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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D7

FILE: SRC 05 174 51894 Office: TEXAS SERVICE CENTER Date: FEB 22 2007

IN RE: Petitioner: [redacted]
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:

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 dismissed.

The petitioner is a Florida corporation and claims to be engaged in professional and technical information services. The petitioner states that it is a subsidiary of [redacted]ocated in Venezuela. 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). The petitioner seeks to employ the beneficiary's services as the general manager of its new office in the United States.

On June 16, 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 full-time employment abroad within the three years immediately preceding the filing of the petition; (2) that the beneficiary was employed in a primarily executive or managerial capacity by the foreign company; and (3) that a qualifying relationship exists between the U.S. company and the foreign company.

The petitioner subsequently filed an appeal on July 13, 2005. 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 beneficiary has at least one year of continuous employment with the foreign company even though he has been present in the United States pursuant to an F-1 classification since January 2003. The petitioner states that the beneficiary was "working at home" as a consulting system manager for the foreign company. In addition, the petitioner states that the beneficiary's position with the foreign company "involves specialized knowledge and is a managerial position." Finally, the petitioner clarifies certain issues discussed in the decision regarding the qualifying relationship between the U.S. entity and the foreign company.

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.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states 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; 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 first issue to be addressed is whether the beneficiary 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.

Upon review of the record, the petitioner claims that the beneficiary began his employment with the parent company abroad, [redacted], located in Venezuela, in November 2002. In January 2003, the beneficiary entered into the United States pursuant to an F-1 nonimmigrant classification in order to obtain his Bachelor of Science Degree in Business Administration from the University of Tulsa in Oklahoma. Subsequently, the petitioner submitted the current petition in order to change the beneficiary's status from F-1 to L-1A classification, so that the beneficiary may commence his

employment with the U.S. entity and open a new office for the petitioner. Thus, the beneficiary was employed abroad with the foreign company from November 2002 until January 2003, approximately two months in total.

In the denial, the director indicated that the beneficiary was employed abroad with the foreign company for approximately two months. The director stated "that the beneficiary has been in daily contact with the foreign affiliate is insufficient." The director asserted that the regulations are clear that the beneficiary must have been employed abroad for one year for the foreign company outside of the United States.

On appeal, the petitioner fails to present evidence that the beneficiary 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. The petitioner asserts that even though the beneficiary has been present in the United States since January 2003, he is still working for the parent company abroad as follows:

> When we say that he has been in daily contact with his department what we meant was "WORKING AT HOME" from a computer actually working for us as a CONSULTING SYSTEM MANAGER[.] He has managed what we consider to be one of the most important departments of our company, with the help of the 2 analysts and the secretary that report to him. During this time he went to Venezuela two times for the annual meetings of the company when we needed him and weekly meetings are held over the Internet which is a common practice in this type of companies and positions. The position was designed to be home-based, even if [the beneficiary] were in Venezuela.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

> An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. *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.*

(Emphasis added.)

Thus, the petitioner failed to submit evidence that the beneficiary was employed abroad for one continuous year since he indicated on his appeal that he commenced his employment with the foreign company in November 2002 and has been present in the United States since January 2003, and did not submit evidence that he worked for a continuous year abroad prior to that date.

In addition, in a support letter dated May 20, 2005, the petitioner states that "[the beneficiary] has worked in several foreign businesses in the past 3 years." Without further explanation, it appears that the

beneficiary has not been employed by the foreign company since November 2002, but instead has been employed by other employers. 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 failed to submit evidence of his employment with the foreign company for one continuous year prior to entering the United States, but rather explains that he has been present in the United States since November 2002 and has worked for the parent company from the U.S. The petitioner submits no evidence in support of this claim. 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)). Regardless, even if the beneficiary performs certain duties on behalf of the foreign entity while in the United States on an F-1 visa, these activities cannot be considered qualifying full-time employment with the foreign entity. Based on the foregoing discussion, the appeal will be dismissed.

The second issue to be addressed in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary has been employed in a managerial or executive capacity by the foreign entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(15)(L), 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.

The nonimmigrant petition was filed on June 3, 2005. As discussed above, the petitioner did not submit sufficient documentation to establish that the beneficiary was employed by the foreign company for at least one continuous year prior to entering the United States. In addition, even if the petitioner would be able to provide documentation of his employment with the company abroad for one continuous year prior to entering the United States, the evidence does not establish that the beneficiary was employed by the foreign company in a primarily managerial or executive capacity.

