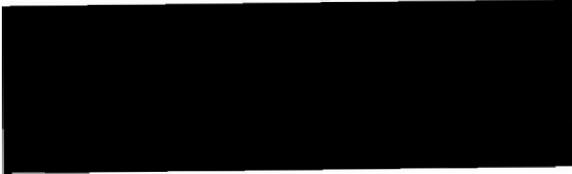




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File: SRC 04 178 51306 Office: TEXAS SERVICE CENTER Date: JUL 12 2006

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:



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 seeks to extend the employment of the beneficiary temporarily in the United States as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The U.S. petitioner, a corporation organized in the State of Texas, claims to be engaged in retail, trade, and investment. The petitioner claims to be the subsidiary of [REDACTED] located in Mumbai, India. 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 on two independent grounds, concluding that (1) the beneficiary was not functioning in the United States in a managerial or executive capacity; and (2) the petitioner failed to establish that it had been doing business for the year prior to the date the petition was filed as required by 8 C.F.R. 214.2(l)(14)(ii)(B).

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director's denial was based on "one single erroneous point," namely, the finding that the petitioner had not been doing business for the previous year. Counsel presents numerous arguments to refute the director's findings with regard to this issue, but does not raise or address the first basis of the director's denial.

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)(14)(ii) 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 this matter is whether the beneficiary has been and will continue to 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.

On page one of the director's decision of November 5, 2004, the director states: "You have failed to prove that you are employed in a primarily managerial or executive capacity." This brief statement is followed by a

recitation of the definitions of both managerial and executive capacity, as defined by 8 C.F.R. § 214.2(l)(1)(ii)(B) and (C). The director, however, makes no further mention of the basis for the denial nor does she discuss the evidence submitted and any deficiencies therein.<sup>1</sup> Counsel on appeal, however, does not address this basis for the denial of the petition.

The AAO notes that the petitioner identified the beneficiary's position as that of "executive officer," and described her duties in the United States as follows:

Confer with the Indian Company and develop long-range goals and objectives of the US Company. **Oversee expansion of operations. Direct and coordinate activities of the organization and formulate and administer company policies:** Direct and coordinate activities relating to purchasing, production, operations and sales for which responsibility is delegated and targeted to further attainment of goals and objectives. Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. Discuss with employees to review achievements and discuss required changes in goals or objectives of the company.

The director issued a request for evidence on July 9, 2004, which requested additional information with regard to the beneficiary's duties and the staffing levels of the petitioner. Specifically, an organizational chart for the petitioner was requested listing all employees, their job titles, and duties. In a response dated September 28, 2004, the petitioner stated that it was precluded from commencing business until the end of the first year of operations; therefore, hiring only started at the end of the first year. The petitioner submits an "Internet Filing Summary" for the petitioner for the quarter ending June 30, 2004, which indicates that nine employees were on the payroll at that time. The petitioner failed, however, to submit additional evidence of their dates of hire, so it is impossible for the AAO to determine if they were employed by the petitioner at the time the petition was filed. 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).

The petitioner also submits an updated description of the beneficiary's duties, which states as follows:

- Direct and coordinate activities of the organization and formulate and administer company policies [20%].
- In consultation with the management and Indian firm develop long-range goals and objectives of the company—with emphasis on developing and guiding expansion policies [20%].
- Be responsible for corporate planning, general administration, marketing-sales and purchasing activities for the subsidiary [20%].

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<sup>1</sup> When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

- Direct and coordinate activities of managers and employees in the production, operations, purchasing, and marketing departments for which responsibility is delegated for further attainment of goals and objectives [20%].
- Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives [10%].
- Review with management and employees company's achievements and discuss required changes in goals or objectives of the company [10%].

On November 5, 2004 the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner declined to address this issue on appeal.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. First, the petitioner failed to specifically articulate the nature of the beneficiary's duties. For example, the petition claims the beneficiary is the executive officer. The statement of her duties, however, is vague and merely paraphrases the regulatory definitions. The overly broad descriptions provided in the record fail 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).

