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FILE: SRC 05 133 50041 Office: TEXAS SERVICE CENTER Date: **APR 05 2007**

IN RE: Petitioner: 
Beneficiary:

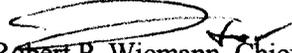
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its 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, a corporation organized in the State of Florida, claims to be the subsidiary of E Teknoloji ve Telekomunikasyon Turizm Hizmetleri Pazarlama Tic. Ltd. Sti., located in Istanbul, Turkey. The petitioner identifies itself as a telecommunications and internet service provider. The beneficiary was initially granted a one-year period of stay in the United States, which was subsequently extended for an additional year. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. On appeal, counsel for the petitioner contends that the director erroneously denied the petition and in support of this assertion 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 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.

In a letter dated April 4, 2005, the petitioner stated that the beneficiary's duties will include the following:

- 1) Establishing long-term policies;
- 2) Hiring-firing personnel;
- 3) Developing customer relations;
- 4) Supervising day-to-day operations;

- 5) Financial transactions of the company;
- 6) Developing contacts with the major service providers in our field.

On April 20, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request asked the petitioner to submit a more detailed description of the day-to-day duties of the beneficiary and other staff members, including evidence in support of any contractual employees the petitioner claimed to have retained. The petitioner submitted a response dated May 4, 2005, which stated that the petitioner employed the beneficiary and one other person, namely, [REDACTED] its Public Relations and Advertising Manager. The petitioner claimed that [REDACTED] was employed for 35 hours per week and had begun working in this position on March 23, 2005. The petitioner further stated that it had retained the services of two contract employees to work as sales agents: [REDACTED] who commenced work on March 1, 2005, and [REDACTED] who was due to start work on June 1, 2005. The petitioner advised that [REDACTED] worked a minimum of 20 hours per week.

With regard to the beneficiary, the petitioner expanded on his duties by stating that he was the "chief technical officer," and listed the following description:

Primary Responsibility: Technical Developments, new programs and systems.

Other Duties: Establishing long-term policies, hiring-firing personnel, developing relations with customers and service providers, supervising day-to-day operations, financial transactions.

On May 18, 2005, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director noted that, based on the lack of sufficient subordinate staff members to relieve the beneficiary from providing non-qualifying duties, it could not be concluded that he would be performing primarily managerial or executive duties. On appeal, counsel relies on complications in the initial phase of the petitioner's business as justification for the current organizational structure and asserts that it is technically impossible to hire additional employees during this phase.

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 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).

In the letter dated April 4, 2005 and in the response to the request for evidence, the petitioner provided a broad overview of the beneficiary's duties. The director found this initial description insufficient to determine the exact nature of the beneficiary's day-to-day role in the company, and therefore requested a more detailed description in the request for evidence. As quoted above, however, it is apparent that the

petitioner's response to this request did little to shed light on the actual duties of the beneficiary as requested by the director.

The response to the request for evidence failed to adequately expand on the initial description or discuss any new duties not previously discussed. It remains unclear, therefore, exactly what the beneficiary will do on an average work day. 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 will 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).

Despite counsel's contentions that the petitioner is still in the development phase and thus the beneficiary is functioning in a qualifying capacity based on the nature of the petitioner's stage of development, the AAO disagrees. The petitioner in this matter was established in 2001, and the beneficiary came to the United States two years after its incorporation. This petition is filed four years after the petitioner's incorporation. Therefore, it cannot be considered a new office for purposes of this analysis.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a four-year-old telecommunications and internet service provider that claimed to have a gross annual income of \$365,000. The firm employed the beneficiary as president/chief technical officer, plus a public relations and advertising manager and one part-time contracted salesperson. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. In fact, counsel on appeal stresses that it is virtually impossible for the petitioner to hire such employees due to the complications it is currently experiencing at this stage of its development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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). Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

For the reasons set forth above it does not appear that the beneficiary is performing primarily managerial or executive duties. For this reason, the petition may not be approved.

Beyond the decision of the director, it is unclear whether the petitioner and the foreign employer are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

In this case, the petitioner claims that the U.S. entity is the subsidiary of the foreign entity by way of its merger with the original employer of the beneficiary abroad, Sim Iletisim Teknolojileri, A.S. The petitioner claims that the foreign employer merged with the newly-claimed foreign parent company on January 1, 2005, and submits a statement attesting to the transfer of shares. However, despite the petitioner's submission of stock certificate number two, which indicates that the newly-claimed foreign parent owns 60% of the petitioner, the record does not contain the original stock certificate issued to Sim Iletisim Teknolojileri, A.S. or the petitioner's stock ledger evidencing the cancellation of the previously-issued shares. Without this documentation, it cannot be definitively established that these shares have been legally transferred to the new foreign parent company.

More importantly, however, is the fact that the record contains evidence that the petitioner is an S corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. See Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned solely by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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).

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.