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File: WAC 05 004 53936 Office: CALIFORNIA SERVICE CENTER Date: **AUG 03 2008**

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 BENEFICIARY:



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, Chief
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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of manager/director to open a new office 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 petitioner, a corporation organized under the laws of the State of California, claims to be a modeling agency and alleges that it is a subsidiary of a Russian limited liability company, Point Model Management, located in Moscow, Russia.

The director denied the petition concluding (1) that the petitioner failed to establish that it has secured sufficient physical premises to house the new operation at the time of filing the petition; and (2) that the petitioner failed to establish that the beneficiary had been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

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 asserts that the director erred in denying the petition because (1) the petitioner was following the director's instructions in his request for evidence by securing physical premises for the U.S. entity; and (2) there is ample evidence in the record to prove that the beneficiary was acting in an "executive" capacity for the foreign entity.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(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, 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 (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 issues in this proceeding are (1) whether the petitioner properly secured sufficient physical premises to house the new operation at the time of filing the petition; and (2) whether the beneficiary had been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

First, the petitioner has failed to secure sufficient physical premises to house the new operation at the time of filing the petition. In the initial petition, the petitioner failed to include any evidence that it had secured sufficient physical premises to house the new office. On October 14, 2004, the director requested additional evidence from the petitioner specifically requesting a copy of the United States entity's lease. On January 4, 2005, the petitioner responded to the request for evidence with a copy of a lease agreement for 250 square feet of space dated December 1, 2004. The director properly denied the petition pursuant to 8 C.F.R. § 103.2(b)(12) for providing evidence in response to a request for evidence which fails to establish eligibility at

the time of filing the petition. Title 8 C.F.R. § 214.2(l)(3)(v)(A) requires the petitioner to demonstrate in its petition that it has secured sufficient physical premises to house the new office. Since the lease proffered by the petitioner is dated over two months after the initial petition was filed, the director properly denied the petition pursuant to 8 C.F.R. § 103.2(b)(12).

On appeal, the petitioner argues that, since the director's request for evidence specifically requested a lease, the petitioner was simply following instructions and should not be penalized. Petitioner's argument is not persuasive. As explained in 8 C.F.R. § 103.2(b)(12), a petition "shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." Since the lease is dated after the date of the petition, the petition must be denied for failing to fulfill the requirement in 8 C.F.R. § 214.2(l)(3)(v)(A). If the petitioner only realized later that securing the physical premises described in the lease was essential to establishing eligibility, it should have withdrawn and re-filed the petition. *See* 8 C.F.R. § 103.2(b)(6); *see also Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Petitioner also argues on appeal that the lack of leased space is not fatal to its petition since the Code of Federal Regulations does not discuss what type of premises would be "sufficient" to house a new office. Counsel¹ explained:

The code does not go on to discuss what type of premises is sufficient to house the operation is [sic]. It would differ depending on the business. When the alien filed the initial application, it was indicated that the office would operate out of an address in Santa Barbara, California. This was the address of an associate of the alien who was kind enough to allow the business to operate from there.

One must keep in mind that the business contemplated can be operated from any location and does not require anything other than a phone and a desk. Models may be booked for jobs from this type of set up. The beneficiary intended to open an office location when the time came, but it was not necessary to do so at the onset since it was not known to what extent it would be needed.

While counsel is correct that 8 C.F.R. § 214.2(l)(3)(v)(A) requires only "sufficient" physical premises be secured by the petitioner, the petitioner did not submit any documentation with its petition, in response to the

¹ While the beneficiary does appear to have been an agent for the petitioner, there is no evidence in the record that the beneficiary authorized counsel to represent or otherwise enter his appearance on behalf of the petitioner in this proceeding. Specifically, the only signed Notice of Entry of Appearance as Attorney or Representative (Form G-28) submitted in this matter contains no reference to the petitioner. The signed Form G-28, dated February 17, 2005, only authorizes counsel to enter his appearance on behalf of the beneficiary, not the petitioner. As the beneficiary of a visa petition is not a recognized party in a proceeding, the attorney for the beneficiary may not be recognized. 8 C.F.R. § 103.2(a)(3); 8 C.F.R. § 103.3(a)(1)(iii)(B). Accordingly, while the assertions made by counsel may be addressed, they will not be given any weight in this proceeding.

request for evidence, or with its appeal, which proves that the original location would be "sufficient" for a start-up modeling agency. Petitioner failed to provide evidence such as a floor plan, photographs showing the set-up of the office, or receipts proving that the petitioner has invested in a computer, a fax machine, a telephone, or any other essential office equipment. Accordingly, the petitioner has not established that it has secured sufficient physical premises to house a new office. For this additional reason, the petition may not be approved.

The second issue is whether the beneficiary had been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

8 C.F.R. § 214.2(l)(3)(v)(B) requires that the petitioner prove that 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."

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.

