

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D-7

File: EAC 08 019 51629 Office: VERMONT SERVICE CENTER Date: OCT 29 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

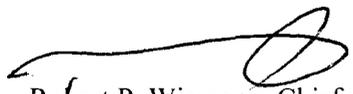
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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 nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas limited liability company, states that it intends to operate a bakery and confectionary. It claims to have a joint venture relationship with the beneficiary's foreign employer, My Bakers, located in Hyderabad, India. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a one-year period.

The director denied the petition concluding that the petitioner did not establish: (1) that it had secured sufficient physical premises to house the new office; or (2) the size of the United States investment and the financial ability of the foreign entity to commence doing business in the United States. The director concluded that the evidence of record was sufficient to demonstrate that the United States operation, within one year of approval of the petition, will support an executive or managerial position.

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 for the petitioner asserts that, contrary to the director's findings, the photographs the petitioner submitted as evidence of its physical premises were clear and identifiable. The petitioner submits additional photographs of its physical premises on appeal. In addition, counsel asserts that the director overlooked the petitioner's evidence of the financial status of the foreign entity, and improperly disregarded the submitted documents as "self-serving."

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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides 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 involves 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

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.

Therefore, if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the

petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(1)(3)(v).

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 therefore. Most importantly, the business plan must be credible.

Id.

The first issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new office.

The petitioner filed the nonimmigrant petition on October 25, 2007. The petitioner indicated on Form I-129 that its address is at [REDACTED], in Houston, Texas. The petitioner stated that it intends to operate a bakery and confectionary.

The petitioner submitted a lease agreement for the premises located at [REDACTED], which indicates that the size of the secured premises is approximately 1,600 square feet, to be used "only for the retail sale of food items."

In a request for additional evidence dated November 1, 2007, the director instructed the petitioner to submit photographs of the interior and exterior of the premises located at [REDACTED]. The petitioner was advised that, as a premium processing customer, it had the option of mailing its response or submitting it by

On January 27, 2007, the petitioner submitted by fax a total of eight photographs depicting retail space located at the street number "15207." The photographs appear to depict a storefront, one or two empty rooms, and another smaller room with one desk and chair. Because the photographs were sent by fax, the quality was poor.

The director denied the petition on February 8, 2008, concluding that the petitioner had failed to establish that it had secured sufficient physical premises to house the new office. The director acknowledged the evidence submitted, but determined that the photographs provided were "dark and non identifiable and therefore cannot be taken into consideration."

On appeal, counsel for the petitioner asserts that the petitioner states that the petitioner acquired the premises at [REDACTED], Houston, Texas "to establish and initiate its operations." Counsel states that "this location was acquired with the intention to establish a business and head office," and that after establishing the registered address at this location, "the Petitioner planned to engage in the establishment of a Bakery."

With respect to the director's specific findings, counsel contends that the petitioner submitted the required photographs and lease agreement for the premises secured, and that the photographs sent in response to the request for evidence were "clear and identifiable." Counsel asserts that the petitioner "cannot be blamed for the lack of resolution on the fax machine."

In support of the appeal, the petitioner submits clearer copies of the previously submitted photographs. The photographs depict a storefront with street address "[REDACTED]" One of the front windows has a sign advertising "KFC Catering," although it is noted that there is a KFC restaurant neighboring the premises. One of the interior photographs depicts a desk, chair and computer. The desk and wall contain various papers, and there is what appears to be a KFC "Biscuit Bowl Combo" sign on the desk, which raises questions as to whether this photograph was actually taken inside the petitioner's premises. The photographs depict one or two empty rooms with no equipment, furniture or fixtures of any type.

Upon review, and for the reasons discussed herein, the petitioner has not established that it has secured sufficient physical premises to house its new office.

First, the AAO concurs with the director that the photographs submitted in response to the request for evidence did not clearly depict the petitioner's premises. While it is correct that the petitioner had the option of sending its response to the request for evidence by fax, it was foreseeable that black and white photocopies of photographs would not translate well over a fax machine. Regardless, the AAO notes other deficiencies in the petitioner's evidence which further support a finding that the petitioner failed to meet its burden of proof with respect to the physical premises requirement at 8 C.F.R. § 214.2(l)(3)(v)(C).

