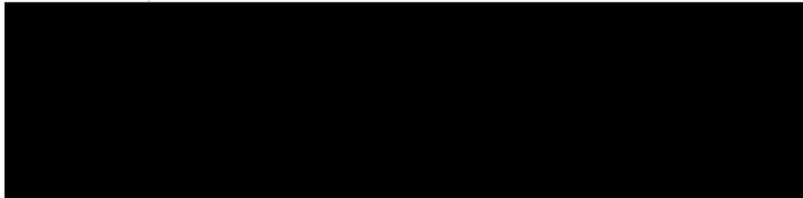


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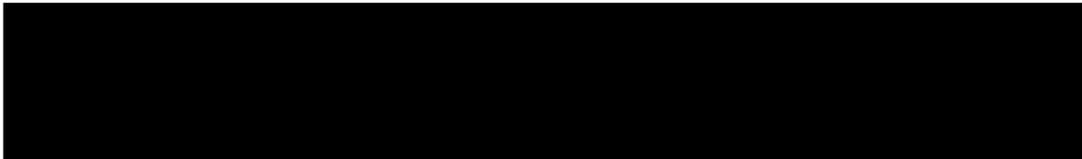
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FILE: EAC 06 144 53517 Office: VERMONT SERVICE CENTER Date: **AUG 03 2007**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

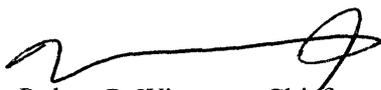
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Vermont 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 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 New York corporation, states that it intends to engage in computer sales and Internet services. The petitioner claims that it is the affiliate of Desktop Creators, located in Anand, India. The petitioner seeks to employ the beneficiary as the chief executive officer of its new office in the United States.

The director denied the petition concluding that the petitioner did not establish that the U.S. company had secured sufficient physical premises to house the new office. The director noted that the petitioner had submitted a license for a "business identity plan" which provides a telephone and fax service, voice mail and a corporate address, but not sufficient internet bandwidth usage or physical premises for the type of business to be operated.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision was based on an erroneous presumption or a misinterpretation of the evidence submitted. Counsel further contends that the specific issue of Internet bandwidth was not addressed in the request for evidence and raised only in the denial. Counsel submits a brief and additional evidence in support of the appeal.

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)(3)(v) also provides 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;
- (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 sole issue addressed by the director is whether the petitioner has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

The nonimmigrant petition was filed on April 19, 2006. The petitioner described the type of business to be operated as a "computer sales and Internet services business." On the Form I-129, the petitioner identified its mailing address as [REDACTED] which appears to be counsel's address. In a letter dated April 12, 2006, the petitioner stated that it "has reviewed numerous locations in several boroughs" in New York City, and attached various real estate listings for prospective office space. The petitioner also stated that it had "obtained premises in New York City to implement its U.S.-based new office."

In support of the petition, the petitioner submitted a "license agreement" between the petitioner and Bevmax Office Centers, for a "Corporate Identity Plan," which "includes proprietary telephone number, voice mail, corporate address/mail reception and fax reception." The address of the office center is [REDACTED]. The license agreement, at clause 9, includes a limitation on Internet service to 200MB per paid connection/user per day. However, the AAO notes that since the petitioner's "Corporate

Identity Plan" does not appear to grant the petitioner the use of an office, the applicability of this provision is uncertain.

The director issued a request for evidence on April 27, 2006, in which he advised the petitioner that the evidence submitted was insufficient to establish that the company had secured sufficient physical premises to house the office. The director requested that the petitioner submit the lease agreement for the property located at [REDACTED] noting that based on the information on Form I-129, the beneficiary would work at this address.

The director acknowledged the petitioner's submission of advertisements for properties in the New York area and the above-referenced license agreement. The director stated that "the advertisements merely show that property is available and the license agreement serves as a 'shell' for your corporation; however, it is not evident that you have actually secured physical premises to house your new office."

