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U.S. Citizenship  
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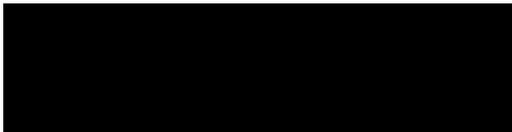


File: EAC 03 182 50016 Office: VERMONT SERVICE CENTER Date: MAY 11 2005

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)

IN 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 Director, Vermont 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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a corporation organized in the State of New Jersey, is engaged in the trading of computer parts. It seeks to employ the beneficiary as its president. The petitioner claims that it is an affiliate of [REDACTED] located in Sidhpur, India.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and that the petitioner would be unable to support a managerial or executive position at the end of its first year of operations based on the business plan submitted.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner requests reconsideration on this matter, and submits a brief statement.

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(1)(3)(v) further provides 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 primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 the initial petition, counsel for the petitioner provided numerous documents pertaining to the foreign entity's business, as well as a copy of the U.S. petitioner's employer identification number and business registration. Counsel failed to submit any of the evidence required under 8 C.F.R. § 214.2(1)(3).

Consequently, the director requested additional evidence establishing that the beneficiary was qualified for the benefit sought on August 6, 2003. In part, the director requested evidence supporting the petitioner's claim that the beneficiary had been acting in a primarily managerial or executive capacity while abroad, and that he would continue working in a primarily managerial capacity while in the United States. The director asked the petitioner to provide a detailed description of the type of business to be conducted in the United States, as well as a detailed statement of the beneficiary's proposed duties in the U.S. as well as any subordinate employees.

In a response dated October 31, 2003, the petitioner, through counsel, submitted a detailed letter accompanied by some, but not all, of the documentation requested by the director. The following brief statement was provided with regard to the beneficiary's proposed duties in the United States:

The beneficiary will be establishing the business and hiring personnel to conduct sales and office duties. Although his duties at the outset may not be entirely managerial in nature at the outset, it is expected to be within one year. In this regard, we submit lists of their customer and vendor contacts. Once the business is up and running with the hired management and staff, the beneficiary intends to return to their parent company [and] only make follow-up visits as needed.

Counsel stated that the U.S. entity is "engaged in the purchase and sales of merchandise," and indicated that it will employ "sales staff" responsible for obtaining sales leads and servicing existing customers, and "office staff" responsible for accounting and bookkeeping.

On February 6, 2004 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States, nor did the evidence sufficiently establish that the U.S. petitioner would be able to support a managerial or executive position at the end of the first year of operations. The AAO will examine each of these issues separately.

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(1)(3)(ii). In this case, counsel and the petitioner failed to provide a detailed description of the beneficiary's proposed duties despite the director's specific request to include the number of hours per week he would devote to each duty. The brief description included in counsel's October 31, 2003 letter is insufficient to identify with specificity what the beneficiary would actually be doing if employed in the United States. Specifics are clearly 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). 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, counsel asserts in his response to the request for evidence that the beneficiary will eventually be performing managerial or executive tasks, although not at the outset. This statement is insufficient to qualify the beneficiary for the benefit sought. Furthermore, the only evidence submitted with regard to the beneficiary's proposed duties are the statements of counsel provided in his October 31, 2003 letter, which claim that the beneficiary is in fact a managerial employee. 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; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Finally, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof.

Though requested by the director, the petitioner did not provide any information regarding the duties and positions of the beneficiary's alleged subordinates. As previously stated, 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). Thus, the petitioner has not established that any of the proposed subordinate employees would require a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that these employees would supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees would be supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Finally, 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.

Despite the director's specific requests for a comprehensive description of the petitioner's intended business operations and its organizational structure, the petitioner failed to provide sufficient evidence which outlined its business plan and organizational hierarchy. Although a lease agreement was submitted along with photographs of the alleged business location, the identified premises appears to merely be a residential dwelling. In fact, the personal documentation submitted on behalf of the beneficiary indicates that this same address is the beneficiary's home address. 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*, 19 I&N Dec. 582, 591-92 (BIA 1988). Consequently, it appears that the petitioner is merely operating a home-based business from the beneficiary's residence. This evidence is insufficient to credibly suggest that the petitioner intends to operate a legitimate and flourishing business as required by the regulations.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity, nor does the record establish that the petitioner will be able to support a managerial or executive position after the first year of operations. For this reason, the petition may not be approved.

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial capacity. Although the petition makes reference to the beneficiary's overseas position as "Vice President," the petitioner has provided no evidence substantiating this claim. A mere title is not enough to establish that the beneficiary has been performing managerial or executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

In addition, the evidence is not persuasive that a qualifying relationship exists between the petitioner and a foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). Although the petitioner claims that the beneficiary and his spouse each own 50 percent of both entities, the required documentary evidence to substantiate this claim has not been provided. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total

number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. As the appeal will be dismissed on the grounds discussed, these issues need not be addressed further. As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

Furthermore, the petition suggests that the beneficiary and his spouse each own 50 percent of the foreign entity and 50 percent of the U.S. petitioner. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. In addition, the fact that both owners of the original foreign corporation reside in the United States raises the question of whether the parent organization is still doing business so that a qualifying relationship exists pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

As discussed briefly in the body of this decision, a final 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. In this matter, the petitioner has not described its anticipated space requirements for its import business and the lease in question does not specify the amount or type of space secured. In addition, it is confirmed that the leased premises doubles as the beneficiary's home residence. 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 director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.