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it intends to operate a bakery and confectionary in the United States. Therefore, it is reasonable to expect the petitioner to secure premises that are suitable for the operation of a bakery. The petitioner submitted a lease agreement for physical premises that are authorized by the landlord to be used and occupied "only for retail sales of food items." There is nothing in the lease agreement indicating that the premises could be used as a bakery, and the photographs submitted further confirm that space does not contain facilities for baking, nor would it appear to accommodate such facilities.

On appeal, counsel for the petitioner indicates that the premises acquired were for a "head office" or "registered office," while the petitioner intends to engage in the establishment of a bakery after establishing its registered office. However, as noted above, the premises acquired, according to the lease agreement, are not intended for use as offices. Rather, the premises are to be used as a retail food store.

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 AAO's analysis of this issue is hindered by the petitioner's failure to submit a business plan clearly describing the nature of the business it intends to operate, and a description of its anticipated space requirements for such business. Therefore, the AAO must assume that the petitioner intends to operate a bakery as stated on the Form I-129. The petitioner has not established that the premises secured are sufficient for the operation of a bakery, and therefore, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner has established the size of the investment in the United States entity, and the financial ability of the foreign entity to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2).

At the time of filing, the petitioner submitted copies of the foreign entity's tax returns and accompanying accountant-prepared financial statements filed with the Government of India for the years 2005-2006, 2004-2005, and 2003-2004. The petitioner also submitted "evidence of money transfer to the USA" in the form of two wire transfer receipts. One wire transfer receipt shows that [REDACTED] transferred \$11,250 to an account held by the beneficiary on October 4, 2007. The second receipt shows a transfer in the same amount on the same date, from [REDACTED] to the beneficiary's account. The "remittance information" for both transactions was "Investment."

Finally, the petitioner submitted a document titled "Business Investment Plan for 2007-2012" which indicates the foreign entity's intent to start a bakery product business in the United States, with an initial contribution of "an extra \$25,000.00" with further capital contributed as needed.

In the request for evidence issued on November 1, 2007, the director advised that the record did not contain sufficient information regarding the size of the United States investment or the financial ability to commence doing business in the United States. The director requested copies of the foreign entity's audited or reviewed financial statements and tax returns for 2005 and 2006, and noted that "internally generated financial statements will not be acceptable as such documentation is considered self-serving." The director advised that

if the petitioner submits documentation that includes foreign currency denominations, that it must calculate the value in United States dollars, and provide evidence of the source for currency conversion exchange rates. Finally, the director requested copies of any bank wire transfers or Customs Forms 4790 that were executed to document the transfer of any funds between the foreign business and the United States entity.

In a response received on January 27, 2008, the petitioner submitted the same documents previously submitted, along with a copy of the foreign entity's 2006-2007 Income Tax Return filed with the Indian Ministry of Finance on July 21, 2006, with accompanying computation of income, balance sheet, and trading and profit & loss account, which were filed as attachments to the tax return. All figures on the submitted documents were provided in Indian rupees, and the petitioner did not provide the requested currency conversions. The petitioner also re-submitted the wire transfer receipts submitted in support of the initial filing.

The director denied the petition concluding that the petitioner failed to submit sufficient evidence of the size of the investment in the U.S. company and the financial ability of the foreign entity to commence doing business in the United States. The director therefore concluded that the record does not support a finding that the petitioner will support an executive or managerial position within one year. The director stated that, although requested, "no audited or reviewed financial statements for the years 2005 and 2006 were received with your response." The director acknowledged receipt of balance sheets and computation of income for tax purposes, but found the petitioner's response to the request for evidence to be insufficient.