In a response dated July 21, 2006, the petitioner provided the following explanation:

[The petitioner] has secured office space at [REDACTED] [REDACTED] (see Exhibit 3 of the petition for evidence of [the petitioner's] office space agreement. The agreement provides for an address telephone number and office services with the ability to use conference rooms and offices as needed, for an additional fee. This is sufficient physical premises for the beginning phase of the business before employees are hired and equipment is purchased.) [The petitioner] will use this office space to interview prospective employees, draft contracts and take other organizational steps as required. Subsequently, [the petitioner] will secure additional full-time space as its operation expands. Inquiries have already been made by the company to locate suitable spaces.

As noted above, the only agreement submitted with the petition was a license agreement for a corporate identity plan at the Bevmax Office Center located at [REDACTED]. The petitioner did not submit an office space agreement for the [REDACTED].

The director denied the petition on July 28, 2006, concluding that the petitioner had not secured sufficient physical premises to house the new office. The director was not persuaded that the submitted license agreement would provide sufficient premises to house the new office, and noted that the petitioner had used addresses of both [REDACTED] and [REDACTED]. The director also referenced the restrictions on Internet usage included in the license agreement and stated that "a company engaging in the provision of 'Computer Sales and Internet Service' will require a large amount of Internet usage." The director further found that a license agreement that provides "telephone service answered in your company's name, 24-hour voice mail, a corporate address, and fax reception, is not evidence that you have secured physical premises to house [the petitioning company]."

On appeal, counsel for the petitioner asserts that the director's decision "was based on a speculative presumption that was further based on an incorrect reading of the documents." Counsel argues that the director made no inquiry into the petitioner's Internet usage requirements prior to concluding that the petitioner must be a heavy user of broadband and determining that the physical premises secured must be insufficient. Counsel explains the petitioner's intended business activities, and submits a letter from Compu-

Technologies, Inc., an internet and network services company, which provides an estimate for daily broadband usage for the petitioning company of 65 to 100 MB per day.

The petitioner also re-submits the petitioner's license agreement, and a letter from [REDACTED] dated August 9, 2006, which states the following:

[The petitioner] currently has a Corporate Identity Plan valid from March 15, 2006 until March 31, 2007. Upon payment of the applicable license fee and additional deposit and execution of a new agreement, [the petitioner] may change their licensing agreement to provide for full time use of one or more offices in 1560 Broadway, 10th Floor, New York, N.Y. 10036 as available at the time of execution. The term of such an agreement would typically be for one year, subject to renewal.

Counsel asserts that the petitioner "had indeed secured as much office space as necessary, to conduct business."

Upon review, the petitioner has not established that the U.S. company had secured sufficient physical premises to house the new office.

The evidence submitted does not establish that the petitioner had secured any office space as of the date the petition was filed. There is no evidence that the "Corporate Identity Plan" includes the use of an office at all. As noted by the director, the license agreement provides for telephone answering services, fax services, voice mail and a mailbox. There is no evidence that the company was assigned a specific office space for its exclusive or even part-time use.

The letter from Bevmax Office Centers submitted on appeal merely states that the petitioner can obtain the use of a full-time office in the future, if available, if it chooses to pay an additional fee and deposit, and if it executes a new agreement. Thus, the letter submitted on appeal confirms that the petitioner's current agreement does not provide for office space. The petitioner's claim that it has the "ability to use conference rooms and offices as needed, for an additional fee" under its current Corporate Identity Plan is not supported by any documentary evidence.

Since the petitioner has not established that it had secured any physical premises, the issue of whether its office has adequate Internet access is moot. However, the AAO concurs with counsel that the director's conclusions on the issue of Internet usage were based on mere speculation. The director's comments will be withdrawn.

However, the director correctly determined that the Corporate Identity Plan does not provide sufficient physical premises to operate the petitioner's business. The petitioner has not submitted evidence on appeal to overcome this determination. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the AAO finds insufficient evidence in the record to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity as defined at sections 101(a)(44)(A) and (B) of the Act. In its letter dated April 12, 2006, the petitioner indicated that the beneficiary has owned and operated the foreign entity since 2000, managed a staff of eight

employees, and "has overseen all operations of the business, from the hiring and firing of staff, financial concerns, supply issues, décor, menu, marketing, etc." The petitioner submitted an organizational chart for the foreign entity showing ten positions under the beneficiary's supervision, including a finance and accounts officer with two subordinates, a sales and marketing manager, a hardware sales employee, a hardware services employee, two software programmers, a software on-site services employee, and an "HR Training Staff" employee. The organizational chart did not provide the names of the petitioner's employees.

