identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

D7

[redacted]

File: WAC 08 056 50645 Office: CALIFORNIA SERVICE CENTER Date: OCT 0 1 2008

IN RE: Petitioner:
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:

[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 Director, California 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 "marketing manager" 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 formed under the laws of the State of Delaware, is described as being in the buttons and accessories business.

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 primarily perform qualifying duties within one year.

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.

In addition, the regulation at 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, 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 primary issue in this proceeding is whether 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 claims in a letter dated December 3, 2007 that the beneficiary will "undertake a temporary assignment at the U.S. California branch company, in order to apply his executive and managerial expertise to establish and expand the branch company." The petitioner also claims that the beneficiary will be the "marketing manager" and that he will be responsible for "warehousing, distribution and marketing." The record is otherwise devoid of evidence addressing the scope, nature, staffing, or organization of the proposed United States operation.

On December 27, 2007, the director requested additional evidence. The director requested, *inter alia*, a letter from the foreign employer explaining the need for the new office in the United States, including an explanation as to how the proposed enterprise will, within one year, grow to support a managerial or executive position; an associated feasibility study; a business plan; and minutes from the meetings of the foreign employer addressing the creation of the United States operation.

In response, the foreign employer submitted a letter dated October 12, 2007 in which it claims that the United States operation was formed as a result of its planned acquisition of a business pertaining to the manufacture of plastic buckles, Duraflex, on January 2, 2008. The new operation will allegedly "extend [its] marketing reach" and "be responsible for the marketing [and] service of customers who design backpacks using [the] Duraflex plastic buckles." The seller of the plastic buckle operation, National Molding Corporation, will allegedly become a licensee, which will manufacture and distribute the buckles within the United States, while the petitioner markets the products on a commission basis. However, the record is devoid of evidence pertaining to this purported acquisition of the Duraflex buckle business or to the petitioner's claimed agreement with National Molding Corporation to market the products.

The foreign employer also claims that the petitioner will receive an "initial investment" of "$600,000.00, which will be used to purchase the Duraflex operation from National Molding Corporation." Thereafter, the foreign employer projects that the petitioner will receive approximately $60,000.00 per month in sales commissions. However, the record is devoid of evidence corroborating these projections and does not include a copy of any agreements or other documents pertaining to this purported contract with National Molding Corporation.

The petitioner also submitted documents titled "feasibility study" and "business plan" in which the petitioner describes the proposed staffing of the United States operation for the first and second year of operations as follows:

> [The beneficiary] is to complete the setup of the US office in Southern California. No hiring is planned at this time, however, if the office setup is completed earlier, we might look into hiring one-two marketing staff soon. At the mean time, [the beneficiary] will manage [an east coast account manager], and together, they will handle the tradeshows (Outdoor Retailer Summer & Outdoor Retialer [sic] Winter) as a team. After the new marketing personnel is hired in South Carolina, [the east coast account manager] will be able to concentrate his effort on the sales effort in [e]ast coast accounts, still report to [the beneficiary] on his account activities.
>
> **2nd-3rd Year Plan**
>
> We plan to hire about two additional marketing staffs in the southern California office. The two new marketing staff is to report to and assist [the beneficiary] in organizing marketing activities that promotes [sic] the Duraflex brand in the US, such as the trade show organization, website, catalogs...etc.
>
> [redacted] will remain the President of the company overseeing everything. Mr. [redacted] will remain the East Coast Account Manager reporting to [the beneficiary] still.

On February 5, 2008, 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 director also noted that the petitioner did not provide "adequate supporting documentation" such as a letter from the foreign employer explaining the need for the new office, a feasibility study, a business plan, and minutes of the foreign employer.

On appeal, counsel asserts that the petitioner has established that the beneficiary will perform qualifying duties within one year of petition approval. Counsel also claims the petitioner did submit the documents that the director claims were omitted from the response to the Request for Evidence.

Upon review, counsel'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 establish that the beneficiary will primarily perform qualifying duties after the petitioner's first year in operation; has failed to establish that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to the operation of the business by a subordinate staff within the petitioner's first year in operation; and has failed to sufficiently and credibly describe the nature, scope, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C).