The petitioner submitted a job description for the beneficiary's position with the foreign company with the original petition. According to the job description, it appears that the beneficiary managed the company's information technology systems including backup, security, technical assistance, and maintenance and modification of the databases. The petitioner also submitted an organizational chart of the foreign company which indicated that the beneficiary supervised two analysts. According to the job descriptions submitted of the business analysts, it appears that these employees would assist the beneficiary in maintaining the company's computer systems and provide customer support to all staff and users.

The director denied the petition and stated that the petitioner had not established that the beneficiary was employed in a managerial or executive capacity with the foreign company.

On appeal, the petitioner states that the beneficiary's employment with the foreign company "involves specialized knowledge and is a Managerial position." The petitioner further asserts that "in order to develop, direct and manage systems an individual needs a highly specialized body knowledge as well as implement advances in technology and modifications in existing data bases." The petitioner also resubmits a similar job description to the one previously submitted.

On review, the petitioner's assertions are not persuasive. 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). The petitioner's description of the job duties must clearly describe the duties to be performed and indicate whether such duties are in a managerial or executive capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not

spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner stated vague duties such as "direct daily operations of department, analyzing workflow, establishing priorities, developing standards and setting deadlines"; and "evaluate the organization's technology use and needs and recommend improvements." 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. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as "develop computer information resources, pricing for data security and control, strategic computing, and disaster recovery"; "control operational budget and expenditures"; and "develop method for integrating different products so they work properly together, such as customizing commercial databases to fit specific needs of the company." As the beneficiary is developing the required systems for the company and modifying and maintaining the databases, it appears that the beneficiary was providing the information technology services of the business rather then directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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. 593, 604 (Comm. 1988).

A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant petition, the beneficiary supervised two business analysts. It appears that the beneficiary was a first-line supervisor and the record does not demonstrate that the beneficiary functioned primarily as a manager or executive.

In addition, on appeal, the petitioner asserts that the beneficiary possesses a specialized knowledge. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Petitioner's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

> The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The request to reconsider the original petition on appeal as a petition for L-1B specialized knowledge classification is, therefore, rejected.

Based upon the lack of a comprehensive job description, it cannot be concluded that the beneficiary has been employed by the foreign entity in a managerial of executive capacity.

The third issue in this proceeding is whether a qualifying relationship exists between the foreign company and the United States entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer is the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The director stated in the decision that the U.S. company's IRS Form 1120, U.S. Corporation Income Tax Return, for 2004, indicated in Schedule K, question 4, that the petitioner is not a subsidiary of an affiliated group or a parent-subsidiary controlled group. On appeal, the petitioner asserts that the answer on Form 1120 for 2004 was a mistake made by the accountant. The petitioner explained that the accountant used a software program to prepare the tax return and the answer "no" is the default answer for the program.

On review, the evidence submitted is sufficient to establish that a qualifying relationship exists between the foreign company and the United States entity.

As general evidence of a petitioner's claimed qualifying relationship, the petitioner may submit stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. In the instant matter, the petitioner submitted the articles of incorporation for the foreign company and the United States company. In addition, the petitioner submitted stock certificate number 1 indicating that the foreign company owns 51% of the United States entity. The AAO will withdraw this part of the director's decision.

Beyond the decision of the director, 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.

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.

The petitioner failed to provide a business plan for the U.S. entity. The petitioner also failed to explain the proposed staffing level for the U.S. entity, the scope and nature of the proposed business activities, the funding required to commence the U.S. operations and the feasibility of the U.S. entity to succeed and reach its goals. 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. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner did not provide sufficient evidence to establish that a sufficient financial investment has been made in the United States company, as required by 8 C.F.R. § 214.2(l)(3)(v)(2). The petitioner did not submit a business plan outlining the anticipated expenses required to commence the U.S. operations. In addition, the petitioner did not submit any documentation to evidence that the foreign parent company has deposited the needed amount of capital in the U.S. entity's bank account, or documentation such as receipts of wire transfers or copies of the U.S. company's bank account. 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. 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 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. Here, the petitioner has not met his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.