



U.S. Citizenship
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Services

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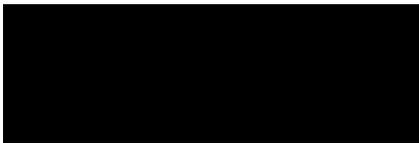
FILE: EAC 02 198 52764 Office: VERMONT SERVICE CENTER Date: JUN 14 2005

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.


for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner avers that it is a wholly-owned subsidiary of Desai Automobiles, located in India. The petitioner plans to operate as a wholesaler and dealer of automobile parts. The U.S. entity was incorporated in the State of New Jersey in 2001. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office.¹ Accordingly, in May 2002, 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), as an executive or manager for three years. The petitioner endeavors to employ the beneficiary as the U.S. entity's vice president at a weekly salary of \$800.

On February 5, 2003, the director denied the petition. The director determined that the beneficiary will be employed in a primarily an executive or managerial capacity within one year and asserts that the beneficiary's duties will be primarily managerial. Counsel submits a detailed brief and copies of previously submitted documents in support of the appeal.

On appeal, the petitioner's counsel claims that the petitioner will support an executive or managerial position within one year.

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 meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

Pursuant to 8 C.F.R. § 214.2(l)(3), 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.

¹ On Form I-129, the petitioner did not indicate that the beneficiary was coming to the United States to open a new office. However, counsel's April 26, 2002 letter to CIS references this matter as a new office petition. Thus, the AAO will adjudicate this matter as a new office petition pursuant to 8 C.F.R. § 214 (l)(3)(v).

- (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.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates 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 issue in this matter is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity within one year.

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 a letter submitted with the initial petition on May 22, 2002, the petitioner indicated that the beneficiary "will take charge of the entire operations" of the petitioner and will control "Corporate Planning, General Administration, Finance, Purchases, Sales, Marketing and Business Development," including the following duties:

Corporate Planning:

[The beneficiary] will analyze the Company's performance. He will prepare comparative analysis of the operating programs. With this he will evaluate the strengths and weaknesses of the company and in light thereof, forecast and plan the business activity of the company, laying down the path of progress for the company's forthcoming year/s. His responsibilities include making recommendations to the management with regard to economic objectives and policies of the company.

General Administration:

[The beneficiary] directs the overall business operations of the company. He will analyze the operating procedures and devise the most efficient methods to accomplish the tasks / work. He is responsible to manage the affairs of the company in a manner to conduct the same in an orderly manner ensuring due compliance with statutory requirements and to achieve smooth and efficient operations overall.

[The beneficiary] will operate with an authority to deal with and decide day to day operations.

Finance:

[The beneficiary] will be in overall charge of the operations of the Group. His responsibilities inter-alia include budget controls, finance, investments and other related matters. He will ensure overall profitable operations of the company.

“[The beneficiary] will direct financial activities.” [The beneficiary] will control the activities of the accounting department. He will devise accounting systems and implement internal audit. He will prepare management, accounting and systems reports for the Company and recommend to the management economic objectives and policies, particularly related to the financial position of the Company, in the area of income, expenses, earnings, investment of surplus funds, and other related matters. He will also provide requisite information to management for making sound business decisions. He will also arrange for the maintenance of proper records of the company. He will also recommend measures to control the operations in a manner of avoiding waste, fraud, etc.

“[The beneficiary] will arrange for audit of Company’s books.” He will advise management as to desirable operational adjustment from the point of view of taxation.

Marketing – Sales:

[The beneficiary] directs the marketing policy of the company. He reviews the market trends and analyze[s] the same to determine the consumer needs, evaluate the market potential in terms of volume at various geographical locations and also within specific buyer groups. He prices the product/s geared to attract potential buyers and also retain the regular clientele. He will assess the competition. With these he develops the overall marketing strategy and organize effective sales of the company’s product/s. In order to achieve this goal, he resorts to advertising and promotional activities to promote sales of the products of the company and attract potential buyers. This activity is undertaken as may be required and justified by business prudence.

