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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: SRC 06 095 51544 Office: TEXAS SERVICE CENTER Date: JUL 03 2008

IN RE: Petitioner: [redacted]
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:

[redacted]

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 nonimmigrant visa petition was initially approved by the Director, Texas Service Center. Upon further review, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of her intent to revoke the approval and subsequently ordered that the approval be revoked. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Georgia corporation claiming to be engaged in the leasing of construction equipment. It originally sought to employ the beneficiary temporarily in the United States as its vice president of marketing, sales, and leasing to open a new office pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L). The petition was approved on February 10, 2006.

On August 3, 2006, the director issued a notice of intent to revoke the approval of the petition, noting that the record did not establish that the United States entity had secured sufficient physical premises to house the new organization, nor would the petitioner be able to support the beneficiary in a primarily managerial capacity at the end of the first year of operations. After reviewing the petitioner's response, the director concluded that the petitioner had failed to overcome the basis for revocation set forth in the August 3, 2006 notice, and subsequently revoked the approval of the petition on September 13, 2006.

On appeal, counsel for the petitioner asserts that the petitioner provided sufficient evidence in response to the director notice of intent to revoke to overcome the basis for the revocation. Counsel claims that the U.S. entity did in fact secure sufficient physical premises and had demonstrated that it would support the beneficiary in a managerial capacity at the end of the first year of operations. In support of these claims, counsel for the petitioner submits additional evidence.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization. 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.

Title 8 C.F.R. § 214.2(l)(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 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 (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 record reflects that the United States entity was established on December 23, 2005, and that it claims to be a subsidiary of Synnium Machinery Limited, located in Hong Kong. The United States subsidiary claims to be involved in the leasing of construction equipment.

The first issue in this proceeding is whether the petitioner secured sufficient physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The nonimmigrant petition was filed on February 2, 2006. With the initial petition, the petitioner submitted a copy of a document entitled "Regus Business Center Service Agreement," dated January 25, 2006. The document indicated that the petitioner would lease office space at a rate of $600.00 per month, with an initial payment of $1875.00 for the period from February 1, 2006 to April 30, 2006. The lease does not provide the square footage of the space leased, and it appears that upon review of the agreement, the petitioner leased merely office space consisting of one workstation and the use of utilities such as telephones and internet on an as-needed basis.

The record indicates that during his L-1 visa interview of March 28, 2006 at the U.S. Consulate in Shanghai, the applicant indicated to the consular office that the petitioner's business was currently being conducted from Shanghai, and that the petitioner did not have telephone service in the United States. The beneficiary also provided a bank statement indicating that the petitioner's business checking account had a balance of $399,980.00, yet reflected no rent payments to Regus pursuant to the January 25, 2006 agreement.

In the notice of intent to revoke, the director requested evidence of payment to Regus for the $600 per month rent in the form of bank statements, cancelled checks, or other evidence. The petitioner submitted documentary evidence, including bank statements for this period, but the director found that the evidence submitted failed to resolve the issue. Counsel for the petitioner also submitted evidence demonstrating the since the approval of the petition, the petitioner had opened an office in Seattle, Washington, and had further purchased property in Georgia as of July 2006. The director, however, found this evidence insufficient and concluded that sufficient physical premises had not been secured. The approval of the petition was revoked on September 13, 2006.

On appeal, counsel reasserts that the evidence submitted in response to the notice of intent to revoke overcame the director's objections and demonstrated that sufficient physical premises had in fact been secured. The same documentation submitted with the response to the notice of intent to revoke is submitted on appeal.

Upon review, the AAO concurs with the director's conclusions. The petitioner submitted an agreement entitled "Regus Business Center Service Agreement," dated January 25, 2006. The document indicated that the petitioner would lease office space at a rate of $600.00 per month for a period of three months. No

documentation pertaining to the intended location of the petitioner's business after April 30, 2006 was submitted.

The director concluded that the petitioner had failed to submit evidence of rent payments paid to Regus in accordance with the lease agreement. While the AAO concurs that there is insufficient evidence to demonstrate that the petitioner complied with the terms of the lease, the AAO also notes that the director failed to address the minimal evidence of rent payments provided by the petitioner.

