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FILE: SRC 06 126 52490 Office: TEXAS SERVICE CENTER

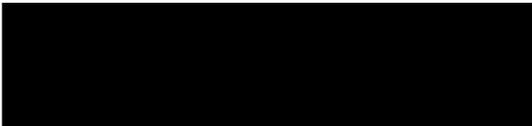
Date: **APR 19 2007**

IN RE: Petitioner:
Beneficiary:



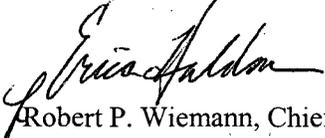
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

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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 employ the beneficiary in the position of chief executive officer 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 Georgia corporation, and claims to be a service warehouse business. The petitioner states that it is the subsidiary of [REDACTED], located in Thailand. The petitioner seeks to employ the beneficiary for one year.

The director denied the petition on July 6, 2006, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director stated that the United States entity does not appear to have any subordinate managers or professionals, and thus the beneficiary will be carrying out the day-to-day operations of the U.S. entity rather than supervising subordinate employees who would relieve the beneficiary from primarily performing non-qualifying duties.

Counsel for the petitioner subsequently filed an appeal on August 7, 2006. On appeal, counsel for the petitioner asserts that the petitioner "took all of the proper and necessary legal steps to establish this entity in the U.S." Specifically, counsel asserts that the beneficiary negotiated the lease of an office and warehouse space until 2009; he retained an accounting firm and a law firm, and "entered into an agreement with an employment leasing company to assist in the hiring of several employees for various positions in the company." Counsel also asserts that the U.S. entity utilizes contract employees which is a "common business practice in the US." Counsel further states, "surely it must be understood that every new company initially requires one individual to be in charge and responsible to oversee the total operations from its inception to its more established date." In support of the appeal, counsel submits a brief and resubmits documentation previously filed.

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.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity by the U.S. entity.

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

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

The nonimmigrant petition was filed on March 15, 2006. The Form I-129 indicates that the beneficiary will be employed in the position of chief executive officer. However, in the L Classification Supplement to Form I-129, the petitioner indicates the beneficiary's proposed position as an Export Manager rather than a chief executive officer. In a letter of support dated March 2, 2006, the beneficiary's proposed duties in the United States are described as the following:

[The beneficiary's] position with the [U.S. entity] is that of Chief Executive Officer. Due to his vast experience with the export department of the company in Thailand, he was selected for this position. The company realizes that there is enormous potential in the North American market for [the U.S. entity]. [The beneficiary] will be responsible for establishing this market as well as hiring the needed supportive staff and marketing and sales. Additionally, he will have complete control of all the operations and decisions affecting this US division.

On March 28, 2006, the director requested additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. Specifically, the director requested: (1) a definitive statement describing the U.S. employment of the beneficiary including, position title; list of all the duties to be performed; and, percentage of time spent on each duty; (2) the number of subordinate managers/supervisors or other employees who report directly to the beneficiary, and a brief description of their job duties and their educational background; (3) specific dates of the beneficiary's employment for each position held with the petitioner; (4) a description of the qualifications required for the position offered to the beneficiary; (5) a description of the level of authority held by the beneficiary; (6) clarification as to whether the beneficiary functions at a senior level within the corporation; (7) specification of the beneficiary's position within the organizational hierarchy; (8) information as to who provides the product sales/services or produces the product of the business; (9) evidence of the current staffing level of the U.S. entity; (10) an organizational chart of the U.S. company; (11) copies of the state employer quarterly wage reports for 2005; and, (12) copies of the company's IRS Form 941, Employer's Quarterly Federal Tax Return, from 2005 to the present.

In a response letter, dated June 23, 2006, counsel for the petitioner described the duties the beneficiary will perform in the United States as the following:

- Establishing the U.S. facility
- Formulating the business plan
- Creating the sales plan
- Establishing a marketing plan
- Managing public relations with customers
- Developing human resource department with professional, skilled and unskilled employees. (Please note that [the beneficiary] will have total control and authority to hire and fire personnel in the U.S.)

Duties: Total and complete control of the US Division to include: Hire and fire all personnel; Develop sales and marketing business plan for North America; Manage the administration of the US Division; Date to date operations of the activities of the company; Enter into business agreements with customers, business clients.

Counsel for the petitioner also indicated that the beneficiary will spend "100% of total responsibilities as the Chief Executive Officer." Counsel further stated that the subordinates who report to the beneficiary are an "initial two to three warehouse workers," one administrative assistant, and one director of marketing and sales that the U.S. entity plans to hire in 2006.

The petitioner submitted the company's Form 1120, U.S. Corporation Income Tax Return, for 2005 which indicated that the company did not pay any wages or salaries and did not pay any compensation to officers in 2005.