Business Development:

[The beneficiary] is responsible for business development, including market research, promotion of sales and thereby the overall business of the company. This will account for 100% incoming revenue of the company. As such he will look for new business opportunities, new products. The aim and purpose for this is to secure progressively increasing development of business and thereby the net revenues of the company.

Purchases:

[The beneficiary] is responsible for the purchase of goods, material and supplies required by the company. He reviews catalogue listings, examines samples, attends demonstration of products and conventions and calls for quotations. He compares offers from alternative sources. He negotiates contract terms and finalizes the same. At the same time he is responsible to ensure regular and continued flow of the materials and supplies required for the operations of the company.

Personnel:

[The beneficiary] will have the charge of the personnel department. He will operate with an authority to hire and fire the staff. He will also review the performance of each individual staff member. He will study the employee's attitude towards the work environment. He will evaluate their motivation and overall efficiency to perform vis-à-vis their job related skills, inter-personnel attitude and intellectual capabilities to deal with situations on the spot. He will also review other factors, such as punctuality, sincerity, honesty, speed [sic] and other, for ongoing and periodical rating of each employee and to decide about their remuneration and rewards. He will establish and follow policies to continually boost the morale of the staff working for the organization.

In support of the petition, the petitioner submitted a proposed organizational chart depicting the beneficiary as vice president overseeing a secretary for general administration, a secretary for personnel, an accountant, an assistant accountant, a sales manager, salesmen and contract staff. The chart shows that the beneficiary will report to the president of the company. The petitioner also submitted a six-page business plan which describes the purpose of the U.S. company and its proposed products and services. The business plan indicates that the beneficiary will be responsible for sales, marketing and business development while establishing the company's client base, establishing contracts with service providers for freight forwarding, warehousing shipping and preparation of related import and export documents, and establishing relationships with local sources for materials and products. The business plan indicates, "Initially, the activities will be carried out by [the beneficiary] with the help of a secretarial/commercial staff. [The beneficiary] will undertake employment of additional staff to assist him for the operations of the company."

On July 15, 2002, the director requested additional evidence. In particular, the director requested an organizational chart for the U.S. entity, a comprehensive description of the beneficiary's proposed

duties, and a complete description of the beneficiary's proposed subordinates' duties and educational credentials.

In response to the request for evidence, counsel for the petitioner submitted a letter dated August 21, 2002, which re-stated and expanded upon the previously described duties. Counsel noted that the petitioner has been offered an opportunity to take over an existing and operating business, but that such proposal was on hold pending approval of the instant petition. Counsel further noted that the business to be purchased has a manager, existing employees, and ongoing operations that would ensure that the U.S. entity is a "self sufficient entity within one year." In addition, counsel asserted that the beneficiary will manage marketing, sales and business development of the organization, which can be considered the "essential function" of the organization. Counsel also expanded upon the beneficiary's duties in the area of purchasing and contracts, noting that he "is responsible for procuring the merchandise required by the company for sales/contracts . . . He reviews catalogue listings, invites bids, examines samples, attends demonstration of products and conventions and calls for quotations."

The petitioner submitted another copy of the previously submitted organizational chart. Counsel stated that the beneficiary "will be assisted by a qualified Accountant with at least a BS in Accounting, an experienced Sales Manager with 12 + years of experience in marketing and business development, secretarial and other staff."

On August 7, 2002, the director found that the petitioner's proposed organizational structure did not clearly identify potential professional, supervisory or managerial employees that would relieve the beneficiary from performing non-managerial duties. Consequently, the director denied the petition, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity within one year.

On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that the beneficiary will serve in a managerial capacity. Counsel further states that two of the petitioner's proposed employees, including the accountant and the sales manager, will serve in professional positions, and asserts that the director failed to acknowledge the petitioner's projected income of \$500,000 within the first year of operations as stated in the business plan. Counsel concludes that the petitioner has thus established that the company will support a managerial position within one year of commencing operations.

On review, counsel's arguments 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 by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In this matter, the petitioner has provided a lengthy description of the beneficiary's proposed duties, and has indicated that he will be employed in a managerial capacity pursuant to section 101(a)(44)(A) of the Act.

