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File: SRC 02 051 50479 Office: TEXAS SERVICE CENTER Date: JUL 07 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)

ON 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, Texas 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 corporate president 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 engaged in website design, database administration and computer programming, and the petitioner claims to be a subsidiary of the parent company, [REDACTED] located in Tel Aviv, Israel. The petitioner seeks to employ the beneficiary for a period of one year to start a new office in the United States.

The director denied the petition, concluding that the petitioner did not establish the following three requirements: 1) the petitioner failed to demonstrate that sufficient housing for the new office has been secured; 2) the petitioner failed to establish that the both the position abroad with the foreign entity and the position in the United States are positions of executive capacity; and 3) the petitioner failed to demonstrate that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

On appeal, counsel for the petitioner asserts that the “INS misapplied law and regulations.” Counsel asserts that the petitioner has secured sufficient physical premises for the new office; that the U.S. company has one year from the approval of the petition to support an executive or managerial position which must be established at the time of filing an extension petition; and the petition sufficiently outlined the scope and financial goals of the U.S. entity. Counsel also asserts that the petition was denied for reasons that were not specifically addressed in a request for evidence “which would have put the petitioner on notice that further discussion or articulation of these points would have been of assistance to the examiner in adjudicating the underlying petition.”

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 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 (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 first issue in this proceeding is whether the petitioner has secured sufficient physical premises to house a new office.

In the initial I-129 petition filed on December 3, 2001, the petitioner submitted a sublease for its initial business premise at [REDACTED] Hallandale, FL 33009. The sublease indicates a space of 843 square feet. The director's decision stated, "a sub-lease between the petitioner and beneficiary for what appears to be a residential apartment does not constitute sufficient premises for a new office."

On appeal, counsel for the petitioner asserts that even though the initial premises of the petitioner corporation are located at a residential address, this does not violate the regulations at 8 C.F.R. 214.2(l)(3)(v)(A). Counsel submits the Zoning and Land Development Code of the City of Hallandale Beach, Florida which suggests that residential homes can be utilized for an occupation. Counsel further states, "the premises are sufficient when taking into account that this is a new office petition; the petitioner is in fact an infant corporation."

Upon review of the lease, it appears that the lease states that the space may be used for commercial purposes. In addition, it may be possible that an apartment is sufficient business premises for a company, however, since the petitioner has not described its anticipated space requirements for its computer business, the petitioner has not established that it has secured sufficient physical premises to house the new office. The lease indicates that the space is 843 square feet but since the petition does not specifically indicate what type of premises are required for the business, it is not clear if this square footage is appropriate for the type of business the petitioner wishes to open. Furthermore, the petition indicates that the beneficiary plans to hire five employees soon after receiving the L-1 classification. It is hard to imagine that a small apartment is adequate space for six employees (including the beneficiary) to work. 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 reason, the petition may not be approved.

The second issue in this proceeding is whether the beneficiary has been employed in a primarily executive capacity for the foreign entity and whether the beneficiary will be employed in an executive capacity in the United States.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(15)(L), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily-

1. 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-

1. 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 continuation sheet of the I-129 petition, the petitioner confirms that the beneficiary was employed by [REDACTED] (the claimed parent company) in Israel in the position of managing director. The petitioner stated “as one of only two Managing Directors (together with the firm’s founder, Mr. [REDACTED] [the beneficiary] had essentially unlimited discretionary decision-making authority there, particularly as to all business and fiscal related matters, including matters such as budgeting; revenue projections; credit policies; fiscal administration; personnel matters and the like.”

On February 4, 2002, the director issued a notice requesting additional information of the beneficiary’s employment abroad with the parent company. Specifically, the director requested an organizational chart, evidence of employment of the independent contractors, and a detailed, definitive description (including the percentage of time spent on each duty) of the beneficiary’s foreign employment.

In the response dated March 26, 2002, the petitioner stated that the beneficiary held a position of executive capacity at the foreign entity as one of two managing directors. The petitioner goes on to state, “the majority of [the beneficiary’s] time as Managing Director in Israel was specifically in sales and marketing matters and customer development. [The beneficiary] indicates to me that probably 75% of his time was involved in increasing sales, and developing a marketing strategy to distinguish [REDACTED] from its competitors. The remaining 25% of his time was involved in such internal matters as budget and revenue matters; coordination with outside Chartered Accountant; credit and pricing strategies; and personnel items.”

In the denial of this petition, the director stated:

[T]he petitioner through counsel stressed that both the proposed position of president and past position of managing director were executive positions. That is, in both these situations the beneficiary was and would be functioning in an executive capacity. However, the petitioner did not submit evidence that the beneficiary *primarily* directed the management of the foreign organization or a major component or function of that organization.

On appeal, counsel asserts that “it has become profoundly obvious in recent years that INS, wishing to deny I-129L petitions filed by what it views as small businesses (although there is no statutory or regulatory prohibition on small business filing I-129L petitions), has used as its weapon of choice the word *primarily*.” On appeal, the petitioner did not provide any additional evidence to establish that the beneficiary directed the management of the foreign organization.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

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).

