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U.S. Department of Homeland Security
U.S. Citizenship & Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: EAC 07 098 50455 Office: VERMONT SERVICE CENTER Date: **JUL 23 2009**

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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal in a decision dated October 29, 2008. The matter is now before the AAO on a motion to reconsider. The AAO will grant the petitioner's motion and affirm its previous decision.

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 California corporation, states that it intends to engage in the "bee industry." The petitioner claims to be a subsidiary of Po Sang Yuen Bee Farm (HK) Ltd., located in Hong Kong. The petitioner seeks to employ the beneficiary as the sales manager of its new office in the United States.

The director denied the petition concluding that the petitioner failed to establish: (1) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity; and (2) that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity within one year.

The AAO dismissed the petitioner's subsequent appeal and found that the director had correctly denied the petition on both grounds stated above. The AAO found that the petitioner had not adequately described the beneficiary's duties while employed by the foreign entity, the staffing structure of the foreign entity, the beneficiary's proposed duties in the United States, or the petitioner's anticipated organizational structure within one year of commencing operations. Based on these deficiencies, the AAO concluded that the petitioner had not established that the beneficiary has been or would be employed in a primarily managerial or executive capacity.

On motion, counsel for the petitioner asserts that the AAO erroneously ignored evidence submitted on appeal, and in doing so, improperly relied on two Board of Immigration Appeals (BIA) decisions, *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) and *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Counsel emphasizes that the AAO, unlike the BIA, reviews all cases *de novo*, is not restricted to the original record, and has "typically" accepted and considered new documents or other evidence submitted by appellants. Counsel asserts that since the AAO"s standards for accepting or refusing evidence are not published in any statutes or regulations, the appellant did not have fair notice of this "change in procedure." Counsel contends that the excluded evidence in question "goes to the core of the AAO dismissal."

Counsel's second argument relates to the AAO's determination that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year. Counsel asserts that the AAO ignored the evidence submitted and improperly relied upon a case involving an alien entrepreneur in determining what constitutes an appropriate business plan. Counsel further objects to the AAO's statement that the regulations "'contemplate' a certain kind of evidence." Counsel contends that "basing a decision on something as vague as what the reviewing officer thinks a regulation 'contemplates' is merely an abuse of discretion and a violation of the appellant's right to due process."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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 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 first issue raised by counsel on motion is whether the AAO improperly excluded evidence submitted on appeal with respect to the beneficiary's job duties with the foreign entity. In dismissing the appeal, the AAO noted that the petitioner's description of the beneficiary's position, based on the record of proceeding before the director, consisted of only two sentences. The AAO noted that such description offered no insight into what specific duties he performed on a day-to-day basis in his position as sales manager. The AAO also emphasized that the director, in a request for evidence issued on April 30, 2007, had requested the petitioner to provide a "complete position description for all of the foreign entity's employees." The AAO noted that the director had further requested information regarding how much of the beneficiary's time is allotted to managerial or executive duties versus non-managerial duties, and information regarding the degree of discretionary authority the beneficiary has over day-to-day operations in his foreign position. The AAO found that, given these specific requests, the petitioner's reply that the beneficiary is responsible for "all the contracting and market development, promotion works," was not responsive to the director's inquiries. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO acknowledged that the petitioner submitted a somewhat lengthier description of the beneficiary's duties on appeal. The AAO emphasized that the petitioner had been put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Citing to *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) and *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988), the AAO declined to consider the evidence submitted for the first time on appeal, and adjudicated the petition based on the record of proceeding before the director.

On motion, counsel for the petitioner asserts that the AAO had no authority to rely on the cited BIA precedent decisions, and that such decision are only relevant to the BIA.

The AAO notes that such authority is set forth in the regulations at 8 C.F.R. § 1003.1(g), which states, in relevant part:

> *Decisions as precedents*. Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States.

Neither *Matter of Soriano* nor *Matter of Obaigbena* have been modified or overruled, and thus they remain binding on AAO personnel as employees of the Department of Homeland Security.

Counsel further argues that "the AAO reviews all cases de novo and is not restricted to the original record." Counsel states that "in the past, the AAO typically accepted and considered new documents or other evidence submitted by appellants."

As correctly noted by counsel, the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Notwithstanding its *de novo* authority, the AAO is not required to take into account any and all evidence submitted by a petitioner on appeal, without exception. The evidence the AAO excluded in this matter was required initial evidence pertaining to the beneficiary's managerial or executive job duties that was not submitted at the time of filing. The director allowed the petitioner 12 weeks to submit the requested evidence, and the petitioner once again failed to provide a description of the beneficiary's job duties.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it in response to the director's request for evidence. *Id.*

The AAO notes that, had the director not issued an RFE allowing the petitioner an opportunity to submit additional evidence pertaining to the beneficiary's foreign job duties, the AAO would have accepted the job description submitted on appeal and considered the evidence in making its decision. Contrary to counsel's assertions, the AAO does not "typically" accept evidence submitted for the first time on appeal under the circumstances that were present in this matter. Instead, the AAO follows the precedent decisions governing the submission of previously requested evidence on appeal.

