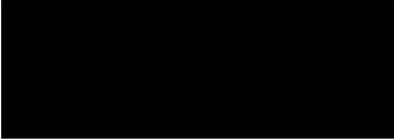




U.S. Citizenship
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FILE: WAC 03 113 53729 Office: CALIFORNIA SERVICE CENTER Date: **APR 04 2005**

IN RE: Petitioner: [Redacted]
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, Director
Administrative Appeals Office

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DISCUSSION: The Director, California 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 its vice president 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 corporation organized in the State of California and claims to be commercial software development company. The petitioner states that it is engaged in a joint venture with the beneficiary's foreign employer located in India. The petitioner seeks to employ the beneficiary for three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, the petitioner disputes the director's findings and provides additional evidence.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(3) state 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed primarily in a managerial or executive capacity.

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

In support of the petition, the petitioner provided the following description of the beneficiary's job duties:

1. To completely handle the responsibilities of all the joint-venture operations in the United States which include the following[:]
 - a. Supervise a team of top management personnel who run the day to day operations
 - b. Provide key strategic technology and project management directives to progress in business
 - c. Set guidelines for quality management, technical support management.

2. Report back to the parent company in India.
3. Identify and strike potential alliances.
4. Represent the company at trade shows.
5. Promote the business through advertising and other channels.

On May 27, 2003, CIS issued a request for additional evidence. The petitioner was asked to provide a copy of its organizational chart identifying all of its employees by name and job title and pointing out those employees that are directly under the beneficiary's supervision. The petitioner was also asked to provide a detailed description of the beneficiary's daily duties and to explain why such duties are qualifying. In addition, the petitioner was instructed to provide several of its quarterly wage reports.

The petitioner's response included an organizational chart where the only name provided was that of the president of the company. The beneficiary's position was highlighted and the petitioner indicated that the beneficiary would eventually oversee account managers. There is no indication that the petitioner currently employs any account managers. The petitioner's quarterly wage statement for the first quarter of 2003, the time period during which the petition was filed, indicates that the petitioner employed a total of four individuals, one of whom was the president of the organization. The petitioner did not provide the job titles or position descriptions for any of the employees named in the quarterly wage statement. In regard to the beneficiary's job duties, the petitioner stated that they would consist of corporate management and business development. Corporate management would include hiring and training account managers, while business development would include making business alliances and evaluating new products. The petitioner stressed the beneficiary's educational background and professional experience with the overseas company claiming that such circumstances make the beneficiary an ideal candidate for the position of the petitioner's vice president.

On August 25, 2003, the director denied the petition concluding that the record does not contain sufficient evidence to establish that the beneficiary would primarily perform managerial or executive duties. The director noted that the petitioner's limited support staff of four employees gives rise to questions as to whether the beneficiary would primarily perform tasks of a qualifying nature.

On appeal, the petitioner states that the proposed position "requires a person with good knowledge of our products and market" and again states that the beneficiary's professional experience with the overseas company makes him ideally suited for the job. While the beneficiary may be well suited for the offered position, the AAO will look first to the petitioner's description of the job duties when examining the executive or managerial capacity of the beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii). It is noted that specifics are an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the instant case, the director stressed the importance of the job description in the request for additional evidence. However, the required specifics were not provided. Instead of a breakdown of the beneficiary's daily activities over the course of his projected transfer, the petitioner provided a broad overview failing to clarify what the beneficiary would actually be doing on a day-to-day basis. As such crucial information is lacking from the

record, the AAO cannot conclude with any degree of certainty that the beneficiary would primarily perform managerial or executive duties. Furthermore, while the petitioner claims that it has recently hired account managers whom the beneficiary would supervise, there is no indication that such individuals had been hired by the time the petition was filed in February 2003. Based on the petitioner's own admission and supporting quarterly tax statements, the account managers were hired during the last quarter of 2003. However, 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). Thus, any additional hires that took place after the petition was filed are irrelevant in the instant matter and need not be considered.

On review, the record as presently constituted is not persuasive in demonstrating that at the time the petition was filed the beneficiary would have been employed in a primarily managerial or executive capacity. The petitioner's total revenue is based on the ability to sell a software product. At the time the petition was filed, the organizational chart did not indicate that the petitioner had a sufficient support staff to relieve the beneficiary from having to primarily focus on having to sell that product. It is noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not demonstrated that the beneficiary would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that he would otherwise be relieved from performing non-qualifying duties. While it is possible that the petitioner later reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the duties performed on a day-to-day basis, the evidence of record suggests that at the time the petition was filed the petitioner had not yet reached that level of complexity. Nor does the record demonstrate that the beneficiary would primarily manage an essential function of the organization or that that he would operate at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record contains no evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States and abroad pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). Even though the essence of the petitioner's business involves selling products and consulting services, the petitioner has submitted no sales invoices to indicate that it has commenced doing business. Pursuant to 8 C.F.R. § 214.2(l)(3)(i) the petitioner is required to submit evidence showing that the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section. Thus, based on the petitioner's failure to submit evidence that it and its foreign counterpart are doing business, the AAO concludes that the petitioner failed to establish that it is a qualifying organization.

Additionally beyond the decision of the director, the petitioner has not established that there is a qualifying relationship with the beneficiary's foreign employer, as required by the regulations at 8 C.F.R. § 214.2(l)(2)(ii)(3)(1). The petitioner claims that it has signed a joint venture agreement with the beneficiary's foreign employer whereby the petitioner owns 40% of the "stock" and the foreign company owns 60% of the "stock." The petitioner provided a joint venture agreement signed by representatives of the two companies in January 2002. The agreement contemplates that the joint venture will eventually be established under the laws of California after obtaining all necessary approvals. However, at the time of filing the petition, there

was no evidence that the joint venture had been established as a separate legal entity. A business created by contract as opposed to one created under corporation law is not deemed a "legal entity" as used in section 101(a)(15)(L) of the Immigration and Nationality Act. *Matter of Hughes*, 18 I&N Dec. 289, 294 (Comm. 1982); *see also Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970).

CIS accepts the interpretation that a 50-50 joint venture creates a subsidiary relationship for purposes of section 101(a)(15)(L) of the Act. Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). In this case, there is no "third corporation" and thus no legal relationship between the entities for immigration purposes. Further, it is noted that the petitioner in this case is not the joint venture itself, but rather one of the partners in the joint venture. The partners of a joint venture do not acquire a qualifying corporate relationship by virtue of forming a joint venture; the qualifying relationship exists only between each individual partner and the joint venture. In this case, the petitioner is only a 40% partner in a joint venture and would therefore never qualify as a "parent company" of the joint venture.

It is noted that 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). As such, due to the additional grounds discussed in the above paragraph, this petition cannot be approved.

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.