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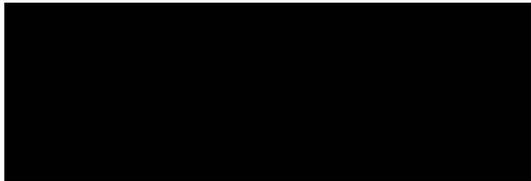
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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File: EAC 07 037 50927

Office: VERMONT SERVICE CENTER

Date OCT 02 200

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The petitioner subsequently filed a motion to reopen, which the director granted. The director then issued a decision affirming his prior adverse findings. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary among its managerial staff 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).¹ The petitioner is a corporation organized in the State of Texas and is engaged in the importing, exporting, and distribution of industrial equipment and providing various industry related services. The petitioner seeks to employ the beneficiary from November 27, 2006 until November 27, 2009.

The director denied the petition based on the determination that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's findings, reiterating the list of duties and responsibilities previously provided by the petitioner and asserting that the beneficiary's duties are managerial and executive in nature.

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.

¹ The record is inconsistent as to the job title of the beneficiary's proposed position with the U.S. entity. Part 5, item 1 of the petitioner's Form I-129 indicates that the beneficiary will be employed in the United States as a logistics manager. However, the letter submitted in support of the Form I-129, dated November 21, 2006, indicates that the beneficiary would be employed in the United States in the position of general manager, whose responsibility it would be to oversee the work of three managerial employees, including the logistics manager.

- (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.

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 primary issue in this proceeding is whether the United States entity would employ the beneficiary in a managerial or executive capacity, where the beneficiary's time would be primarily spent performing duties of a qualifying nature.

In support of the Form I-129, the petitioner provided a letter dated November 21, 2006 in which [REDACTED] the petitioner's vice-president, stated that the beneficiary's proposed employment would involve overseeing the company's activities and providing direction to a management staff comprised of a sales manager, a logistics manager, and an accounts manager.² Mr. [REDACTED] further stated that the beneficiary would indirectly manage all other personnel who would be reporting to the beneficiary's managerial subordinates.

Additionally, the petitioner provided its organizational chart, listing a total of 13 employees, including the beneficiary. The chart illustrated a multi-tiered organizational hierarchy, consisting of four managerial tiers. The beneficiary's position is depicted as third from the top, subordinate directly to the company's vice president. The chart shows that the beneficiary's direct subordinates consist of the three managers for the divisions listed above. The AAO notes, however, that Part 5, item 12 of the petitioner's Form I-129 previously indicated that the petitioner had 17 rather than 13 employees, a discrepancy that has not been resolved in the instant record of proceeding. This discrepancy is more puzzling when taking note of the fact that the beneficiary, whose immigration status, and therefore his employment for the U.S. petitioner, remains uncertain. Without the beneficiary as part of the petitioner's organizational structure, the petitioner would then have only 12 employees rather than 17 employees as claimed in the Form I-129. 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).

After reviewing the petitioner's initial submissions, the director determined that additional evidence was required in order to determine whether the beneficiary's proposed position with the U.S. entity would be within a managerial or executive capacity such that the beneficiary's subordinate staff would include supervisory, professional, or managerial employees who would relieve the beneficiary from having to perform the services of the U.S. entity. Accordingly, a request for additional evidence (RFE) was issued on February 22, 2007, informing the petitioner of the record's shortcomings. The petitioner was instructed to provide complete position descriptions for the beneficiary's direct subordinates, including an hourly breakdown of the job duties they would perform on a weekly basis, and an explanation of each subordinate's educational credentials.

The petitioner responded by submitting a letter dated May 10, 2007 from Mr. [REDACTED] who asserted that "the nature of [the beneficiary's] duties and responsibilities will require him to perform at an utmost senior level within the organizational hierarchy" and urged that the beneficiary would not be a manager only in position title. Mr. [REDACTED] asserted that the beneficiary's "senior position involves simultaneously working on different projects" and claimed that his role "does not necessarily lend itself to specific listing of assignments." Therefore, instead of describing the beneficiary's actual daily tasks, Mr. [REDACTED] provided the following list of job responsibilities:

² *Supra* n. 1.