The AAO notes that the only issue raised on motion is the AAO's reliance on *Matter of Soriano* and *Matter of Obaigbena* in declining to consider the job description submitted on appeal. However, in addition to finding the beneficiary's job description insufficient, the AAO also dismissed the appeal based on the petitioner's failure to demonstrate that the beneficiary supervises a subordinate staff of supervisors, managers or professionals, or manages an "essential function," within the foreign organization. The AAO noted that the petitioner had identified only one subordinate employee within the beneficiary's department, did not submit

the requested description of this employee's duties, and otherwise failed to demonstrate that the beneficiary is relieved from performing the day-to-day non-managerial duties associated with the foreign entity's sales and promotion functions.

Based on the foregoing discussion, the petitioner has not submitted evidence or arguments sufficient to overcome the AAO's prior determination, and has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the AAO's previous decision will be affirmed.

The second ground for denial of the petition and dismissal of the petitioner's appeal was the petitioner's failure to establish that the U.S. company would employ the beneficiary in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

The AAO began its discussion of this issue with a general discussion of the regulatory requirements for the opening of a new office, noting that the petitioner's evidence and business plan should demonstrate a realistic expectation that the new U.S. 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. Included in this discussion was an excerpt from a precedent decision relating to the regulatory requirements for the alien entrepreneur immigrant visa classification, Matter of Ho, 22 I&N Dec. 206 (Assoc. Comm. 1998). The AAO noted that the decision is instructive in the instant matter because it discusses the "the contents of an acceptable business plan."

However, the AAO ultimately denied the petition based on the petitioner's failure to submit a detailed description of the beneficiary's proposed duties, or the proposed organizational structure of the U.S. company after the first year of operations.

On motion, counsel contests the AAO's reference to *Matter of Ho*, noting that the case law is not directly relevant to the matter under review. Counsel also objects to the following statement that appears in the AAO's decision: "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." Counsel asserts that such statement amounts to the personal opinion of the reviewing officer. Counsel asserts that the AAO concluded that the petitioner's evidence does not contain the features of an acceptable business plan according to *Matter of Ho*. Finally, counsel contends that the AAO failed to consider the actual evidence submitted and whether it meets the regulatory requirements for a new office petition.

Counsel's assertions are not persuasive. First, the AAO notes that the "as contemplated by the regulations" language to which counsel objects was derived directly from *Matter of Ho*, and does not represent the personal opinion of the reviewing AAO appeals officer. *See* 22 I&N Dec. at 213 (stating "A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives.") A reveal of the record shows that the AAO properly attributed this language to *Matter of Ho* in its decision.

Second, the AAO did not deny the petition based on the petitioner's failure to meet the *Matter of Ho* standard with respect to what constitutes an acceptable business plan. Rather, the AAO included the excerpt from *Matter of Ho* in its decision because it finds the discussion of business plans contained in that decision instructive. L-1 petitioners are not required to adhere to such standard, but petitioners may find the discussion contained in *Matter of Ho* useful when preparing to file a new office petition.

Rather, contrary to counsel's assertions, the AAO denied the petition because the petitioner did not adequately describe the beneficiary's proposed duties in the United States, as required by 8 C.F.R. § 214.2(l)(3)(ii), nor did it submit sufficient evidence of the proposed organizational structure of the U.S. company after the first year of operations, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(*1*).

In denying the petition, the AAO acknowledged the petitioner's voluminous response to the director's request for additional evidence, but emphasized that the petitioner failed to provide any additional information to elaborate upon the beneficiary's actual duties in the United States, and provided only broad and vague statements regarding his general areas of responsibility. 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 failed to provide any detail or explanation of the beneficiary's proposed 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). Counsel has not challenged this conclusion on motion or provided evidence to overcome the AAO's conclusion. The brief position descriptions contained in the record as presently constituted fall significantly short of establishing that the beneficiary's primary duties in the U.S. company would be managerial or executive in nature within one year.

In addition to finding the beneficiary's U.S. job description deficient, the AAO found that the evidence submitted did not establish that the beneficiary would be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his responsibilities and to the operation of the business in general. The AAO emphasized that the petitioner failed to specifically describe its staffing plan, and the brief business plan submitted contains no indication as to how many and what types of staff would be hired during the first year of operations. In addition, although the petitioner claimed in response to the request for evidence that four employees had already been hired, the AAO noted that the petitioner provided no documentary evidence of payments to the claimed employees, and on appeal, seemed to indicate that employees have not yet been hired. The AAO concluded that since the record contained insufficient explanation as to what duties the beneficiary and his subordinate staff will perform after the petitioner's first year in operation, it could not be determined that he will be "primarily" employed as a manager or executive within one year.

The AAO emphasizes that the regulations governing new office petitions require the petitioner to submit evidence regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals. 8 C.F.R. § 214.2(l)(3)(v)(C)(*1*). The petitioner's evidence with respect to its proposed organizational structure consisted of little more than unsupported statements. 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)). Again, counsel does not address these substantive issues

on motion and instead contends that the AAO ignored evidence and improperly relied on *Matter of Ho* in dismissing the appeal.

Upon review, the AAO finds that its prior decision was properly based on the petitioner's failure to satisfy the regulatory requirements pertaining to new office petitions. Counsel has not indicated what specific evidence was ignored, and, upon careful review of the record, the AAO cannot find that it overlooked a detailed description of the beneficiary's proposed duties or relevant evidence pertaining to the petitioner's proposed staffing levels that was not addressed in its prior decision. Accordingly, the petitioner has not overcome the grounds for denial and the AAO's prior decision will be affirmed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the previous decision of the AAO will be affirmed and the petition will be denied.

ORDER: The AAO's decision dated October 28, 2008 is affirmed.