The record contains bank statements for the petitioner for the periods ending January 31, 2006; March 31, 2006; April 30, 2006; May 31, 2006; June 30, 2006 and July 31, 2006. The AAO notes that the account summaries indicate the following payments made to Regus, via check card, during this period:

April 19, 2006:	$2,040.90
April 28, 2006:	$ 601.56
June 5, 2006:	$ 224.75
July 6, 2006:	$ 215.78

There are several discrepancies with regard to these payments. First, according to the terms of the lease, the term of the lease expired on April 30, 2006. The petitioner provided no documentation evidencing the extension of such a lease agreement. Second, the payments are in amounts that do not equal the monthly payments as stated in the lease agreement. Furthermore, they represent payments issued in the end of April and the beginning of June and July. No payments are documented for February, March, or May.

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). The petitioner's submission of bank statements evidencing check card payments to the leasing company, and in amounts not reconcilable with the stated monthly payments, are not persuasive to show that the petitioner was occupying the premises during the requisite validity period, which began on March 1, 2006.

In addition, it is noted that the beneficiary explained in his interview that business operations were being conducted in Shanghai, and that the U.S. petitioner had no phone service. No utility bills have been submitted for the period from March 1, 2006 until the time of revocation, and no additional documentation is included in the record to show that the petitioner actually occupied sufficient premises and began conducting business during this time. It should be noted that the petitioner's business is leasing construction equipment. However, in addition to the issues raised by the director in the notice of revocation, the AAO notes that the agreement with Regus makes no mention of commercial space or exterior storage areas or lots in which the petitioner would store this undoubtedly large construction equipment. The mere agreement to lease office space for a period of three months, when the petitioner's intended business is to lease construction equipment, is simply insufficient to convince the AAO that *sufficient* physical premises were leased by the petitioner at the time of the petition's filing.

Counsel contends on appeal that the petitioner has since purchased a property in Georgia as of July 2006, and further submits documentation of its new offices which are operating in Seattle, Washington. This

evidence is not persuasive. The petition in this matter was approved based on the petitioner's claim that it would open a new office in Georgia for the leasing of construction equipment. The fact that months after the filing of the petition it has purchased a commercial space and expanded its operations to Seattle is simply insufficient to warrant a reversal of the revocation in this matter. 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, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner established that it will be able to support the beneficiary in a primarily managerial or executive capacity at the end of the first year of operations. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) provides that the petitioner will submit evidence that:

> 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.

During his interview at the U.S. Consulate in Shanghai, the beneficiary indicated that he was the sole employee of the U.S. entity. The director noted that despite asking the beneficiary to provide proof that the petitioner in fact had secured office space, in the form of bank statements or phone bills, the beneficiary submitted only a bank statement showing a balance of $399,980. The bank statement showed no record of withdrawals of rent payments which, according the documentation provided, totaled $600 per month. Noting discrepancies between the evidence submitted during the interview and certain claims made on both Form I-129 and in the organizational chart, the director issued a notice of intent to revoke requesting evidence to clarify these issues. Specifically, the director noted that the petitioner's business appeared to be conducted from Shanghai, and thus requested definitive evidence that the petitioner was actually paying rent for its allegedly leased office space.

In response, counsel claimed that the L-1 petition for [redacted], another of the foreign entity's employees, was approved on April 27, 2006 and that he entered the United States on June 11, 2006 to implement the petitioner's business plan. The president of the foreign entity, in a letter of support dated August 29, 2006, also claims that he was dispatched to the United States in June 2006 to further the business development of the petitioner. Finally, in a letter dated August 7, 2006 between the petitioner and [redacted], which is submitted to the AAO for reference, it appears that at of August 2006, [redacted] was hired to assist [redacted] implement the business plan of the petitioner.

Counsel, therefore, relies on the presence of these three employees to overcome the director's finding that the petitioner would not be able to support the beneficiary in a primarily managerial or executive capacity at the end of the first year of operations. The AAO disagrees.

In addition to the question of whether the petitioner will support the beneficiary in a primarily managerial or executive capacity at the end of the first year of operations, there are a number of other factors to consider when adjudicating a new office petition. While the director focused primarily on the deficiencies set forth in the notice of intent to revoke, the AAO notes that a number of other factors, such as the petitioner's proposed business plan and hiring plan, the size of the U.S. investment, and the proposed duties of the beneficiary must all be considered when evaluating the validity of a new office petition. The AAO will attempt to analyze the areas which the director omitted from her analysis.