As a threshold matter, it is noted that, contrary to the director's statement in her decision, the petitioner's response to the Request for Evidence contains copies of a letter from the foreign employer explaining the

need for the new office, a document titled "feasibility study," a document titled "business plan," and what appear to be minutes of the foreign employer. Accordingly, to the extent the director's comments indicate that these documents were missing from the record, these comments are withdrawn and the AAO will review the documents in its consideration of the appeal. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). However, to the extent the director's comments were simply an indication these documents were not "adequate," these comments will not be disturbed because, as further explained below, the AAO agrees that the petitioner has failed to establish that it will be able to support a primarily managerial or executive employee within one year.

First, the job description for the beneficiary fails to credibly 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 description of the beneficiary's duties, which generally indicates that the beneficiary will primarily perform non-qualifying operational, administrative, or first-line supervisory tasks after the petitioner's first year in operation. For example, the petitioner claims that, after the first year in operation, the beneficiary will attend trade shows and will supervise between one and three workers who will market Duraflex buckles. However, neither of these tasks is a qualifying managerial or executive duty. To the contrary, sales and marketing tasks, and the first-line supervision of sales and marketing personnel, are operational or first-line supervisory tasks. Furthermore, the petitioner fails to address who, other than the beneficiary, will perform the non-qualifying administrative tasks inherent to the operation of a small business, e.g., correspondence, accounts payable, answering the telephone, invoicing, and banking. 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).

Accordingly, it appears more likely than not that the beneficiary will be primarily performing non-qualifying tasks after the first year in operation. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. The record is also devoid of evidence establishing that the proposed subordinate employees will be "professionals." Given the size and nature of the vaguely described business, it is more likely than not that the beneficiary and his proposed subordinate employees will all primarily perform the tasks necessary to the operation of the business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006).

Accordingly, the petitioner has failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity within one year, and the petition may not be approved for that reason.

Second, 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, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C)(*1*). As explained above, the petitioner claims that the United States operation was formed as a result of its planned acquisition of a business pertaining to the manufacture of plastic buckles, Duraflex, on January 2, 2008. The new operation will allegedly "extend [its] marketing reach" and "be responsible for the marketing [and] service of customers who design backpacks using [the] Duraflex plastic buckles." The seller of the plastic buckle operation, National Molding Corporation, will allegedly become a licensee, which will manufacture and distribute the buckles within the United States, while the petitioner markets the products on a commission basis. Thereafter, it is projected that the petitioner will receive approximately $60,000.00 per month in sales commissions.

However, upon review, the record is devoid of evidence pertaining to this purported acquisition of the Duraflex buckle business or to the petitioner's claimed agreement with National Molding Corporation to market the products. The record is also devoid of evidence corroborating any of its financial projections. The record also does not specifically describe the operation's marketing strategy, and the petitioner fails to submit evidence of having established any business relationships or identified any potential customers. The record does not contain any independent analysis, contracts, or list of business contacts. Absent a detailed, credible description of the petitioner's proposed United States business operation which is supported by evidence, it is impossible to conclude that 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. Once again, 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).

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 and the foreign employer are qualifying organizations.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." "Affiliate" is defined in part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*).

In this matter, the petitioner claims to be 100% owned and controlled by Duraflex Holding Ltd. of the British Virgin Islands. The petitioner also submitted a chart which indicates that Duraflex Holdings Ltd. is owned by UTX Group Holdings Ltd. which, according to this chart, also owns and controls the beneficiary's claimed foreign employer in Hong Kong. However, the record is devoid of evidence corroborating these claims. Once again, 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). The record does not contain stock certificates or other organizational documents which establish ownership and control of either entity. Furthermore, the director specifically requested evidence establishing ownership and control of the foreign employer. While the petitioner submitted a financial report and an annual return for the foreign employer, the petitioner failed to submit evidence which establishes its ownership and control. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Accordingly, the petitioner has failed to establish that it and the foreign employer are qualifying organizations, and the petition will 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 at 1002 n. 9 (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. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.