

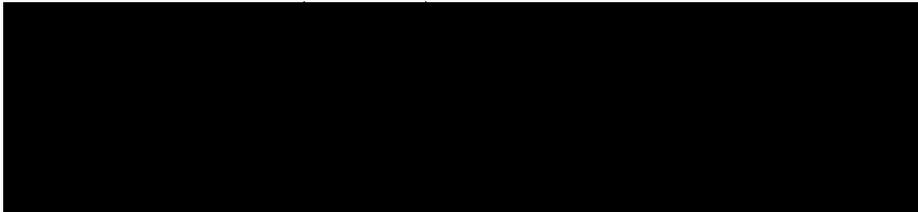


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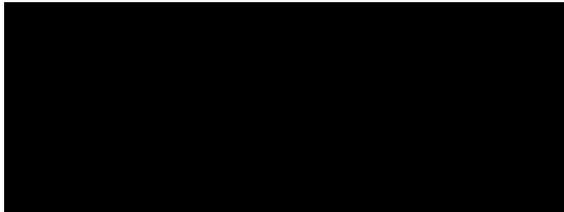
File: WAC 04 120 50167 Office: CALIFORNIA SERVICE CENTER Date: OCT 27 2005

IN RE: Petitioner:  
Beneficiary:



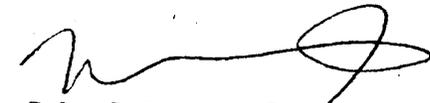
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that intends to engage in the development and sale of computer software. The petitioner claims that it is the subsidiary of [REDACTED] located in Beijing, China. The petitioner seeks to employ the beneficiary as the general manager of its new office for a three-year period.

The director denied the petition concluding that the petitioner did not establish that it had secured sufficient physical premises in which to house the new office. Specifically, the director noted that although the petitioner had submitted a copy of its sub-lease agreement, it had failed to submit the requested evidence that the master lessee's landlord had consented to the sub-lease arrangement.

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, counsel for the petitioner asserts that the sub-lessor had obtained the landlord's oral consent to sub-lease the office space to the petitioner prior to entering into the agreement. Counsel accepts responsibility for failing to submit a written consent in response to the request for evidence. On appeal, counsel submits a letter from the president of the master lessor's property management company acknowledging the sublease agreement, and a copy of the petitioner's new lease agreement for an office in the same building.

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(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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 involves 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 (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 the present matter is whether the petitioner has secured sufficient physical premises to house the new office in the United States as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The petition was submitted on March 24, 2004. In support of the petition, the petitioner submitted a sublease agreement for a single business office dated February 1, 2004, valid for the period from March 1, 2004 to December 31, 2004.

On March 29, 2004, the director issued a request for additional evidence. In part, the director requested that the petitioner submit the following information to establish that it had secured adequate physical premises for the new U.S. company:

- Type of Business: Describe, in detail, the type of business in the U.S., such as import/export, manufacturing, sales, etc.
- Worksite: Define the worksite in the U.S., such as a sales office, representative agency, [REDACTED]
- Location: Explain why the location for the business in the U.S. was chosen, and how the location specifically benefits the type of business being conducted.

\* \* \*

- Sub-Leased Premises: If the U.S. company's premises are sub-leased, provide a letter from the owner or property management company which confirms that the property owner has granted permission to the lessee to sublease to the U.S. company and that the U.S. company is actually occupying and maintaining the sub-lease agreement. The letter should be on the owner's or property management company's letterhead stationary and should include the name, address and phone number of the owner or property management company should any further verification be required. Also, include a copy of the contract between the owner and the lessee granting the permission/authority to sub-lease the space. Provide copies of escrow documents or evidence of title available in the public records of the County Records Office, to establish who actually owns the property that is being sub-leased. Finally, include a letter from the U.S. Company as to why they do not maintain an independent business presence.

The director also requested a copy of the zoning map showing the location of the petitioner's business premises, evidence of an insurance policy that includes the petitioner and all its facilities and equipment, a letter from the insurer stating their knowledge of the petitioner's building occupancy, and an occupancy permit for the petitioner.

In a response dated June 7, 2004, counsel for the petitioner indicated that the U.S. business would "develop, import and export software technology, equipment and services," and provided the following explanation regarding the petitioner's sub-leased premises:

The company temporarily will use as its business location an extra office with its accountancy firm, [REDACTED] at this initial stage of business. Since the company is newly established and its main business is software technology development, it does not need a warehouse, factory or other substantial space at current time.

The petitioner submitted another copy of the sublease agreement, and a copy of the master lease agreement for the suite in which the petitioner rents an office. Finally, counsel indicated that the petitioner would purchase insurance and apply for an occupancy permit following approval of the instant petition. The master lease agreement was valid for a three-year period ending on August 31, 2004.

The director denied the petition on June 18, 2004 concluding that the petitioner had not submitted sufficient evidence that it had secured adequate physical premises to house the new office. The director observed that

the master lease agreement clearly prohibits the lessee from sub-leasing the premises without the written consent of the landlord. As the petitioner did not submit the requested evidence that the lessor had granted consent for the petitioner to sub-lease the premises, the director found that the sub-lease agreement was invalid.

On appeal, counsel for the petitioner acknowledges that the petitioner failed to submit documentary evidence showing that the consent from the landlord has been obtained before the sublease took effect. Counsel states: "In fact, such consent was indeed obtained from the landlord, but both the assignor and the assignee failed to document it, an omission that both the petitioner and the consul [sic] deeply regret." Counsel notes that "the petitioner has been paying all the rental fees and complied with all the terms and conditions as contained in the sublease" and acquired a new lease on July 26, 2004.

