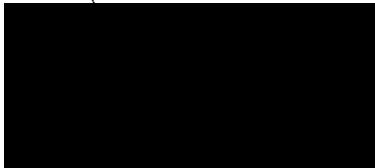


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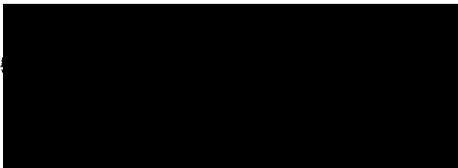
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FILE: WAC 04 024 52886 Office: CALIFORNIA SERVICE CENTER Date: JUN 14 2005

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:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner claims that it is a subsidiary of Karnavati Offset Private Limited (KOPL), located in India. The petitioner plans to operate a commercial printing operations business. The U.S. entity was incorporated in the State of California in 2003. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office. Accordingly, in November 2003, 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 president and CEO at an annual salary of \$50,000.

On December 18, 2003, the director denied the petition. The director determined that the petitioner had not established: (1) a financial investment from the foreign entity sufficient to commence doing business in the United States; and, (2) that the beneficiary will function in an executive or managerial capacity within one year.

On appeal¹, counsel disagrees with the director's decision and asserts that the evidence submitted is sufficient to establish that the U.S. entity is in a financial position to operate a viable business and will be able to support an executive position within one year of operation. Counsel submits a brief and an expert opinion letter in support of the appeal.

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 regulation at 8 C.F.R. § 214.2(1)(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 (1)(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 Counsel filed a Motion to Reconsider and Appeal. However, the director declined to treat the appeal as a Motion to Reconsider and forwarded it to the AAO for review.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with 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 serves 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(1)(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 (1)(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 in this proceeding is whether the petitioner has established the size of the United States investment and the financial ability to commence doing business in the United States.

In support of the I-129 petition, filed on November 4, 2003, the petitioner submitted its fifteen page business plan which provided the company's background, its plan to acquire an established printing business, its proposed products and services, its sales forecast for the first year of operations, growth expansion plans, a proposed organizational chart, and descriptions of three commercial printing businesses described as "target acquisition candidates currently under due diligence."

However, on November 9, 2003, the director requested additional evidence including a more detailed business plan, a feasibility study, minutes of the foreign company's meetings discussing the U.S. business plans, evidence of the purchase of some assets needed to run the petitioner's business, and evidence of the total investment or capital deposited in the petitioner's bank accounts, and an original letter from the foreign entity explaining the need for the new office in the United States. The director noted that the letter from the foreign entity should address the amount of the U.S. investment and the financial ability of the foreign company to pay the beneficiary and commence doing business in the U.S. The director also requested evidence to show that the foreign entity has committed a substantial amount of capital investment in the U.S. company, including copies of original wire transfers from abroad, or canceled checks and deposit receipts detailing monetary amounts for the stock purchase. Finally, the director asked the petitioner to provide a detailed description of the actual costs to establish the U.S. business to the point of being operational, and evidence that the U.S. company has been purchasing assets and obtaining required permits, licenses, and insurance

In a response dated December 4, 2003, the petitioner submitted, through counsel, the following: (1) an original letter from the foreign entity stating, in part, that the initial investment in the petitioner would be \$100,000; (2) minutes of four board of directors meetings of the foreign entity, indicating its decision to establish the U.S. company, including a resolution "that initial investment in the U.S. subsidiary would be approximately US\$100,000" with an additional \$100,000 investment planned within the first year ; (3) another copy of the previously submitted business plan; (4) evidence that the U.S. company had \$5,000 in its bank account as of November 24, 2003; (5) a California Notice of Transaction Pursuant to Corporations Code Section 25102(f) indicating that the value of the petitioner's stock sold or proposed to be sold was \$10,000; (6) a one-page document outlining the budget/operating costs for the petitioner's first year of operations; and (7) financial documentation for the foreign entity. Counsel advised that the foreign entity had not undertaken a formal feasibility study with respect to the establishment of the U.S. company. With respect to the investment in the United States, counsel stated, "The company has identified three U.S. printing companies . . . which the newly established company will expand and operate as the acquisitions are made Please note an additional \$200,000 US is budgeted and available for Transfer to fund the planned acquisition no on "Offer to Buy" status." The petitioner also included a description of each "acquisition candidate" and a document entitled "offer and agreement to buy" a business which identified the beneficiary as the buyer. The agreement was signed by the beneficiary on November 7, 2003, but was not signed by the seller.

