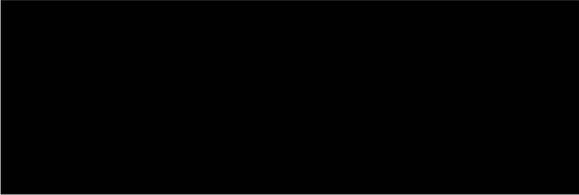


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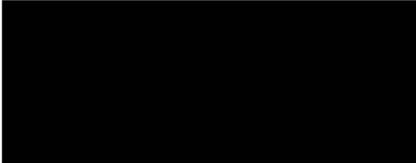
File: EAC 08 036 51560 Office: VERMONT SERVICE CENTER Date: **AUG 29 2008**

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, 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 corporation organized in the State of New York that will engage in construction, import and export, trading, oil and gas services, seeks to employ the beneficiary as its executive manager. The petitioner claims that it is the affiliate of Arabia Trade Industrial Contracting, LLC (ATIC, LLC), located in Giza, Egypt. The petitioner seeks to employ the beneficiary in the United States for one year to open a new office.

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.

The petitioner filed an appeal in response to the denial. On appeal, the petitioner submits a statement in which it asserts that the beneficiary, a civil engineer, is clearly qualified for the benefit sought. The petitioner continues on appeal to challenge each of the director's conclusions, and further asserts that the beneficiary is attempting to duplicate the foreign entity's offices in the United States. In support of the appeal, the petitioner submits additional documentary evidence pertaining to the United States company.

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.

- (v) 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 (1)(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 primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity within one year.

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.

With the initial petition, the petitioner submitted a letter dated October 29, 2007, in which it claimed that the U.S. entity was established and commenced doing business in October 2007. It further claimed that it was in the process of hiring five essential employees, namely, a secretary, an assistant manager, an administrative manager, a project engineer and an executive/general manager. However, no business plan outlining the proposed first year of operations was submitted.

With regard to the beneficiary, the petitioner claimed that as executive manager, he would be employed in the United States in an executive capacity. Specifically, the petitioner described the beneficiary's proposed duties as follows:

[The beneficiary] is needed in an executive capacity to direct the management of [the petitioner]. His duties will include (i) establishing the firm's goals and policies with regard to the United States customers, (ii) training United States supervisory personnel regarding the operation and fee structure of [the petitioner], (iii) hiring, promoting and firing employees, and (iv) supervising the assistant manager, administrative manager, engineering project manager and any other professional or managerial personnel who may be retained. In the next year, the firm projects that it will hire the essential staff which will initially consist of a secretary, assistant manager, administrative manager, and engineering project manager. [The beneficiary] as the New York executive manager shall receive during the first year a salary of \$40,000 per year for his services. [The petitioner] has the resources of its Egyptian affiliates.

The director issued a request for additional evidence on November 27, 2007. The request specifically asked the petitioner to submit documentation outlining the petitioner's proposed organizational hierarchy of the

entity, as well as a statement explaining how this new company will require and support the services of a bona fide manager or executive. The director further requested evidence to demonstrate how the beneficiary would be relieved, after one year of operations, from performing non-qualifying duties. Finally, the petitioner was requested to submit, in list form, a discussion of all the petitioner's proposed employees, including their proposed duties and the manner in which they would work with the beneficiary.

In a response dated December 15, 2007, the petitioner addressed the director's queries. With regard to the beneficiary, the petitioner provided the following statement:

As was previously described in the initial accompanying cover letter, the beneficiary will be employed in an executive capacity to direct the management of [the petitioner]. His duties will include (i) establishing the firm's goals and policies with regard to the United States customers, (ii) training United States supervisory personnel regarding the operation and fee structure of [the petitioner], (iii) hiring, promoting and firing employees, and (iv) supervising the assistant manager/director of U.S. operations, administrative manager, engineering project manager and any other professional or managerial personnel who may be retained.

The beneficiary will have full discretion over the day-to-day activities of the US Company, to coordinate these activities with the firm's other components in Egypt, and shall, as the New York executive, direct the managerial staff in Egypt he is currently responsible for directing to better fulfill the needs of the company, as he creates and perceives them. All of the above tasks involve the exercise of overall policies by the Board of Directors and/or shareholders in Egypt and U.S. The beneficiary will also oversee the administrative manager, engineering project manager, and assistant manager/director of U.S. operations.

The petitioner continued by identifying the proposed subordinate positions to be filled within the first year, and provided an overview of their duties. The petitioner advised that the engineering project manager would be required, for example to plan, coordinate and direct research, design production and project activities, in addition to supervising engineers. He would also identify technical problems preventing the completion of a project, propose budgets for projects. He would be required to have at a minimum a bachelor's degree in engineering or a related field.

The assistant manager would be required to "make well educated decisions which will effect productivity and which will allow the director to review and negotiate contracts on behalf of the firm." The assistant manager must have, according to the petitioner, a bachelor's degree in accounting or finance. The administrative manager, according to the petitioner, would coordinate and direct the many support services of the petitioner, and oversee secretarial and reception services, payroll, and data processing. According to the petitioner, a bachelor's degree would be required as a prerequisite for this position. The petitioner also identified proposed positions for a "mid-level manager," an executive secretary, and "other full-time personnel," and indicated that it would also hire independent contractors.

On January 18, 2008, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the

organization. The director further concluded that the petitioner would not reach the point where it could employ the beneficiary in a primarily managerial or executive capacity by the end of the first year of operations. Specifically, the director concluded that the petitioner failed to demonstrate that the beneficiary would function at a senior level within the organization aside from position title, and further found that the beneficiary would not be supervising professional employees who would relieve him from performing everyday functions.

