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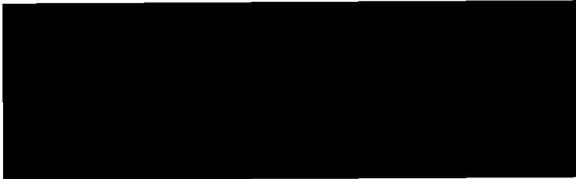
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**U.S. Citizenship
and Immigration
Services**

D7



File: WAC 05 113 50126 Office: CALIFORNIA SERVICE CENTER Date: **DEC 06 2006**

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: SELF-REPRESENTED

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 petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager 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 is a corporation organized in the State of Arizona that claims to be engaged in the design and manufacture of architectural ceramics. It claims that it is the subsidiary of [REDACTED] located in Chihuahua, Mexico. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the petitioner has secured sufficient physical premises to house its office.

The petitioner subsequently filed an appeal of the director's denial. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner seeks to clarify errors it believes the director made in rendering the decision in this matter. In support of the appeal, the petitioner submits a brief and additional evidence.

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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The first issue in the present 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.

With the petition, the petitioner submitted a copy of its Employer's Annual Federal Unemployment (FUTA) Tax Return (Form 940-EZ) for 2004. This document indicated that the petitioner paid a total of \$7,493.18 in 2004. The petitioner also submitted a copy of the beneficiary's Form W-2 for 2004, which indicated that the beneficiary earned \$7,493.18 in wages that year. No discussion of the beneficiary's duties in the United States was submitted.

On April 11, 2005, the director requested additional evidence. Specifically, the director requested more specific information with regard to the duties of the beneficiary, and particularly focused on the elements of managerial and executive capacity and the manner in which the beneficiary's job responsibilities corresponded to each. The director also requested an organizational chart for the petitioner, demonstrating all other employees, their titles and duties, and their position in the organizational hierarchy. Finally, payroll summaries and quarterly wage reports were requested to corroborate the employment of any persons identified on the organizational chart.

In response, the petitioner submitted a letter dated April 25, 2005. The petitioner provided the following description of the beneficiary's position:

In regards to **the beneficiary's executive capacity**, his duties as **General Manager** include:

Complete Management and handling the responsibilities of all operations in the United States.

Supervise all project management along with local architects, decorators, interior designers and contractors.

Supervising hired employees (when needed) who will run the day-to-day operations at company in the United States and sales representatives.

Provide key strategic technology, knowledge and project management directives to stay ahead in the architectural ceramics business.

Manage finance operations, Personnel and Human development policies.

Set guidelines for quality management, technical support management, and attend trade shows.

Report back to the parent company in Mexico.

Identify potential trading deals.

The petitioner also submitted an organizational chart, which indicated that the beneficiary oversaw “sales representatives,” [REDACTED] Accountant, and [REDACTED] Statutory Agent. To supplement the chart, the petitioner submitted a list identifying the three sales representatives. The addresses of all persons listed were provided. No payroll summaries or quarterly wage reports were submitted.

On June 6, 2005, the director denied the petition. The director determined that the beneficiary had not acted in a primarily managerial or executive capacity during the previous year, and that the petitioner had not yet reached the point where it could support the beneficiary in such a capacity. Specifically, the director noted that in addition to providing a vague description of the beneficiary’s duties, the petitioner had also failed to provide evidence to corroborate its claim that it employed the persons named on the organizational chart.

On appeal, the petitioner asserts that the beneficiary was employed in a primarily managerial capacity, and provides additional documentation pertaining to the retention of the employees/contractors identified on the organizational chart. Upon review of the record, the AAO concurs with the director’s decision for the reasons set forth below.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner’s description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this matter, the petitioner failed to provide an adequate description of the beneficiary’s proposed duties with the extension request. Instead, it merely provided a brief, generalized synopsis on the L Supplement to the Form I-129. As the initial submission was insufficient to warrant approval, the director requested more information, including a more specific description of the beneficiary’s duties, in the request for evidence dated April 11, 2005. Although the petitioner responded to this request, it merely provided brief, one-sentence overviews describing the general nature of the beneficiary’s role in the petitioner’s enterprise. Despite the director’s specific request for the petitioner to provide a detailed breakdown of the beneficiary’s day-to-day

duties as well as a description of the beneficiary's discretionary duties for the past six months, the petitioner failed to provide sufficient details with regard to the beneficiary's position. As such, the record contains little information with regard to the exact nature of the beneficiary's duties.

