

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



U.S. Citizenship
and Immigration
Services

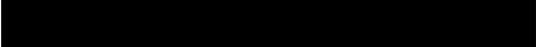
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FILE: LIN 01 053 51478 Office: NEBRASKA SERVICE CENTER Date: **AUG 11 2005**

IN RE: Petitioner: 
Beneficiary: 

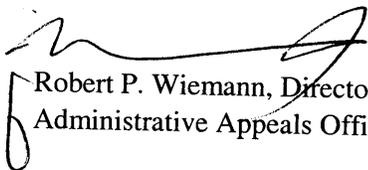
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter was before the Administrative Appeals Office (AAO) on appeal. The AAO subsequently summarily dismissed the appeal. The matter is now before the AAO on motion to reopen and motion for reconsideration. The motion to reopen will be granted. The motion for reconsideration will be dismissed.

The petitioner was established in 2000 and is described as an importer and marketer of merchandise. The petitioner seeks the beneficiary's services for a period of one year, at a weekly salary of \$500.00 plus allowances. The director determined that the petitioner had failed to establish: (1) that it had secured sufficient physical premises to house the new office; (2) that the beneficiary would be employed primarily in a managerial or executive capacity; and (3) that the new business would be able to support a managerial or executive position after one year of operation. The AAO summarily dismissed the appeal stating that it had been fifteen months since Citizenship and Immigration Services (CIS) had received the notice of appeal, and that no brief or further evidence had been received thereafter.

On appeal, counsel states that the appellate brief and evidence were filed in a timely manner. Counsel submits as evidence, a copy of the US Post Office express mail receipt, a confirmation of delivery by the US Post Office, and an affidavit in support of the mailing. In support of petitioner's claim, counsel states that sufficient physical premises had been secured to house the new office, that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity, and that the entity will be able to support such a position after one year of operation.

In the instant matter, counsel has stated a plausible reason and has furnished new facts to be provided in the reopened proceeding.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

In addition to counsel's assertions and the evidence submitted on motion, the AAO recognizes the existence of a stamped copy of the appellate brief, dated May 28, 2001, contained in the record of proceeding.

The director determined that the petitioner had failed to submit sufficient evidence to establish that it had secured sufficient physical premises to house the new office. The director stated that the photographs submitted by the petitioner demonstrated that the business was located in the beneficiary's home. The director notes that although a copy of a commercial lease agreement for the lease of premises known as [REDACTED] was submitted in support of the petition, no photographs of said premises were submitted as evidence. The director concluded that the evidence was insufficient to demonstrate that the petitioner had acquired premises suitable to house a commercial enterprise and to meet local land-use ordinances.

On motion, counsel disagrees with the director's decision and asserts that the petitioner has submitted sufficient evidence to establish that it has secured sufficient physical premises to house the new office. Counsel asserts that

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

the petitioner submitted a copy of the lease agreement and photographs of the premises known as [REDACTED] which is a commercial area. Counsel further asserts that the petitioner is resubmitting photographs and a copy of the commercial lease agreement for a warehouse site known as [REDACTED] which is also a commercial area.

On appeal, the petitioner submitted a copy of a lease agreement dated May 14, 2001. The petition in the instant matter was filed November 24, 2000. The director's decision was issued March 27, 2001. After the director specifically requested additional documentation on this issue the petitioner failed to submit sufficient evidence. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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 evidence contained in the record is not sufficient to overcome the objections of the director. The record indicates that the U.S. entity is being established to import and market the foreign entity's products. The record also demonstrates that the foreign entity manufactures, distributes, imports, and exports tires and the raw materials used in manufacturing tires. The photographs submitted by the petitioner along with the lease in effect at the time of filing of the petition, depict an office located in the beneficiary's home.

Furthermore, the petitioner has failed to explain the inconsistencies contained in the evidence regarding the leased premises known as [REDACTED]. There is insufficient evidence to establish that [REDACTED] a suitable facility to conduct business and warehouse tires and/or other such goods. The petitioner failed to submit photographs, as specifically requested by the director, of the premises known as [REDACTED] thus bringing into question its actual existence. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Furthermore, 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, Id.* The evidence does not establish that the petitioner had secured sufficient physical premises to house the new office when this petition was filed.