- To effectively plan and coordinate all customer support activities whilst ensuring the most feasible methods are implemented for achieving the most efficient support of customers, sales staff and installers[.]
- To be responsible for the development, implementation and adherence to a [c]ustomer [s]upport [p]rogram, by developing and reviewing standards, policies and procedures for all functions involved with, or related to [l]ogistics, [a]ccounting and [s]ales functions
- To review and resolve product and service problems and other concerns within the [p]roduct [g]roup and or functions including vendors, customers, quality control personnel and any other entity related to logistics, product development and service.
- To oversee and supervise the processing of sale[s] orders, acknowledgements and sales invoices in conjunction with the [s]ales [d]epartment.
- To receive and review through is line managers all customer satisfaction surveys and all customers['] feed back. To analyze and act upon any customer complaint trends with regard to product or component failure and take appropriate corrective action with appropriate subordinates or other personnel.
- To provide guidance and advice on matters of technical assistance and training to customer representatives and field service personnel as and when required.
- [To b]e responsible for the control and review of all [c]ompany sales and purchase orders thereby ensuring conformity of established policies and procedures.
- To oversee and supervise all functions related to receiving of products, inventory control and interim quality controls and shipping of all goods sold.
- [To b]e responsible for annual performance reviews of all his subordinate staff.
- To assume direct supervisory responsibility for support staff assigned and to assist those in supervisory roles to effectively supervise staff under their direction. This includes the administration and facilitation of periodic performance reviews, authorization and approval of time[-]off requests.
- To assume an oversight role in the area of [i]nformation and [t]echnology by ensuring that information systems function properly and supervise the resolution of any problems as and when they arise.
- To assume a [f]acilities oversight role by ensuring the proper care and condition of the physical office environment as well as interacting with the landlord in the resolution of any

issues which may arise.

- Participate in and contribute to the [c]ompany's senior management monthly meetings to review the effective execution of operational plans and in the quarterly meetings to promote the [c]ompany's overall direction by developing and securing strategic sales opportunities so as to expand revenue growth and manage resource retention across our targeted market segment, identify new business opportunities and build lasting professional relationships.
- Stand in and assume responsibility for [the] [v]ice [p]resident's role as and when required due to [the] VP's ad hoc absence from the workplace.

It is noted that the petitioner provided no direct evidence establishing its employment of the three managers claimed be the subordinates of the beneficiary's proposed position. While the AAO acknowledges that this documentation was not specifically requested in the RFE, precedent case law has firmly established that 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)).

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a qualifying managerial or executive capacity. While the AAO finds that the adverse conclusion was warranted by the record presently before us, it is noted that the director's underlying analysis was flawed and must be duly addressed in this decision.

First, the director commented on the nature of the petitioner's business, finding that the "small import/export outfit" does not require a primarily managerial or executive employee. The basis for this finding, however, is unclear, particularly in light of the gross and net annual incomes indicated by the petitioner in its Form I-129 and further shown in the petitioner's 2005 and 2006 federal tax returns.

Second, the director issued another adverse finding on the basis of the beneficiary's proffered salary. The AAO notes, however, that a beneficiary's salary is an admissibility factor and not criterion to be used in determining his or her prospective employment capacity. The director's finding with regard to the latter is not supported by any statute or precedent decision.

Third, the director noted that while the beneficiary's claimed subordinates appear to have the necessary qualifications to perform in a professional capacity, they are not so employed within the petitioning entity. The AAO notes that the petitioner need not establish that the beneficiary's subordinates are both managerial and professional. Section 101(a)(44)(A)(ii) of the Act specifically states that if the beneficiary manages subordinate employees, the petitioner must establish that such subordinates are supervisory, professional, or managerial. There is no requirement that the subordinates must be both professional and managerial. In the present matter, the petitioner has indicated, through its provision of an organizational chart which includes the petitioner's hierarchy and the position titles included therein, that the beneficiary's subordinates are managers, who purportedly have subordinates of their own. The director's comment places an undue burden on the petitioner and is hereby withdrawn.