Other than the organizational chart and the expectation that it will eventually become one of the top three pump leasing companies in the State of Georgia within the next five years, as outlined in a letter from the petitioner dated January 30, 2006, the petitioner provides no concrete business plan. 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.

In this case, no such document has been submitted, and the petitioner's organizational chart and statements in its letters of support were quite vague and lacked detail with regard to the petitioner's planned objectives and timeline for achieving its goals. The petitioner omits any discussion of market strategy and the relative strengths and weaknesses of the petitioner. Although counsel on appeal submits documents pertaining to new hiring by the petitioner and a letter from a real estate broker assisting the petitioner in its expansion, these documents do not satisfy the petitioner's burden of proof. The petitioner provides no specific timeline for hiring subordinate employees, no financial projections, and no contracts currently in place. The petitioner relies primarily on its secured office space and the fact that it has hired two new employees, [redacted] (Chief Financial Officer) and [redacted] (Account Manager) since the filing of the petition. However, the hiring of two employees for positions not identified on its proposed organizational chart does little to demonstrate that it is implementing a comprehensive business plan.

In addition, the organizational chart submitted was inaccurate, as it listed members of the foreign entity's staff abroad who would eventually be transferred to the U.S. entity for an unknown duration to assist in the start-up of the company. However, the intended purpose of this visa classification is to enable a foreign entity establish a new company in the United States that will eventually require little or no personnel to be transferred from the foreign parent. While the petitioner indicates that it plans to hire additional staff in the future, the current organizational structure, made up of temporary employees, fails to conform to the proposed business plan submitted with the petition and fails to convince the AAO that the U.S. entity will be able to support the beneficiary in his intended managerial or executive position at the end of the first year of operations.

These deficiencies in the record, coupled with the vague job description of the beneficiary, prohibit a finding that the petitioner will be able to support a managerial or executive position at the end of the first year of operations. While the beneficiary is the intended vice-president of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment and that such capacity will be unwavering after the first year of operations.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In this case, the petitioner vaguely described the beneficiary's duties and seems to merely paraphrase the regulatory definitions of managerial and executive capacity in its letters dated January 30, 2006 and March 9, 2006. In addition, the descriptions provided fail to explain how the beneficiary's duties will interact and/or change with the hiring of the proposed subordinates. With a one-year limit during which it must establish a new office and support the beneficiary in a bona-fide managerial or executive position, it is unclear why the petitioner is unable to present a viable business plan outlining the steps the company will take each month to get the business underway. As discussed above, no definite hiring plan or timeline was submitted which would demonstrate when and how the beneficiary would be relieved from performing these non-qualifying duties. Moreover, the initial organizational chart, indicating that the petitioner will employ a president, a vice-president of technology and engineering and a vice-president of marketing, sales and leasing, does not account for the hiring of the chief financial officer and the account executive whom the petitioner hired subsequent to the revocation of the petition's approval. Merely claiming that that the beneficiary will plan, develop, and establish policies, without clearly specifying how and when he will do so, makes the instant petition less than credible.

Furthermore, absent a specific hiring plan and based on the petitioner's contention that it will employ three employees with executive titles, it appears that the beneficiary will be performing non-qualifying tasks. It is clear, therefore, that his proposed duties include many practical obligations that would normally be delegated by a manager or supervisor to a subordinate staff. The actual duties themselves 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). While the AAO recognizes the need for a managerial or executive employee to undertake such duties in the wake of a new company's establishment, the petitioner has failed to show how, if at all, the beneficiary will eventually be relieved from performing these tasks. An employee who primarily performs the tasks necessary to produce a

product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Additionally, the description of the beneficiary's duties is vague and not specific enough to clearly establish the beneficiary's role in the company. For example, the petitioner claims that the beneficiary's duties include "manag[ing] all employees" and "develop[ing] the customer base in North America." These duties, however, provide little insight to the nature of the beneficiary's day-to-day obligations. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108.

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. For the reasons discussed above, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity, or that the petitioner will grow to the point where it will require the services of a full-time manager or executive at the end of its first year of operations.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The decision of the director dated September 13, 2006, is affirmed. The appeal is dismissed.