-lessor and Intelligent Office, or any information regarding the size or type of premises secured.

In response to the director's subsequent request for photographs of the petitioner's office space, the petitioner submitted a photograph of a small office containing one computer desk. The petitioner did not explain how it is able to sublease "a portion" of an office with room for only one desk, nor clarify how it intended to operate a furniture showroom out of such a location. The AAO acknowledges that, in response to the director's request for evidence, the petitioner also submitted a lease agreement between the petitioner and RiverArts Building, LLC for a larger space to be used for a warehouse and showroom. Although the lease agreement appears to have been signed on January 9, 2006, the petitioner was not established until January 23, 2006. Further, the term of the lease commences on or after April 1, 2006, and is contingent upon whether the rented building passes a final inspection. Again, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner has not established that it had secured sufficient physical premises to house its intended business as of the date the petition was filed. 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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.