On appeal, the petitioner restates the beneficiary's qualifications and provides substantive evidence in support of its claim that it is not technically a new office based on the amount of business it has conducted within the previous year. It is noted, however, that in response to each of the director's specific objections, the petitioner merely refutes the director's conclusions, yet makes no assertions nor submits any specific evidence to overcome these findings.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary will be a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties will be "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a qualified manager or executive by virtue of his position title, experience abroad, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed executive duties. 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).

The description of the beneficiary's proposed duties, provided in the supporting documentation, is vague and seems to merely paraphrase the regulatory definitions. Specifically, the identification of duties such as "establishing the firm's goals and policies" and "hiring, promoting and firing employees" do little to clarify what the beneficiary will do on an average workday. 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.* at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties, it appears that the majority of his time will be devoted to the coordination of activities between the U.S. and Egyptian offices. Moreover, on appeal, the petitioner submits an abundance of documentary evidence demonstrating that the beneficiary has been traveling to various countries in the past year for business related purposes, and all invoices and money transfers are in his personal name, as opposed to that of the foreign entity. It appears, therefore, that the beneficiary is actively engaged in first-hand business transactions with customers in various countries as opposed to directing managerial or professional staff abroad, as he contends is his current obligation. 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).

Based on this evidence submitted on appeal, it appears that the same types of responsibilities and duties will be exercised by the beneficiary in the United States. Although the petitioner contends that the beneficiary will hire three professional staff members in the coming year,¹ all of whom must possess a bachelor's degree, it does not seem feasible based on the current activities of the beneficiary abroad and the proposed nature of the U.S. business.

For example, the petitioner failed to submit a comprehensive business plan outlining the timeline for expansion of the newly-formed company within the coming year. While the petitioner submitted an abundance of documents from the foreign entity, and a document entitled "Financial Goals," none of this documentation sufficiently outlines the proposed scope and nature of the petitioner's proposed expansion in the United States.

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 staffing requirements and contain a timetable for hiring, as well as a job description for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

The record as it currently stands lacks a detailed plan such as the one outlined above. Although on appeal the petitioner indicates that it has filled several of its proposed positions, there is no outline with regard to the

¹ It is noted that on appeal, the petitioner submits an employee list, identifying ██████████ as its projects manager, ██████████ as its mid-level manager, Sundus el Ridi as its administrative manager, and ██████████ as its co-secretary. However, the petitioner has submitted no corroborative evidence, such as pay stubs or quarterly tax returns, to demonstrate that the petitioner in fact hired these employees. 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)).

manner in which staff will interact with each other during once business commences. As a result, it makes it virtually impossible for the AAO to conclude that the beneficiary's role will satisfy the requirements of the regulations at the end of the first year of operations. Although the petitioner asserts that the beneficiary will be acting in a primarily managerial capacity within one year of the approval of the petition, the petitioner provides no independent evidence to corroborate these claims. 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).

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(l)(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.

At the time of filing, the petitioner contended that it will engage in construction, import and export, trading, and oil and gas services. However, it has submitted a copy of a lease for what appears to be a basement apartment in a residential unit, and claims that it will soon hire three professional employees. Moreover, on appeal, it identifies by name three professional employees and a secretary, yet no documentation of their official hire dates has been submitted. Concurrently, the petitioner offers evidence of the beneficiary's extensive travel to countries like France, the United States, and Great Britain, and claims that the beneficiary's duties, all of which it claims are qualifying in nature, will be the same when the U.S. office is established. While the AAO acknowledges that the petitioner's intent in hiring subordinate employees is to enable the operation of the U.S. entity while the beneficiary is traveling, it does not appear that the proposed professional employees the petitioner intends to hire or has hired will be able to relieve the beneficiary from performing non-qualifying duties. Specifically, according to the petitioner's proposal with regard to the staff it intends to hire (i.e., a secretary, an assistant manager, an administrative manager, a project engineer and an executive/general manager, as set forth in its October 29, 2007 letter), there does not appear to be anyone designated to assume responsibility for the petitioner's core business areas of construction/engineering, oil and gas, and trading. Therefore, since none of the proposed and/or current employees are delegated to perform either the duties of the beneficiary or the duties associated with the core areas of the petitioner's proposed business, the petition and supporting evidence are insufficient to convince the AAO that the beneficiary will be relieved from performing day-to-day, non-qualifying duties by the end of the first year of operations.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, a question exists with regard to the claimed qualifying relationship between the petitioner and the claimed foreign affiliate. In the original letter of support dated October 29,

2007, the petitioner claims that the beneficiary is the majority owner of both the foreign entity and the petitioner, and that he owns 95% of ATIC, LLC (the foreign entity). This letter refers the AAO to Exhibit E, a stock certificate evidencing said ownership. In what appears to be a duplicate copy of the October 29, 2007 letter, contained later in the file, the petitioner claims that ATIC, LLC, the foreign entity, owns more than 50% of the U.S. company. This letter, like the former, also refers the AAO to Exhibit E, a stock certificate allegedly evidencing said ownership. Upon review of the file, the only stock certificate listed submitted indicates that the beneficiary is the owner of 190 shares of the petitioner. The certificate, which is partially illegible, is not numbered.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this matter, the only evidence of ownership of the petitioner is the stock certificate listing the beneficiary as the majority shareholder. If the beneficiary is the majority owner of the foreign entity, then the companies would be deemed affiliates and a qualifying relationship would be deemed to exist. However, the record contains no documentation pertaining to the ownership of the foreign entity, and the fact that the petitioner omits additional evidence, such as the stock ledger or the meeting minutes evidence the sale of shares, renders this certificate of limited evidentiary value. Moreover, the conflicting statements contained in the two letters of the same date in the file render this issue more confusing. 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). Absent evidence of the ownership of the foreign entity, it cannot be determined whether a qualifying relationship exists between the parties. 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).

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.