Notwithstanding the director's reasoning, the denial properly notes that the record lacks sufficient evidence to establish that the beneficiary would be relieved from having to devote the primary portion of his time to the performance of non-qualifying tasks. While the AAO acknowledges the petitioner's tax returns for 2005 and 2006, which show substantial revenues generated and significant salaries paid during both years, the AAO cannot make any assumptions regarding the beneficiary's proposed job duties on the basis of the petitioner's financial status.

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). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the record lacks a comprehensive and sufficiently detailed description of the beneficiary's day-to-day tasks. While the petitioner provides an extensive list of the beneficiary's proposed job responsibilities, the record lacks an adequate explanation clarifying which tasks the beneficiary would actually carry out on a daily basis in his quest to reach his job objectives. 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. Precedent case law recognizes the significance of a detailed job description, finding that the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). While the AAO does not rule out the possibility that the beneficiary may primarily perform qualifying job duties within his proposed position for the U.S. entity, the record as presently constituted does not support an affirmative finding, and it appears more likely than not that the beneficiary will not be primarily employed in a qualifying capacity.

Additionally, while the AAO does not agree with the director's finding regarding the managerial or professional nature of the beneficiary's proposed support staff, the petitioner must provide documentary evidence to establish that such a support staff was in place at the time the Form I-129 was filed such that the beneficiary would be immediately relieved from having to primarily perform non-qualifying tasks if the petition were approved. As previously stated, the petitioner's assertions, without supporting documentary evidence, are insufficient for the purpose of assisting the petitioner meet its burden of proof. *See Matter of Soffici*, 22 I&N Dec. at 165.

On appeal, counsel asserts that the petitioner generates considerable revenue and has 15 full-time employees, including four managers whose work the beneficiary would directly oversee. It is noted, however, that counsel's assertions regarding the petitioner's organizational make-up and the number of employees the beneficiary would oversee are inconsistent with information previously provided by the petitioner. As stated earlier, the petitioner's Form I-129 indicates that the petitioner has a total of 17 employees, while the organizational chart submitted in support of the petition lists 13 employees including the beneficiary. Counsel's current claim that the petitioner has 15 full-time employees adds further confusion to an already existing discrepancy, which the record does not resolve. *See Matter of Ho*, 19 I&N Dec. at 591-92. The record is also inconsistent with regard to the number of employees the beneficiary would manage. While the petitioner stated in Part 5, item 2 of the Form I-129 that the beneficiary would oversee two managerial

employees, the organizational chart indicates that the beneficiary would have three managerial subordinates and counsel now claims that the beneficiary would have four managerial subordinates. Despite the fact that all three assertions are inconsistent, the petitioner has provided no documentation establishing which, if any, of these assertions is factually accurate.

Accordingly, the AAO concludes that the petitioner has failed to provide sufficient documentation to establish that its Form I-129 warrants approval. While the petitioner is not precluded from filing another Form I-129 curing the significant deficiencies noted herein, the AAO cannot find that the beneficiary would be employed in a qualifying managerial or executive capacity on the basis of the record currently before us.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, the regulation at 8 C.F.R. § 214.2(l)(3)(iv) requires that the petitioner establish that the beneficiary was employed abroad for the requisite one-year period in a qualifying managerial or executive capacity. In the present matter, while the petitioner provided the foreign entity's organizational chart, which also showed that the beneficiary's direct subordinates were three managerial employees, the petitioner failed to provide a description of the job duties performed by the beneficiary during his employment abroad. Without this crucial information, the AAO cannot conclude that the petitioner met the requirement specified in 8 C.F.R. § 214.2(l)(3)(iv), and the petition must be denied 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.