The director instructed the petitioner to describe the typical managerial responsibilities performed by the beneficiary and to articulate and submit documentary evidence regarding management decisions made by the beneficiary. The director requested position titles and descriptions for the beneficiary's subordinate employees, information regarding the amount of time the beneficiary allocates to managerial and executive functions versus non-managerial functions, and copies of the foreign entity's most recent payroll records.

In response, the petitioner stated that "the beneficiary has overseen all operations of the operation, from the hiring and firing of staff, financial concerns, supply issues, service concerns, dealing with clients, marketing, etc." The petitioner stated that the beneficiary managed a staff of ten people. In response to the director's request for job descriptions for the beneficiary's subordinates, the petitioner submitted the names and job duties of "the four critical supervisory personnel that over whom [the beneficiary] has managerial control." The petitioner submits a list of "key people" with no position titles. [REDACTED] is described as being responsible for "Over all management of the operations. Coordination between various agencies. Tendering processing / evaluation activities." The petitioner indicated that [REDACTED] is responsible for "Measurement, Verification, inspection work, verification of communica/bills [sic]." The petitioner stated that [REDACTED] is responsible to "follow up with various agencies for the horizontal connectivity" and for "our entire accounts." Finally, the petitioner indicated that [REDACTED] is responsible for all technical matters of the company, coordination with the departments connectivity, field survey activity, and "looking after" various "districts." In lieu of providing the foreign entity's recent payroll records, the petitioner stated "please note that the tax return for 2005 indicates a total payroll expense of IR 195,000.00."

The petitioner has not provided a consistent or detailed description of the beneficiary's duties sufficient to establish his employment with the foreign entity in a qualifying managerial or executive capacity. The petitioner's initial statement that the beneficiary has "overseen all operations of the business" including such aspects of the business as "décor" and "menu" was not only vague, but is simply implausible in the context of a business that claims to primarily provide computer hardware and peripheral sales and services. Although the director specifically requested that the petitioner clarify the beneficiary's duties and submit evidence to substantiate any claimed managerial tasks, the petitioner merely repeated that the beneficiary "has oversee all operations of the operation." Any 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). 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). Absent further clarification, the AAO cannot determine that the beneficiary's duties with respect to "supply issues," "service concerns," "marketing," and "dealing with customers" are at a managerial level.

Furthermore, the petitioner's failure to submit requested evidence to document the claimed ten-person staff cannot be excused. The director clearly requested recent payroll records and position descriptions to substantiate the vague organizational chart provided with the initial petition. The petitioner's response, while it provided position descriptions for four employees, failed to provide the job titles for these employees, or evidence of wages paid to them. Furthermore, the position descriptions themselves were vague and appeared to be inconsistent with the type of business operated by the foreign entity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Although the petitioner relies on the petitioner's total payroll of 195,000 Indian rupees as evidence of payments to its employees, the AAO notes that this amount is equivalent to approximately \$5,000 and is not persuasive in establishing that the foreign entity in fact employs a ten-person staff. The petitioner did not explain why its recent payroll records were not being submitted. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Overall, the lack of a detailed job description for the beneficiary's current position, and the petitioner's failure to provide evidence of the staffing levels of the foreign entity, preclude the AAO from finding that the beneficiary has been or would be employed in a qualifying managerial or executive capacity. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. For this additional reason, the petition will not be approved.

Finally, the AAO notes that the petitioner claims to be an affiliate of the foreign entity and indicates that both companies are 100 percent owned by the beneficiary. The record establishes that the beneficiary is the sole proprietor of the foreign entity, however, the petitioner has not submitted documentary evidence to establish that the beneficiary owns the U.S. company. 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)). As this required initial evidence was not requested by the director, the AAO notes this deficiency for the record and will not discuss the matter further.

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).

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.