U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 05 254 50241 Office: TEXAS SERVICE CENTER Date: APR 09 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:

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 AAO will dismiss the appeal.

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 is a Florida corporation that states that it intends to operate as a building contractor and general investment company. The petitioner claims that it is the subsidiary of [redacted] located in Brazil. The petitioner seeks to employ the beneficiary as the president/general manager of its new office in the United States for a two-year period.

The director denied the petition concluding that the petitioner had not submitted evidence to establish that the foreign entity had made a financial investment in the U.S. company as of the date the petition was filed. The director found that the petitioner had therefore failed to demonstrate that the intended United States entity, within one year of the approval of the petition, would support an executive or managerial position.

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, the petitioner asserts that the director erroneously denied the petition based on the lack of available initial resources, and failed to consider the evidence submitted in response to the director's request for evidence, which showed that the petitioner had nearly $10,000 in its checking account. The petitioner further asserts that the statute does not set forth requirements for the timing or form of investment in the United States company. The petitioner submits a brief and 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.

(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 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 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)(v)(C)(*2*).

The nonimmigrant petition was filed on September 19, 2005. The petitioner indicated on Form I-129 that the U.S. company would operate as a building contractor and "general investment" company, but did not submit a business plan, identify the anticipated start-up costs for the company, or provide evidence that the claimed foreign parent company had made an investment in the U.S. company.

The director issued a request for evidence on October 22, 2005, instructing the petitioner as follows:

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 December 8, 2005, the petitioner submitted a "Transaction History" statement for the U.S. company's business checking account, which shows the following transactions: (1) a $1,000 funds transfer credit on November 10, 2005; (2) a $2,000 counter credit on November 21, 2005; and (3) a $7,000 counter credit on December 8, 2005. The petitioner stated that the transaction history shows "the initial funds sent from the parent company."

The director denied the petition on January 3, 2006, concluding that the petitioner had not established the size of the financial investment in the U.S. entity and its ability to commence doing business in the United States. The director acknowledged receipt of the petitioner's banking transaction history, but found the evidence insufficient to establish that the foreign entity had made an investment in the United States entity as of September 19, 2005. The director observed that the funds transfer in the amount of $1,000 occurred on November 10, 2005, subsequent to the filing of the petition, and emphasized that eligibility must be established as of the date of filing. The director further concluded that the evidence submitted therefore failed to establish that the U.S. entity, within one year of approval of the petition, would support an executive or managerial position, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

On appeal, the petitioner asserts that the director "made [a] mistake when denying the benefit requested by lack of available initial resources." The petitioner states that the bank statement submitted in response to the request for evidence showed a balance of $9,996.00 "like part of a bigger investment planned starting from the time in which our employee's visa was approved." The petitioner contends that while the director apparently reviewed the bank statement, he failed to take into account two of the three deposits listed in the company's bank transaction history, including deposits in the amount of $2,000 and $7,000, and instead stated that the investment amounted to only $1,000. The petitioner further asserts that the director's decision was based on a "strange interpretation of the statute that establishes the form or the time in any part of like [sic] the funds should be brought for the proposed investment and doesn't make it because it's the solely [sic] responsibility of the investor according to their professional vision."

Upon review, the AAO finds insufficient evidence of the size of the United States investment and the ability of the company to commence doing business in the United States. The AAO acknowledges that the petitioner had $9,996 in its checking account as of December 8, 2005. However, there is no evidence in the record to substantiate that these funds were transferred from the foreign entity as an investment in the United States business or to pay the petitioner's start up costs. Although the director appears to have assumed that $1,000 was transferred from the foreign entity on November 10, 2005, the AAO can find no basis for this assumption, considering the minimal evidence submitted regarding the funding of the United States entity.

The director specifically requested evidence of sufficient funding for the U.S. entity, including copies of wire transfers from the foreign entity, or other evidence of financial resources committed by the foreign entity. The petitioner failed to submit any documentary evidence of a financial investment in the U.S. company by the foreign entity and did not identify the source of the funds that appear on the submitted bank statement. 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).

Furthermore, the petitioner has neither clarified the purpose of the money in its checking account nor identified its anticipated start-up costs, therefore, it is not clear whether these funds would be sufficient for the purpose of commencing operations in the United States, or that the funds were specifically intended for such purpose. 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)).