However, the petitioner's description of the beneficiary's duties does not establish that he will perform primarily managerial duties. The petitioner describes the beneficiary as being responsible for

market research, promotion of sales, business development and purchasing activities. Since the beneficiary actually purchases, markets and sells the petitioner's product, he will be performing tasks necessary to provide a service or product and these duties will not be considered managerial or executive in nature. 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).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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.

The petitioner has provided a proposed organizational chart for the United States entity, but has neither provided a timeline for the hiring of subordinate staff, nor provided job descriptions for proposed employees. In the request for evidence, the director requested that the petitioner submit a complete position description and educational credentials for all of the beneficiary's proposed subordinates in the United States, including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis. The petitioner failed to submit this information in response, and only indicated that it would employ an accountant with a bachelor's degree, a sales manager with experience in sales and marketing, a secretary and "other staff." This evidence is critical, as it would have established whether any of the beneficiary's staff would be professionals, managers or supervisors, and whether the petitioner would hire a staff sufficient to relieve the beneficiary from performing non-managerial duties. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established.

8 C.F.R. § 103.2(b)(8). 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 petitioner's vague description of its proposed staffing is insufficient to establish that the organization will support a managerial position within one year of commencing operations.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

Though requested by the director, the petitioner did not provide a detailed description of the duties to be performed by its proposed employees. Although the petitioner indicated that one of the beneficiary's subordinates, an accountant, will possess a bachelor's degree, the petitioner has not established that the proposed position actually requires a professional. Without the detailed job description, the AAO cannot determine if the employee will perform professional accounting duties, or merely bookkeeping functions. Nor has the petitioner shown that any of the proposed subordinates will supervise subordinate staff members or manage a clearly defined department or function of the petitioner during the first year of operations, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's proposed subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel correctly states that the beneficiary need not supervise subordinate employees in order to qualify for the benefit sought. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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. at 604. In this matter, the petitioner has neither specifically identified the function to be managed nor provided evidence that the beneficiary manages an essential function.

Moreover, in examining the business plan, the precedent decision, *Matter of Ho*, 22 I&N Dec. 206, 213 (Comm.1998), lists possible criteria for establishing an acceptable business plan. "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." The decision concluded, "Most importantly, the business plan must be credible." *Id.* at 213. Although *Matter of Ho, Id.*, addresses the specific requirements for the immigrant investor visa classification, the discussion of the business plan requirements is instructive for the L-1A new office requirements.

The petitioner's business plan lacks specificity and is vague. For instance, the business plan lists undefined goals as the petitioner will establish contacts with prospective buyers, establish, commence, and conduct business. Also, the petitioner plans to locate additional products and opportunities to diversify in other related business opportunities. These goals are non-specific and broad. In addition, the petitioner claims that the market conditions provide high potential that will lead the business to be self-sufficient and have an advantage in the market; however, the petitioner fails to explain how its business will accomplish such a competitive edge. Accordingly, it is not clear how the petitioner arrived at its financial projections, or how it would achieve its anticipated profits.

The AAO acknowledges the petitioner's claim that it has been "offered to take over an existing and operating business with a manager and five employees and if the deal materializes, the beneficiary will have the assistance of this team." 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). Regardless, the petitioner provided no supporting documentation, such as a bid or proposal, to substantiate its claim that it intends to purchase an existing business. 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 also failed to disclose the size of the investment in the United States entity as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner submitted a single statement indicating that it had less than \$5,000 in its account at the time the petition was filed. It is not clear how the company would commence operations with this minimal investment, nor does the petitioner's business plan address the cost of commencing operations. 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 fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. While the beneficiary will clearly perform some managerial duties during the first year of operations, the record does not establish that a majority of the beneficiary's duties will be managerial within one year. The vague description of the petitioner's proposed staffing, the non-specific business plan and the limited investment in the United States operation do not 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.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner has submitted a copy of its lease for the premises located at [REDACTED]. In this matter, the petitioner has not described its anticipated space requirements for its automobile parts wholesale

business. The lease in question also does not specify the amount or type of space secured. In addition, the lease appears to have been altered concerning the commencement of the lease and the term of the lease. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. For this additional reason, the petition may not be approved.

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).

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 appeal will be dismissed.

ORDER: The appeal is dismissed.

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