The petitioner did not submit the state or federal employer quarterly tax returns as requested by the petitioner. In addition, the petitioner did not submit the job duties of the beneficiary's subordinates; the organizational chart of the U.S. company; a breakdown of the percentage of time the beneficiary will spend on each duty; and evidence of the current staffing level of the U.S. entity. 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 director denied the petition on July 6, 2006, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director stated that the United States entity does not appear to have any subordinate managers or professionals, and thus the beneficiary will be carrying out the day-to-day operations of the U.S. entity rather than supervising subordinate employees who would relieve the beneficiary from primarily performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the petitioner "took all of the proper and necessary legal steps to establish this entity in the U.S." Specifically, counsel asserts that the beneficiary negotiated the lease of an office and warehouse space until 2009; he retained an accounting firm and a law firm, and "entered into an agreement with an employment leasing company to assist in the hiring of several employees for various positions in the company." Counsel also asserts that the U.S. entity utilizes contract employees which is a "common business practice in the US." Counsel further states, "surely it must be understood that every new company initially requires one individual to be in charge and responsible to oversee the total operations from its inception to its more established date." Finally, counsel asserts that the denial has created a financial burden on the petitioner.

On appeal, it appears that counsel is arguing that the instant petition is a new office petition pursuant to the regulations at 8 C.F.R. § 214.2(l)(3)(v). However, the petitioner indicated on the Form I-129 that the beneficiary is not coming to the United States to open a new office. Thus, the instant petition will not be reviewed as a "new office" petition and instead the petitioner's and beneficiary's eligibility will be determined pursuant to the regulations at 8 C.F.R. § 214.2(l)(3). On appeal, a petitioner cannot change the type of petition it filed or offer a new position to the beneficiary, or materially change a position's title, its associated job responsibilities. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. 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). 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.*

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).

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will "have complete control of all the operations and decisions affecting this US division"; "manage the administration of the U.S. division"; "formulating the business plan"; and "establishing the U.S. facility." 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. *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).

The description also includes several non-qualifying duties such as the beneficiary will be responsible for "managing public relations with customers"; "develop sales and marketing business plan for North America"; and "enter into business agreements with customers, business clients." However, the petitioner did not identify any employees who would perform the day-to-day marketing, sales and public relations functions of the U.S. company. It appears that the beneficiary will be directly performing a number of marketing and operational tasks involved in expanding the petitioner's business operations rather than directing such activities through subordinate employees. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Furthermore, the director specifically requested that the petitioner provide a detailed job description, including the beneficiary's specific duties to be performed in the United States and the percentage of time spent on each duty. The petitioner did not submit the requested job description as requested by the

director. 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 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 petitioner's description of the beneficiary's position provides no information regarding his day-to-day duties, such that they could be classified as managerial in nature. The AAO will not accept an overly broad and ambiguous job description and speculate as to the related duties.

The petitioner indicated on the Form I-129 that the company has one employee. According to the director's response to request for evidence, the petitioner indicated that the beneficiary's subordinates will be an "initial two to three warehouse workers", one administrative assistant, and one director of marketing and sales, which the U.S. entity plans to hire in 2006. The petitioner did not indicate when the U.S. company plans to hire the warehouse workers and the administrative assistant. Thus, it appears that the beneficiary will not have a subordinate staff until a later date when the above-mentioned personnel are hired. In addition, as noted by the director, according to the company's Form 1120, U.S. Corporation Income Tax Return, for 2005, the U.S. entity did not pay any salaries and wages and/or compensation to officers. In response to the director's request for evidence, the petitioner submitted invoices issued to the U.S. entity for janitorial services and consulting on QuickBooks. It appears that the U.S. entity utilized contract workers for computer technical assistance and janitorial services. However, the petitioner did not submit any documentation to evidence that the U.S. entity currently employs individuals who the beneficiary will supervise.

It appears from the record that the beneficiary will be the only individual performing any marketing and sales functions, finance operations and business development activities, and all of the various operational tasks inherent in operating a business on a daily basis, such as purchasing inventory, paying bills, handling customer transactions, negotiating contracts and managing the import of the inventory. 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 "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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

As noted, on appeal, counsel for the petitioner asserts that the U.S. entity has entered into an agreement with an employment leasing company to "assist in hiring of several employees for various position in the company." However, the petitioner did not submit this agreement or any other documentation evidencing the agreement. 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)). Furthermore, counsel for the petitioner indicated that the leasing agreement will assist the U.S. entity in hiring personnel in the future, and thus the evidence does not demonstrate that the U.S. entity currently employs any additional employees. 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).

In the original petition, the petitioner submitted invoices issued to the U.S. entity for janitorial services and consulting on QuickBooks. It appears that the U.S. entity utilized contract workers for computer technical assistance and janitorial services. On appeal, counsel for the petitioner states, "it is a common business practice in the US to lease employees." In addition, counsel explains that the U.S. entity hired an accounting firm and a law firm. Although counsel states that the petitioner has contractual employees in the areas of accounting, legal services, technical services and janitorial services, the petitioner has not clearly identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

Based upon evidence submitted, it appears that the beneficiary would be at least initially, performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its chief executive officer. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. The petitioner must show that it has sufficient staff to support the beneficiary in a managerial or executive capacity from the date of filing. Unlike a petitioner filing a "new office" petition pursuant to 8 C.F.R. § 214.2(l)(3)(v), this petitioner will not be afforded additional time to move 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. Although the U.S. enterprise is in a preliminary stage of development, the petitioner is not relieved from meeting the statutory requirements. Accordingly, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

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.