On appeal, the petitioner argues that the regulations are not particular as to the "form or the time" with respect to the investment in the United States entity, and suggests that the monies documented on the petitioner's bank statement are "part of a bigger investment." It appears that the petitioner is contesting the director's inquiry as to the source and amount of the investment in the United States entity, as well as the director's determination that the petitioner failed to establish that the U.S. entity had been funded as of the date the petition was filed. Counsel's argument is not persuasive. The regulations and relevant case law confirm that evidence submitted in support of a nonimmigrant petition establish the petitioner's and beneficiary's eligibility for the benefit sought as of the date the petition was filed. 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); *see also* 8 C.F.R. § 103.2(b)(12)(requiring that evidence submitted in response to a request for additional evidence establish eligibility as of the time the petition was filed). In this matter, the only evidence submitted with respect to the funding of the U.S. entity post-dates the filing of the petition by two months, and the director properly concluded that the petitioner had failed to establish eligibility as of the date of filing.

Moreover, despite the petitioner's objections to inquiries regarding the source, timing and amount of funding provided to the U.S. company, it must be noted that if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). 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 house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to commence doing business in the United States. *Id.*

While it is true that the regulations do not establish a minimum investment amount, the AAO cannot accept the petitioner's unsupported assertions that the company has or will have sufficient funds to commence business operations in the United States in the absence of evidence identifying the business's projected start-up costs, business plans, and the actual investment of funds from the claimed foreign parent company as of the date the petition was filed. 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 petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. For this reason, the appeal will be dismissed.

A related matter briefly addressed in the director's decision is whether the petitioner submitted sufficient evidence to demonstrate that the petitioner, within one year, will support the beneficiary in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(C); *see also* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B)(defining "managerial capacity" and "executive capacity.") The petitioner indicated on Form I-129 that the beneficiary would serve as the president/general manager of the U.S. company with responsibility to "run business start up." The petitioner further stated in its letter dated September 10, 2005 that the beneficiary will "devote all his time in the United States to commencement and management [of] the U.S. business," with responsibility for "successful commencement of operations," and establishing a "sound financial footing with an adequate client base." 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). The record as presently constituted contains no comprehensive description of the beneficiary's proposed job duties sufficient to establish his employment in the United States in a managerial or executive capacity.

In addition, as noted above, the petitioner failed to submit a business plan for the U.S. office, and did not otherwise describe the proposed nature of the office, the anticipated scope of the entity, or its proposed organizational structure and financial goals, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(*1*). 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.

The petitioner indicated that it intends to engage in building contracting and "general investment," and submitted an occupational license indicating that the company will operate as a painting and wall covering contractor. Otherwise, the record is devoid of any evidence regarding the proposed U.S. operations, hiring plans, strategies, objectives, or financial goals. 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. The minimal evidence submitted fails to 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. For this additional reason, the appeal will be dismissed.

Another issue not addressed by the director is whether the beneficiary has been employed by the foreign entity in a managerial or executive capacity for one continuous year during the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner submitted a letter from the foreign entity, with English translation, indicating that the beneficiary has been employed by the petitioner's parent company on a full-time basis since February 1, 2003. The foreign entity noted that the beneficiary "is in charge of managing the human resources department like Director." The petitioner stated in its letter dated September 10, 2005 that the beneficiary was hired by the foreign entity to "audit the Human Resource Department," and that he has been continuously employed in an executive capacity since 2003.

In response to the director's request for additional evidence regarding the organizational structure of the foreign entity, the petitioner submitted an organizational chart depicting the beneficiary as the head of the human resource department, overseeing employees responsible for "selection and recruiting," "employee capability potential," "hiring and firing," and "medical assistance." The petitioner provided a brief outline of the function of each position within its company, but did not specifically provide a job description for the beneficiary.

The petitioner also submitted, in response to the director's request, the beneficiary's pay statements for the 2004 and 2005 years. The pay statements for 2005 identify the beneficiary's job title as "*diretor recursos humanos*" (director human resources) and his monthly salary as R$3,500.00. In contrast, the beneficiary's 2004 pay statements indicate his job title as "*contador*" (accountant) and his monthly salary as R$ 3,000.00. 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 petitioner did not acknowledge that the beneficiary previously held a different position with the foreign entity, and therefore has not provided a job description for the position of accountant with the foreign entity.

The AAO notes that the beneficiary was admitted to the United States as a B-1 nonimmigrant in March 2005, and the six-month period he spent in the United States immediately prior to the filing of the instant petition cannot be considered in calculating the beneficiary's qualifying period of employment abroad. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A)(stating that "brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment broad but such periods shall not be counted toward fulfillment of that requirement.") Accordingly, the petitioner must establish that the beneficiary was employed in a qualifying managerial or executive capacity with the foreign entity for a continuous year prior to being admitted to the United States as a visitor in March 2005. Based on the evidence submitted, it appears the beneficiary held the claimed managerial or executive position of "director of human resources" with the foreign entity for no more than three months prior to coming to the United States. Regardless, the petitioner has not provided a sufficient description of the beneficiary's responsibilities with the foreign entity to establish his employment abroad in a managerial or executive capacity. Going on record without supporting

documentary evidence is not sufficient the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. 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.