While the initial petition is unclear regarding whether the petitioner is alleging that the beneficiary worked in a managerial or executive capacity overseas, counsel clearly states on appeal that the evidence submitted with the initial petition shows that the beneficiary has been acting in an "executive capacity." Regardless, due to the lack of clarity, both capacities will be considered as they were by the director in denying the petition.

In the initial I-129 petition, the petitioner describes the beneficiary's duties with the foreign employer as follows: "General Director of company. Oversees all aspects of company's operations[, i]ncluding procuring accounts, handling talent, managing photo shoots, modeling assignments and also managing day to day operations."

The petitioner also submitted letters and other documents supporting its contention that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity. In the cover letter dated September 29, 2004, counsel describes the beneficiary's work experience as "president" and points to the following documents as evidence of the beneficiary having worked in an executive or managerial capacity abroad: (1) the beneficiary's resume; (2) the corporate documents for the foreign employer proving that the beneficiary was involved in its establishment; and (3) translated tax documents listing the beneficiary as "head of the company." In a letter of support from the foreign employer dated August 3, 2004, the foreign employer describes the beneficiary as the general director without any elaboration.

On October 14, 2004, the director requested additional evidence regarding the beneficiary's employment with the foreign company. Specifically, the petitioner was requested to provide the number of employees at the foreign location and an organizational chart of the foreign entity with information about each employee's job title, duties, educational level, and salary.

On January 4, 2005, the petitioner responded to the request for evidence. In response, the petitioner provided a Russian language document, which includes an organizational chart for the foreign employer. This document, which was translated into English, places the "director general," presumably the beneficiary, at the top of the chart. While the chart shows the beneficiary supervising various employees and departments, including "management," the chart does not identify the employees' duties, names, salaries, or skill levels. The chart also does not explain how many employees actually work for the foreign employer or how many people work in each department.

On January 19, 2005, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary had been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

On appeal, counsel asserts that the director erred and that the initial filing was accompanied by

"approximately 5 inches of documentation" showing that the beneficiary was acting in an executive capacity. Counsel specifically points to five categories of evidence: (1) the beneficiary's resume; (2) the corporate documents for the foreign entity showing that the beneficiary played a role in its establishment; (3) Russian tax documents listing the beneficiary as head of the company; (4) a link to a website identifying the beneficiary as the president of the foreign employer; and (5) corporate minutes and documents listing the beneficiary as the president of the foreign employer.

Upon review, petitioner's assertions are not persuasive.

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. 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). Since the AAO will look first to the petitioner's description of the job duties when examining the executive or managerial capacity of the beneficiary, it is essential that the petitioner provide very specific information regarding the beneficiary's duties abroad. *See generally* 8 C.F.R. § 214.2(l)(3)(ii) and (iv).

In the request for evidence, the director requested that the petitioner submit evidence regarding the number of employees at the foreign location and an organizational chart of the foreign entity with information about each employee's job title, duties, educational level, and salary. The petitioner failed to submit this information and instead chose to provide a general organizational chart, which was materially unresponsive to the director's request. This evidence is critical as it could have established that the beneficiary was acting in a managerial or executive capacity. 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).

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position.

In the present matter, the totality of the record does not support a conclusion that the beneficiary has any subordinates, and, if he does, whether they are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary and his subordinates perform the actual day-to-day tasks of running a modeling agency. As explained in the initial I-129 petition, part of the beneficiary's duties abroad is "managing day to day operations." The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional

employees or provider of a service. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Moreover, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988). Pursuant to section 101(a)(44)(A)(iv) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iv), the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

For these reasons, the petition will not be approved.

Beyond the decision of the director, the record does not contain evidence describing the scope of the U.S. entity, its organizational structure, and its financial goals; evidence showing the size of the United States investment, the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and, as explained above, evidence specifically depicting the organizational structure of the foreign entity, as required by 8 C.F.R. § 214.2(l)(3)(v). For these additional reasons, the appeal must be dismissed and the petition denied.

In addition, the evidence presented does not prove that the petitioner and the foreign employer are qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G). To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (*i.e.*, one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners.

While both the letter written by counsel dated September 29, 2004, and the letter of support sent by the foreign employer dated August 3, 2004, claim that the beneficiary is a majority stockholder in both the U.S. entity (100% ownership) and the foreign entity (70%), a review of the translated Russian documents for the foreign entity reveal that the beneficiary is actually a 30% owner of the Russian company. The Memorandum of Association, the corporate minutes, and the Articles of Limited Liability Company for Point Model Management all consistently reveal that the beneficiary is a 30% owner while A [REDACTED] is a 70% owner. Therefore, since [REDACTED] owns a majority interest in the Russian company and the beneficiary owns a majority interest in the petitioner, the two companies are not affiliates and are not qualifying organizations. For this additional reason, the appeal must be dismissed and the petition denied.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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.