On appeal, counsel for the petitioner asserts that the petitioner submitted copies of its actual tax returns that were filed with the government of India. Counsel contends that the documents were not internally generated, as suggested by the director, but are government documents prepared by the foreign entity's accountant for filing with India's taxation authorities. Counsel asserts that such evidence "clearly suffices the financial ability concerns."

Preliminarily, the AAO concurs with counsel that it does appear that the director overlooked or otherwise failed to consider the foreign entity's tax returns, which were among the documents specifically requested by the director as evidence of the financial status of the foreign entity. As noted above, the AAO's review is conducted on a *de novo* basis; therefore, the AAO will herein address the petitioner's evidence and eligibility here.

Upon review of all of the evidence submitted, the AAO cannot find that the evidence of record "clearly suffices the financial ability concerns" as contended by counsel. The petitioner has not established the size of the United States investment or the financial ability to commence doing business in the United States, as there are several deficiencies in the evidence of record.

First, the petitioner did not, in fact, submit a complete response to the director's request for evidence, as it submitted all financial documents for the foreign entity with currency provided in Indian rupees. The director specifically instructed the petitioner to submit all financial information in United States dollars and to provide the source of the currency conversion rates used. 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).

Second, the petitioner has not provided any explanation of its anticipated capital requirements or start-up costs for the commencement of business in the United States. Therefore, although the record contains a half-page “business investment plan” indicating that \$25,000 will be invested in the U.S. company, there is no way to discern whether this investment would be adequate for the petitioner to commence its intended operations. Absent some explanation of the amount of cash required to pay for the company’s start-up costs, which are typically itemized in a company’s business and financial plan, the AAO cannot conclude that an investment of this size would be sufficient. 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)).

Finally, the record as presently constituted contains no evidence of any funds already provided to the U.S. entity for the purpose of establishing the new company, nor any evidence that the company even had a bank account as of the date of filing. The evidence of record shows that two individuals, who have not been specifically linked to the foreign entity or its partners, transferred funds totaling \$22,500 from unidentified accounts in India to the beneficiary’s personal account in the United States. Therefore, the wire transfer receipts are of little evidentiary value in establishing an investment in the U.S. company.

Overall, the evidence submitted does not clearly establish the size of the foreign entity's investment in the United States entity, nor does it demonstrate that the company had or would have sufficient funds to meet its anticipated start-up costs at the time the petition was filed. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that the beneficiary would be employed in a managerial or executive capacity within one year of the petition approval, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner has not submitted a business plan for the U.S. office, or otherwise provided evidence regarding the proposed nature of the office or describing the scope of the entity, its organizational structure, and its financial goals. 8 C.F.R. 214.2(l)(3)(v)(C)(I). The petitioner simply states that the U.S. company will engage in the same business as the foreign entity, estimates that it will have four employees, and indicates that it anticipates annual income of \$240,000. The record contains no hiring plan, no explanation as to what types of employees will be hired or when they will be hired, and no financial projections supporting the petitioner’s assertions. The limited information provided regarding the nature and scope of the business falls significantly short of meeting the evidentiary standard in the regulations. The AAO has no basis to determine how many employees the company intends to hire by the end of the first year of operations, or whether the proposed staff would reasonably relieve the beneficiary from performing non-managerial and non-executive tasks associated with operating the petitioner’s business. 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. at 165. The AAO cannot speculate as to when the proposed employees might be hired or otherwise determine how many employees the company would support at the end of the first year of operations, or who would be performing the day-to-day, non-managerial functions of the petitioner’s business.

Furthermore, the petitioner has provided an excessively vague description of the beneficiary’s proposed duties that merely paraphrases the statutory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. For example, the petitioner indicated that the beneficiary will develop long

range goals and objectives, direct and coordinate activities, formulate and administer company policies, review and analyze activities, costs, operations, and discuss required changes in goals or objectives. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Overall, the vague job description provided for the beneficiary, the lack of a detailed business plan, hiring plan or financial projections, considered with the lack of evidence of the size of the U.S. investment as discussed *supra*, prohibits a determination that the petitioner could realistically support a managerial or executive position within one year. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 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.

ORDER: The appeal is dismissed.