On December 18, 2003, the director denied the petition determining that the U.S. company was not in a financial position to operate a viable business. The director found that the investment capital of \$5,000 was insufficient to operate the business and was not sufficient to pay for the stocks purchased by the foreign entity. The director also noted that there was no documentary evidence such as contracts submitted to support the petitioner's claim that it planned to acquire three U.S. based printing companies. The director concluded that "the petitioner has failed to substantiate that it has, via its foreign affiliated company, made the financial investment required to set up a qualifying new office operation in the United States."

On appeal, counsel asserts that the evidence submitted is sufficient to establish that the U.S. entity is in a financial position to operate a viable business and will be able to support an executive position within one year of operation. Counsel claims that the "U.S. budget for the first two (2) years for acquisition and set up was \$200,000. . . Please note that the account is currently in excess of approximately \$100,000.00." Counsel further explains that a "corporation may establish any price for its stock" and that "the viability of the company is based on the Business Plan and overall funding." Counsel also notes that the U.S. subsidiary's budget was "clearly shown in a number of places as \$200,000."

On review, the AAO finds that the petitioner submitted insufficient evidence of the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States. Although counsel claims and submits evidence that the U.S. entity currently has "\$100,000" in its bank account, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Moreover, at the time of filing its petition and in examining the documents submitted, the U.S. entity had \$5,000 in its U.S. business checking account as of November 24, 2003. Based on the petitioner's and counsel's representations, the U.S. business requires an initial investment of \$100,000. Therefore, \$5,000 appears to be insufficient to support the establishment of the new business. In addition, although counsel has merit in claiming that the "par Value of a Company's stock has no relation to the actual value; that a corporation may establish any price for its stock," the AAO will evaluate the sale of the stock and transfer of funds as evidence of having the financial ability to commence doing business in the United States. In this case, the petitioner has failed to establish that the foreign entity had transferred any funds to the U.S. company as of November 2003. The petitioner submitted evidence that it had \$5,000 in its bank account and noted that such funds were for its initial stock offering. However, there is no evidence that these funds originated with the foreign entity. The director specifically requested documentation as to the origin of the U.S. company's investment funds, including copies of wire transfers. The petitioner did not document the source of these funds. 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). Furthermore, the documentation submitted indicates that the petitioner valued its initial stock offering at \$10,000, not \$5,000, which raises further questions regarding the foreign company's investment in the United States entity.

Further, the petitioner's assertion that "an additional \$200,000 US is budgeted and available for Transfer to fund the planned acquisitions" and limited exhibits is insufficient evidence to indicate that the foreign company had the financial resources to commence doing business in the United States. Without actual documentary evidence such as a bank statements and copies of wire transfers indicating that the U.S. entity had actually received the necessary funding at the time it filed the petition, it is unclear how exactly the company would commence operations. In addition, although the petitioner repeatedly claimed that \$200,000 is available for transfer to the U.S. company, the petitioner did not submit evidence, such as the foreign entity's bank statements, to

establish the existence of these claimed funds. 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 (Reg. Comm. 1988) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Without evidence of funding, the petitioner has not established how it would carry out its business strategy to acquire existing printing businesses in the United States. The petitioner submitted evidence of an offer to buy an existing business but this document identified the buyer as the beneficiary, not the U.S. company. Nevertheless, there is no evidence that this offer was accepted by the seller or that the company had funds to pay the proposed \$35,000 downpayment. This document is insufficient to establish that the petitioner is prepared to commence doing business in the United States.

After careful consideration of the evidence, the AAO has determined that the petitioner failed to establish the investment in the U.S. company and financial ability to commence doing business. Accordingly, the appeal will be dismissed.

The second issue in this proceeding is whether the evidence submitted is sufficient to demonstrate that the beneficiary will be primarily employed in an executive or managerial capacity within one year of the approval of the petition.

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 an October 31, 2003 letter submitted with the initial petition, the petitioner stated that the beneficiary, as president and CEO of the U.S. entity, would be involved in the following duties:

[H]old ultimate responsibility for establishing, implementing, managing and directing all operations of the U.S. subsidiary, including the goals, policies and objectives of the corporation in order to ensure a successful and profitable business operation. [The beneficiary] will have the authority over the marketing, financial, product development, and acquisition departments of [the petitioner]. He will have full authority to hire, fire and promote subordinate management personnel as well as general staffing personnel. [The beneficiary] will also be responsible for researching and identifying prospective new acquisitions and negotiating contracts for purchase on behalf of [the U.S. company].