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 this matter, despite the director's specific request for detailed information, the petitioner failed to adhere to this request. 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). In this matter, the petitioner's failure to thoroughly address the director's specific requests has rendered it impossible to conclude that the beneficiary is functioning in a primarily managerial or executive capacity.

Additionally, the petitioner provided contradictory assertions with regard to the capacity of the beneficiary. The petitioner claimed that he occupied the position of general manager, yet alleged that his duties were primarily executive. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In the request for evidence, the director clearly outlined the requirements for both capacities, and requested evidence demonstrating that the beneficiary's job duties fell into one of the two categories. As discussed above, however, the petitioner's vague response precluded a definitive analysis of the beneficiary's capabilities. On appeal, the petitioner acknowledges this misunderstanding, and notes that in the Mexican culture, no distinction is made between manager and executive. The petitioner clarifies on appeal that the beneficiary is in fact functioning in a managerial capacity, and provided more details and evidence regarding the manner in which the beneficiary's duties satisfy the requirements of the regulatory definition.

This evidence, however, will not be considered. 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 will 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). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249

(Reg. Comm. 1978). The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner indicates that it employs three salespersons, an accountant, and a statutory agent. The record prior to adjudication, however, is devoid of any evidence that these persons are in fact employed by the petitioner. In fact, the submission of the addresses of these persons on the organizational chart, some of which identify suite numbers, suggests that they are at best independent contractors who may have occasionally rendered services to or on behalf of the petitioner.

Despite the director's request for evidence of payroll summaries and quarterly wage reports, the petitioner failed to submit any documentation which would establish that the petitioner employed a workforce aside from the beneficiary. For the first time on appeal, however, the petitioner submits documentation in support of the working relationship of the petitioner with the accountant and the manner in which it engages the services of consultants. As previously discussed, 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 AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764; *Matter of Obaigbena*, 19 I&N Dec. 533. The appeal will be adjudicated based on the record of proceeding before the director.

To establish that the petitioner has staffed the new operation in the previous year, the petitioner must submit a description of staffing, including the number of employees and the types of positions, as well as evidence of the wages paid to the employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). In the absence of such evidence as pay stubs and payroll records, the petitioner has not established that the petitioner employs a subordinate staff that would relieve the beneficiary from performing non-qualifying duties. 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. *Id.* Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner had ever secured sufficient physical premises to house the new office. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, the record indicates, and the petitioner confirms, that a commercial lease was never secured for the petitioner's business. The record contains evidence of a lease, executed on July 14, 2004 and commencing August 1, 2004, for the rental of a residential unit by the beneficiary, his wife, and their three children. The petitioner confirms in the record that because the petitioner's business is small and was slow to start, it was necessary for the beneficiary to simultaneously use his residence for business purposes.

The director denied the petition, finding that the petitioner's failure to secure a commercial lease violated the regulatory requirements. The AAO agrees.

The record reflects that the U.S. entity did not secure any lease until July 14, 2004, nearly three months after the approval of the original new office petition. In addition, the fact that the lease was for a residential unit intended to house the beneficiary and his family, and was not for a commercial property to serve as a starting point for the petitioner's business, further indicates that the petitioner failed to comply with the regulatory requirements. Either the petitioner did not comply with this requirement, misrepresented that it had complied, or the director committed gross error in approving the initial new office petition without evidence of the petitioner's sufficient physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

On appeal, the petitioner submits evidence of its rental of storage space in addition to the residential unit, alleging its good faith efforts to commence business. This agreement was executed on March 30, 2004, shortly before the approval of the initial petition. However, this rental agreement was for a 10' x10' storage unit, which is clearly not a commercial premises and not large enough of a space in which to commence a business.

Upon review of the evidence of record, the AAO concurs with the director's conclusion that the petitioner had failed to secure sufficient physical premises to house its office. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted photographs of its residential property used as a basis for its business, as well as photographs of murals and materials and bank statements. However, the record contains no other evidence of the petitioner's activities during the period from the petition's approval until the time the extension request was filed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. As stated above, at the time the petitioner seeks an extension of the new office petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H). Again, there is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant case, there is no evidence that the petitioner was doing business during the previous year. 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.

FURTHER ORDERED: The director shall review the prior L-1 nonimmigrant petition approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. §214.2(1)(9).