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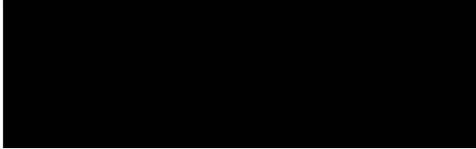
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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File: EAC 07 061 51259 Office: VERMONT SERVICE CENTER Date: FEB 01 2008

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)

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 in the position of president to open a new office 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 petitioner, a corporation organized under the laws of the State of Nevada, is allegedly engaged in the business of film marketing.¹

The director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year.

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 asserts that the petitioner has established that the beneficiary will perform qualifying executive duties within one year of petition approval.

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

¹It is noted that, according to documents on file with the Nevada Department of State, the legal name of the petitioner is actually [REDACTED]

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

In addition, the regulation at 8 C.F.R. § 214.2(1)(3)(v) states 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, 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 petitioner has established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

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.

The petitioner described the proposed United States operation in a letter from the foreign entity dated November 16, 2006 and in a document titled "business plan." The petitioner describes its proposed enterprise as converting and marketing adult films produced by the foreign entity abroad. The petitioner further indicates that the beneficiary "will open offices in Nevada and California, hire secretaries and investigate the possibilities of producing films in the USA in HD 16:9 for the European market."

On January 4, 2007, the director requested additional evidence. The director requested, *inter alia*, a proposed organizational chart for the United States operation, a more detailed description of the duties of the beneficiary and his proposed subordinates, and evidence that the foreign entity funded the incorporation of the United States operation.

In response, the petitioner submitted a statement in which it further describes the proposed United States operation. The petitioner asserts that it plans to "hire subcontractors (graphic artists, DVD authoring) who [the beneficiary] will find and hire on the US labour market." The petitioner further asserts that it plans to hire within one year a general manager, a bookkeeper, a graphic artist, and two secretaries. The petitioner describes the proposed duties of the general manager as follows:

- a) Running of Las Vegas office
- b) Being directly in charge of all office personnel
- c) Assisting with negotiations pertaining to production and royalty sales

d) Negotiations and finalizing contracts.

The petitioner did not submit an organizational chart in which "all of the beneficiary's proposed subordinates are clearly specified" as requested by the director in the Request for Evidence.

On February 21, 2007, the director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year.

On appeal, counsel asserts that the petitioner has established that the beneficiary will perform qualifying executive duties within one year of petition approval.

Upon review, the petitioner's assertions are not persuasive.

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.

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 organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions 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.

For several reasons, the petitioner in this matter has failed to establish that the United States operation 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. The petitioner has failed to sufficiently describe both the beneficiary's and his subordinates' proposed duties after the petitioner's first year in operation; has failed to establish that an investment has been made in the United States operation; has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office; and has failed to describe the organizational structure of the foreign entity. 8 C.F.R. § 214.2(l)(3)(v)(C).

First, as correctly noted by the director, the petitioner has failed to establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has provided a vague and non-specific description of the beneficiary's proposed duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, while the petitioner asserts that the beneficiary will initially set up the petitioner's office, hire staff, and finalize contracts with a variety of vendors, the petitioner failed to specifically describe the beneficiary's proposed duties after the business is established. The fact that the petitioner has given the beneficiary a managerial title and asserts that he will hire a "general manager" who will be "directly in charge" of subordinate workers does not alone establish that the beneficiary will actually perform managerial duties after the petitioner's first year in operation. The petitioner must also establish that the beneficiary will perform primarily qualifying duties. Specifics are clearly an important indication of whether a beneficiary's duties will be 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. The petitioner failed to specifically describe the duties of the proposed subordinate employees or to explain how, exactly, these prospective employees will relieve the beneficiary from performing non-qualifying tasks. The petitioner also failed to submit a detailed organizational chart in which "all of the beneficiary's proposed subordinates are clearly specified" even though this evidence was 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). As the petitioner fails to explain what tasks the beneficiary and his subordinate staff will perform after the petitioner's first year in operation or to explain how much time the beneficiary will devote to performing non-qualifying tasks, it cannot be confirmed that he will be "primarily"

employed as a manager or executive. 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; see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. While the petitioner asserts that it will hire a "general manager" who will be "directly in charge of all office personnel," the petitioner has failed to establish that this prospective employee will truly be a supervisory or managerial employee or, equally important, that the proposed enterprise will require the services of a subordinate tier of supervisors or managers after its first year in operation. Not only has the petitioner submitted a vague and non-specific description of the proposed duties of the "general manager," the petitioner failed to submit a proposed organizational chart clearly specifying the supervisory or managerial role of both the beneficiary and the "general manager." Once again, 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). Specifics are clearly an important indication of whether an employee's duties will be managerial or supervisory in nature. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41. Citizenship and Immigration Services (CIS) will not consider a worker to be a supervisory, managerial, or professional employee because of his or her job title.