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, *aff'd*, 905 F.2d 41. Although the petitioner provided a broad statement of the beneficiary's duties in the initial petition and again in response to the request for evidence, this description did not articulate what a specific day in the role of the beneficiary would consist of. Instead, the descriptions merely provided a brief synopsis of the beneficiary's managerial/executive duties, and failed to discuss or identify job-specific tasks or obligations the beneficiary is required to perform. Essentially, the petitioner equates managerial and executive capacity with the beneficiary's title of executive officer, yet fails to provide solid examples of how this managerial or executive capacity is actually attained. 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.).

In addition, the petitioner has failed to show that the beneficiary has a staff of professional, supervisory, or managerial employees to relieve her from performing non-qualifying tasks. Although the petitioner contends that it employs nine persons, there is no definitive evidence in the record to show that these persons were on the petitioner's payroll at the time of filing. 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. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future, and that hiring was slow to start as a result of the petitioner's delay in conducting business during the previous year due to problems with the social security department. However, 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, despite the petitioner's claim that it has begun to conduct business within the required time period and thus has satisfied the regulatory requirement. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" 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."

In this matter, the petitioner claims that it is engaged in "retail, trade, and investment." The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business.

With the initial petition, insufficient evidence of the petitioner's business practices was submitted. Consequently, in the request for evidence issued on July 9, 2004, the director requested documentation establishing that the petitioner had been doing business during the previous year as required by the regulations. In the response filed on September 28, 2004, the petitioner stated "[a]s noted in the past, the Petitioner was prevented from commencing full business operations until June 2004 – because of problems with the social security department." With regard to the director's request for the petitioner's U.S. Corporation Income Tax Return for 2003, the petitioner stated that "true operations did not commence until June 2004 (near the end of its one-year approval period), as such 2003, corporate income tax returns are not available." Finally, the petitioner submits evidence of a commercial lease secured on May 15, 2004, approximately 1 month prior to the petition's expiration.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. The record indicates that the beneficiary was granted a one-year period of stay from June 14, 2003 to June 13, 2004 to open a new office. The record further indicates that the petitioner would engage in retail, trade, and investment. However, by the petitioner's own admission, there is no indication of any business activities whatsoever until June 2004, the same month the initial new office petition expired. In addition, there is no documentation or information regarding the activities of the beneficiary and the petitioner during the time period prior to June 2004.

Based on this limited information, it is clear that the petitioner was not doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claim that business was slow to start in the wake of problems with the social security administration. However, the record is devoid of an explanation as to what the petitioner did between June 2003 and June 2004, and further lacks any explanation or documentation regarding other activities engaged in by the petitioner to promote its business during this period. The fact that the petitioner did not commence operations until June 2004, the month of the visa expiration, does not excuse the petitioner from meeting the regulatory requirements.

As stated above, 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. Furthermore, at the time the petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted at the time of filing confirmed that the petitioner had not been conducting business as required. The fact that it began conducting business shortly before the expiration of the beneficiary's initial stay does not automatically entitle the petitioner to an extension of the visa, for it fails to change the fact that the petitioner failed to conduct business during the previous year. Counsel seems to be under the impression that by conducting as little as one day of business before the expiration of the initial one-year period, the requirement is satisfied. This is not the case. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner's evidence pertaining to the stock distribution of the companies does not satisfy the requirements for a qualifying relationship between the United States and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the petitioner claims that it is the subsidiary of [REDACTED] by way of that company's majority ownership interest in the petitioner. Specifically, the petitioner claims to be owned by two shareholders: [REDACTED] the foreign entity, with 510 shares, and the beneficiary, with 490 shares. However, no evidence of consideration exchanged for the stock ownership in the petitioner has been offered. In fact, the stock ledger submitted shows a blank entry, marked as (-), in the space reserved for the amount paid for the stocks. Without evidence that the foreign entity actually paid for its ownership interests in the petitioner, a qualifying relationship cannot be found to exist. 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)).

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, *aff'd*, 345 F.3d 683.

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.