The petitioner also submitted its business plan, which indicates that the company expects to hire three to five employees within the first year. The business plan also includes a proposed organizational chart depicting a company secretary, administrative assistant, a sales and marketing department, a production and operations department, and a finance and human resources department. The petitioner indicated in its October 31, 2003 letter that it projects initial staffing of four to six individuals during the first one to two years of operations.

On November 9, 2003, the director requested additional evidence of the beneficiary's proposed U.S. position including a detailed description of his proposed duties, the U.S. entity's organizational chart showing the beneficiary's position, and job titles and job duties for any subordinate employees the beneficiary will supervise.

In response to the director's request for evidence on this subject, the petitioner resubmitted the organizational chart included in the business plan. The petitioner described the beneficiary's subordinate employees' duties and explained how the beneficiary would monitor the support staff's duties and responsibilities. The petitioner also stated that the beneficiary would perform the following job responsibilities:

- To supervise and manage all aspects of the U.S. subsidiary company, &
- To direct all operations of the company, including the goals, policies and objectives in order to ensure a successful and profitable operation, (35%)
- To hold authority over the marketing, financial, product development departments of the company, (26%)
- To hold full authority to hire, fire and promote subordinate management personnel as well as generate staffing personnel, and (19%)
- To be responsible for researching and identifying prospective new acquisitions and negotiating contracts for purchase on behalf of the company. (20%)

The director subsequently denied the petition because the petitioner failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity within one year of the approval of the petition. The director noted that the description of the job duties merely paraphrased the definitions of managerial and executive capacity.

On appeal, counsel disagrees with the director's decision, and claims that the director ignored the submitted business plan and anticipated growth of the business. Counsel also submits an expert opinion letter which addresses the viability of the U.S. company and the beneficiary's qualifications. 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(I)(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.

In the instant matter, the business plan submitted by the petitioner fails to detail clear, realistic projections to establish that the U.S. entity will realize growth within one year. Although the organizational chart demonstrate that the U.S. entity intends to hire new employees, it has not provided a clear timetable for hiring subordinate employees, or established that there would be sufficient staff to relieve the beneficiary from performing non-qualifying duties within one year of approval of the petition.

In addition, the AAO notes that the petitioner has budgeted only \$60,000 for salaries during its first year of operations. If this figure includes the beneficiary's \$50,000 salary, it is clear that his subordinate staff would be minimal. Even if this figure does not include the beneficiary's salary, it's not clear how this amount pay the wages of all the employees of one to three full-service printing businesses.

Moreover, while the petitioner has provided detailed descriptions of its proposed personnel, its proposed staff does not include any employees who would perform the actual printing services of the business. The petitioner has not established that its organizational structure will support a managerial or executive position within one year of commencing operations.

In addition, the petitioner has 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 states that the beneficiary's duties include "directing all operations of the company," "hold authority over marketing, financial and product development departments," and "supervise and manage all aspects of the U.S. subsidiary company." 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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). In addition, many of the described duties generally paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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. at 1108.

Further, the petitioner claimed that the "Initial size of the company is irrelevant." The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa. CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In addition, as noted above, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) requires a petitioner seeking to open a new office sufficient evidence regarding the size of the investment, its proposed organizational structure and its detailed business plan in order to demonstrate a realistic expectation that the company, at the end of its first year of operation, will have an actual need for a manager or executive who primarily performs qualifying duties. As noted above, the petitioner has provided insufficient evidence of its financial ability to commence operations, and an unclear picture as to what the company's organizational structure may be within one year, and a vague description which fails to identify the beneficiary's actual proposed duties.

Based upon the evidence presented, the petitioner has failed to demonstrate the U.S. entity will be able to support the beneficiary in a primarily managerial or executive position within one year of commencing operations. Accordingly, the appeal will be dismissed.

The AAO notes that the petitioner submitted an expert opinion letter in support of the appeal offered as evidence of the viability of the U.S. company and of the beneficiary's managerial and executive qualifications. While the AAO certainly respects the opinion provided, the testimonial

letter does not shed light on any of the documentary deficiencies regarding the foreign entity's investment in the U.S. entity, nor does it explain how the beneficiary meets the definitions of managerial or executive capacity under the Immigration and Nationality Act. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Here, the expert opinion submitted does not overcome the valid objections of the director or the deficiencies discussed in detail above.

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.