The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary's proposed duties would be primarily managerial or executive in nature. The director stated that the description given by the petitioner was "too vague" to determine the beneficiary's daily activity. The director noted that in the absence of a credible business plan, supported by substantiating documentation, a vague position description was insufficient to sustain the burden of proof.

On motion, counsel disagrees with the director's decision and asserts that the beneficiary's proposed duties will consist of: establishing the new operation; supervising, directing, hiring and firing employees; negotiating contracts with new customers; representing the company at trade shows; and exercising a power of attorney in establishing and legally maintaining the U.S. entity. The petitioner submitted a company resolution, which listed the beneficiary's proposed duties as:

1. He shall manage [the U.S. entity] and will supervise and control the work of other employees.
2. He shall exercise discretion over day-to-day operations or working of [the U.S. entity] and marketing the products of the primary and subsidiary companies.
3. He shall have the power to hire and fire any employee.
4. He shall have the power to enter into contracts on behalf of the primary and subsidiary companies.
5. He shall have full powers and responsibilities to establish the goals and policies of the parent and its subsidiary companies. He shall have the final authority to form and amend business policies to trade the products on credit or cash or on sale basis [sic] to achieve the goals of parent companies.
6. [The beneficiary] shall have the right to sue or to defend on behalf of parent company and its subsidiary companies. [sic]
7. It is further resolved that [the beneficiary] will continue to get his salary, commissions and perks as per contract entered between parent company and its subsidiary companies

The petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. The petitioner has failed to distinguish the beneficiary's managerial versus executive duties. For example, the petitioner describes the beneficiary's duties as managerial in that he supervises support staff, and executive in that he is responsible for establishing company policies and goals. Further, the record shows that the beneficiary will be primarily performing the marketing and sales functions of the business rather than primarily performing managerial or executive duties. Consequently, there is insufficient evidence to show that the beneficiary will perform the high level responsibilities as defined, or that he will primarily perform those duties rather than spending the majority of his time performing day-to-day functions of the organization. In addition, the petitioner has failed to overcome the objections made by the director with respect to the beneficiary's job duty descriptions being "too vague." On motion, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of manager or executive capacity. See section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For example, the petitioner stated that the beneficiary would exercise discretion over the day-to-day operations of the U.S. entity, would have the power to establish goals and policies, and would have the power to direct the management of the organization. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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.).

The petitioner has failed to overcome the objections made by the director. The director determined that, absent a comprehensive business plan which would realistically predict profits, it could not be convinced that the U.S. entity would be in a position to support a managerial or executive position within one year of approval of the petition.

On motion, counsel submitted a copy of the company's balance sheet as of May 1, 2001, a copy of its projected profit and loss statement for the years 2001 through 2004, and a copy of a bank statement indicating the foreign entity's account balance as of March 5, 2001. Counsel asserts that the evidence clearly

demonstrates that the U.S. and foreign entities have sufficient funds to support a managerial or executive position within one year of operation.

While counsel has presented additional evidence and argument, the record does not support a finding that the U.S. entity will be able to support a managerial or executive position within one year of operation in compliance with the regulatory requirements for a "new office" pursuant to 8 C.F.R. § 214.2(1)(3)(v)(C). Although the regulations do not require proof that the duties performed by the beneficiary in the first year were entirely managerial or executive, there must be some evidence of managerial or executive activity. In this matter, the record does not demonstrate that the U.S. entity will contain the organizational complexity to support the proposed managerial or executive staff position. In addition, the petitioner failed to submit a business plan that shows in detail how the new business will be fully operational within one year, with employees in place and doing business by providing a product or service.

The evidence demonstrates that the petitioner intends to hire new employees, however, there has been no evidence presented that details the time frame in which new employees will be hired, what the new hires duties will consist of, or how the beneficiary's duties will interrelate with that of the new hires. There is no evidence to show that the beneficiary will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. Furthermore, the petitioner's evidence is not sufficient in establishing that the beneficiary will be directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher level executives.

Rather than the beneficiary functioning at a senior level within the organizational hierarchy within one year of operation in the United States, it appears from the record that he will continue to perform the functions of the organization and carry out the day-to-day services of the business. Contrary to counsel's assertions, a basic projected profit and loss statement, alone, will not suffice to explain how the new office plans to support a managerial or executive position within one year of operation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In review, counsel has failed to overcome the director's objections with respect to each issue. It should be noted for the record that, unless CIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The previous decisions of the director and the AAO are affirmed.
The petition is denied.