Therefore, it cannot be confirmed that the beneficiary will supervise and control other supervisory, managerial, or professional employees, and it appears that the beneficiary will primarily be, at most, a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. See 101(a)(44) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial or executive capacity after the petitioner's first year in operation.

Second, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to establish that an investment was made in the enterprise. 8 C.F.R. § 214.2(l)(3)(v)(C)(2). In this matter, the record is devoid of evidence of any investment having been made in the United States operation prior to the filing of the petition. In the Request for Evidence, the director specifically requested evidence that the foreign entity funded the incorporation of the United States entity. The petitioner failed to respond to this request. Once again, 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). Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year for this additional reason.

Third, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because the petitioner has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C)(1). The petitioner's "business plan" vaguely describes the United States operation as marketing the foreign entity's European produced films. However, the plan fails to specifically describe the petitioner's proposed customers

or competitors. The plan also fails to corroborate its projections regarding revenue, income, expenses, or financial goals. The record does not contain any independent analysis or a proposed organizational chart. Once again, 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). Absent a detailed, credible description of the petitioner's proposed United States business operation addressing the petitioner's proposed marketing plan, customers, staffing, organization, and income/expense projections, it is impossible to determine whether the proposed 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. Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year for this additional reason.

Fourth, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because the petitioner failed to describe the organizational structure of the foreign entity. 8 C.F.R. § 214.2(l)(3)(v)(C)(3). Other than a vague organizational chart consisting only of job titles, the record is devoid of any explanation of the foreign employer's organizational structure. The petitioner failed to describe the duties of the subordinate employees.

Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for the above reasons.

Beyond the decision of the director, the petitioner has failed to establish that it has secured sufficient physical premises to house the new office. 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner indicated in both its Form I-129 and its "business plan" that its present address is [REDACTED] Las Vegas, NV 89117. On appeal, the petitioner submitted a lease for this location dated May 10, 2006. This lease is titled "Residential Lease – Rental Agreement." The beneficiary is the lessee, and paragraph 4 indicates that the premises "shall be used solely as a private dwelling." The petitioner also asserted the following in the statement submitted in response to the director's Request for Evidence:

As soon as [the beneficiary] receives his visa, an office will be established probably at [REDACTED] on Oakey and Markus St. In addition a full time secretary is also planned for 07[.]

Furthermore, [the beneficiary] will shortly rent an office from Alante International Sales, Inc. in Chatsworth, CA with an existing warehouse.

In view of the above, the petitioner has failed to establish that it has secured sufficient physical premises to house the new office. First, the petitioner is not a party to the lease dated May 10, 2006, and there is no evidence in the record establishing that this lease was assigned to the petitioner with the consent of the landlord. Therefore, the *petitioner* has not secured these physical premises. Second, the lease for [REDACTED] Las Vegas, Nevada clearly restricts the use of the premises to residential purposes. It is not credible that this location would be sufficient for a film conversion and marketing enterprise to grow to the

point that it will support a primarily managerial or executive employee within one year. Third, as explained above, the petitioner asserts that it plans to secure more appropriate commercial space for the United States operation in the future. However, the petitioner's future plan to secure sufficient physical premises is not relevant to the instant petition. The regulations require that the petitioner establish that it has already secured sufficient physical premises. 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).

Accordingly, as the petitioner has failed to establish that it has secured sufficient physical premises to house the new office, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years. 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner failed to specifically describe the beneficiary's job duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties will be 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. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad. Similar to the United States operation, while the petitioner asserts that the foreign entity is managed by a "general manager," the petitioner failed to establish that this employee is truly a supervisory or managerial employee or, equally important, that the enterprise requires the services of a subordinate tier of supervisors or managers. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Accordingly, the petitioner has not established that the beneficiary has been employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, the petitioner claims that both it and the foreign entity are 100% owned and controlled by the beneficiary. As a purported owner of both the petitioner and the foreign entity, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. 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).

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition may not be approved for this additional reason.

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.