In support of the appeal, counsel submits an August 2, 2004 letter from the president of the property management company for the building in which the petitioner's sub-leased office is located, who indicates that [REDACTED] has subleased a portion of its suite to the petitioner. The property management's president states: [REDACTED] has consented to the Sublease. [The petitioner] has determined that it would prefer to have a direct lease with [REDACTED] for its own offices. For this reason, [the petitioner] has now directly leased from [REDACTED] affiliated with [REDACTED] the premises described in the attached Lease." The petitioner submits a new lease for a different suite in the same building valid from August 1, 2004 to October 31, 2004.

Counsel's arguments are not persuasive. The petitioner has not established that it had a valid lease agreement for sufficient physical premises to house the office at the time the petition was filed. The director observed that the petitioner was subleasing an office and reasonably requested that the petitioner submit documentary evidence to show that the petitioner's lessor had the consent of its landlord to sublease the space to the petitioner. The petitioner failed to respond to this request, although the master lease agreement clearly indicates that the written consent of the landlord is required for any subleasing arrangement. The petitioner also failed to respond to the director's request for a letter from the petitioner explaining why the U.S. company does not maintain an independent business premises separate from its accountant's office.

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). Furthermore, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Regardless, the evidence submitted on appeal is insufficient to overcome the director's findings. The letter from the property management company merely confirms that the landlord is aware of the sublease arrangement and has consented to it as of August 2, 2004, more than six months after the sublease agreement

was signed, and after the petitioner has already signed a new agreement for different premises. The record is still devoid of documentary evidence that such consent was granted to the lessor at the time the agreement was signed, in spite of the fact that the master lease explicitly requires written consent from the landlord. 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)). Further, the AAO notes that the master lease agreement was due to expire on August 31, 2004, while the sub-lease agreement was granted to the petitioner for a period ending on December 31, 2004, which raises further questions regarding the validity of the sub-lease. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Counsel's assertion that "both the assignor and the assignee failed to document" the landlord's consent does not qualify as independent and objective evidence. Furthermore, evidence that the petitioner creates after CIS points out the deficiencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

In addition, the petitioner has failed to submit secondary evidence that it was leasing and occupying the office, such as evidence that it was paying rent to the sub-lessor, evidence that it had obtained a business license, or evidence that it had established a telephone line separate from that utilized by the accounting firm that leased the office suite. Even if the AAO accepted the validity of the sub-lease agreement, the petitioner has not established that a single small office is adequate physical premises for the development, import and export of software. The petitioner has not described its anticipated space requirements for its business and the lease in question does not specify the amount of space secured. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. The evidence submitted in support of a new office petition should show that the company is prepared to commence business operations and should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations. To establish eligibility, the petitioner must provide evidence that it has acquired sufficient physical premises from which to carry out his business plan.

The petitioner submits a copy of a new lease agreement on appeal. The new lease agreement does not identify the amount of space leased and is for only a three-month period. Regardless, 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). The petitioner did not submit evidence that it had acquired sufficient physical premises to house the new office at the time of filing. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not persuasively demonstrated that the beneficiary's proposed role involves executive or managerial authority over the new operation, or that the new office will support a managerial or executive position within one year of approval of the petition. See 8 C.F.R. §§ 214.2(l)(3)(v)(B) and (C). The petitioner described the beneficiary's proposed duties in only vague terms, noting that she will "oversee the entire operation of the subsidiary," "hire and train more employees" and

"control the subsidiary's financial records." The petitioner did not, however, indicate what specific managerial or executive duties would be encompassed by overseeing the company or controlling its financial records, nor did it specify what types of employees the beneficiary would be hiring and training. 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). The petitioner also indicated that the beneficiary would supervise a sales employee, as well as "examine the US market conditions," "draft business proposals," and "contact with US companies, negotiate contracts, and enter into business agreements." Without further explanation, these duties appear to describe an employee engaged in sales, marketing and first-line supervisory tasks. These duties do not appear to be incidental to the beneficiary's daily duties. The beneficiary's duties associated with these activities would not comprise primarily managerial or executive functions. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 583, 604 (Comm. 1988).

Further, although specifically requested by the director, the petitioner has not provided a description of the proposed staffing of the new office, including the proposed number of employees and types of positions they will hold. Instead, the petitioner referred to a February 18, 2005 letter from the foreign entity which indicates that the company intends to employ the beneficiary, a "salesman," a president who will be primarily located in China, and "more staff." In response to the director's request for a business plan including specific details as to how the business is to be conducted within one, three and five-year projections for business expenses, sales, gross income and profits or losses, the petitioner submitted a three-page document that lacks the detailed information requested by the director. For example, the business plan indicates that the company plans to transfer two managers, and hire a local professional sales person and four or five engineers, but does not provide a timeline for its hiring plan. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The evidence on record is insufficient to 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). For this additional reason, the appeal will be dismissed.

Finally, the AAO notes that a search of the California Department of State's Internet site (<http://kepler.ss.ca.gov/corpdata>) shows the petitioner's corporate status as "dissolved" as of this date. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. See 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). As it is assumed that any dissolution occurred subsequent to the filing of the instant appeal, the AAO notes the deficiency for the record and will not discuss this issue further.

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).

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The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.