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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Id.*

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. *Id.*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. Rather, it appears from the record that the parent company is composed of two managing directors (one of which is the beneficiary), one development team member, one administrator (for credit/accounts payable and sales/marketing), one office administrator, three programmers and one art designer. The only individual performing any sales and marketing-related functions, personnel operations, and budget and revenue operations is the beneficiary; the other managing director and the administrators. Since the administrators have been described as performing only administrative functions for the beneficiary, it can only be assumed, and has not been proven otherwise, that the beneficiary is performing all other sales and marketing functions, including devising marketing plans, contacting clients and advertisers, performing any public relations tasks, and budget operations such as preparing the payroll and budget projections. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has not established that the beneficiary was employed by the foreign organization in a qualifying managerial or executive capacity. Therefore, the appeal will be dismissed.

In regards to the beneficiary's position in the United States, the petition states that the beneficiary will hold the position of initial corporate president to open a new office [REDACTED]. In the petition, the petitioner describes the proposed duties of the beneficiary in the United States as the following:

Developing and establishing all corporate policies and objectives; planning business objectives; and developing all the company's policies, functions and operations; and establishing responsibilities and procedures in order to attain corporate objectives, which objectives, [the beneficiary], himself will establish. His duties as Corporate President further include directing the financial programs of the Florida subsidiary to ensure the availability of sufficient funds at all times to attain desired objectives. In addition, in his role as Corporate

President, [the beneficiary] will have the authority to hire and fire personnel, as he dreams fit.... Specifically, [the beneficiary] will have signing authority, singly, for the corporate bank account of the Florida subsidiary, and will have the authority, singly, to legally bind [redacted] U.S. subsidiary] in any and all of its legal contracts, agreements and business transactions with any and all third parties.... [the beneficiary], by the way, will be spending 100% of his time directing and supervising the entire business of [redacted] including planning and implementing its growth strategy, with the goal in mind of laying a solid groundwork for corporate accomplishments, profitability and growth for the Florida subsidiary. Essentially, none of his time will be spent directly providing the good and services of the Florida Subsidiary.”

On February 4, 2002, the director issued a notice requesting additional information of the United States business including: 1) evidence of the funding or capitalization of the U.S. company; and 2) proposed staffing levels of the new business with position titles and duties.

In the response dated March 26, 2002, the petitioner stated, “in summary, staffing levels have nothing to do with your adjudication process, either because you are using a concept that pertains to the adjudication of I-140’s, or because you are getting ready to deny this petition on the basis of the position of corporate president not meeting the concept of *managerial* capacity, on which concept the petition was *not* filed, but rather was filed under the definition of *executive* capacity.” The petitioner also refers back to the initial petition which claimed that the beneficiary would hire three people shortly after the approval of the L-1 petition. The petitioner states “it is *those* people who will *primarily* provide the services of the petitioner corporate, namely, web design, database administration, all manner of computer programming salutation, trouble shooting, etc.” The petitioner maintains that the beneficiary will direct the U.S. company in an executive capacity.

In the denial, the director indicated, “the petitioner through counsel stressed that both the proposed position of president and past position of managing director were executive positions. That is, in both these situations the beneficiary was and would be functioning in an executive capacity.... nor did [the petitioner] explain in sufficient detail how the proposed position of president in the US start-up web design company would be primarily directing the management of the organization or a major component or function of that organization.”

On appeal, counsel asserts:

[Y]ou are presuming, before the company is even allowed to start doing business and before the president is even allowed to report for work for the first day, that the alien beneficiary himself will be primarily providing good or services. . . . [the] petitioner agrees that other people will have to be involved in the company, or else the conclusion is inescapable that the petitioner himself or herself will primarily provide the goods or services; however, the time to prove that is at the extension stage one year later, when INS will have an abundant opportunity to find out if the petitioner corporate in fact has workers on hand who primarily produce the good or services of the petitioner corporation.

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). On review, 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 "developing and establishing all corporate policies and objectives," "planning business objectives," and "developing all the company's policies, functions and operations." The petitioner did not, however, define the beneficiary's goals, policies, or clarify who actually provides the services in order to develop a company that provides computer services. 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. 190 (Reg. Comm. 1972). 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. at 1103. Since the petitioner fails to establish that the day to day duties of the beneficiary will be primarily of executive in nature, this appeal will be dismissed.

The third issue in this proceeding is whether the petitioner has demonstrated that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position.

On February 24, 2002, the director requested evidence of the funding or capitalization of the U.S. company, such as copies of wire transfers showing transfers of funds from the foreign organization; evidence of financial resources committed by the foreign company; copies of bank statements; profit and loss statements or other accountant's reports to establish a qualifying relationship. The petitioner did not provide any of the requested evidence except a U.S. bank account statement.

In the response to the request for evidence, the petitioner submitted a bank statement for the U.S. entity as of February 28, 2002 indicating a closing balance of \$8,700; a transaction history dated February 22, 2002, indicating total deposits of \$8,700; and a bank statement indicating that the U.S. entity opened an account on February 21, 2002 with a deposit of \$8,700.

The director determined that the petitioner had not demonstrated that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position. The director determined that the petitioner had not adequately defined the proposed nature of the office, and had not realistically described the scope of the entity, its organizational structure and its financial goals.

On appeal, counsel argues that since this issue was not raised in a request for evidence from the service center, the petitioner did not have an opportunity to respond to the service's concern. Furthermore, the petitioner asserts that these issues were discussed at length in the initial petition.

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(1)(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 addition, if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when 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" through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

Furthermore, as contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

*Id.*

Upon review, the petitioner has not submitted sufficient evidence to establish that the intended United States operations, within one year of approval, will support an executive or managerial position.

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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.