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U.S. Citizenship  
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Services

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File: EAC 08 008 52828 Office: VERMONT SERVICE CENTER Date: **SEP 02 2008**

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

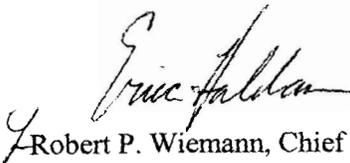
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.



Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its president 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 is a corporation organized in the State of Florida and claims to be engaged in the repair, refurbishing, and distribution of slot machines in South Florida and Latin America. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner, through counsel, subsequently filed an appeal asserting that the director erred and that the beneficiary's duties establish that he would be employed in an executive capacity.

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)(14)(ii) also provides that a visa petition, which involved the opening of a

new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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.

In support of the Form I-129, the petitioner provided a letter dated October 8, 2007 stating that it seeks to employ the beneficiary for an additional two years in a managerial capacity. The petitioner stated that it is currently directed by the beneficiary, who, as a result of its "Strategic Alliance Agreement" with Evolution Game Technology Corp. (hereinafter "Evolution"), is now overseeing the activities of two Evolution employees alleged by the petitioner to be managerial. The petitioner provided the following description of the beneficiary's proposed employment:

[The beneficiary] acts in an executive capacity, and has been in charge of specific critical functions. He heads up: 1) the business development component of our business and, 2) directs the product development and acquisition function of our operations. In this capacity, he: establishes the goals and policies of the U.S. [s]ubsidiary, i.e., he 1) determines the level and pace of expansion, 2) decides which gaming products and services are economically viable to offer in specific markets here and abroad; 3) pursues, selects and oversees all negotiations with both suppliers and purchasers worldwide (with final and exclusive authority to commit the U.S. [s]ubsidiary to sales and supply contracts), and 4) establishes policies and procedures for all business development as well as product offerings. He is the senior corporate officer in charge of these functions, and exercises complete discretion in carrying them out. He receives directives and approvals of a general nature from [sic] the board of directors . . . . He oversees others who carry out the tasks associated with executing upon his functions.

[The beneficiary] will continue to[:]

- Be responsible to meet or exceed the financial results forecasted by the U.S. [s]ubsidiary for gaming machines sales, in accordance with the expectations of the [p]arent [c]ompany's board of directors.
- Develop new strategies for developing relationships with manufacturers of gaming machines and games, and acquiring new and innovative products worldwide.
- Develop and manage processes and procedures for penetration and growth within target markets, as well as efficient product delivery, maintenance and follow[-]up.

Identify the needs and preferences of consumers within [the] niche gaming markets and develop new products and acquire new games to satisfy demand.

- Analyze competitors in the slot machine and "games of skill" industry, including their products, prices, marketing and advertising methods, and develop and implement competitive products, plans and practices accordingly.
- Analyze and report gaming product adoption and usage in [the] target markets, and utilize the information to drive subsequent product strategies.
- Ensure future gaming product releases reflect experience gained from external market activities, including customer discussions, usage analysis, revenue/payout data, competitive response, and market research.
- Lead product personnel through the promotion, launch, maintenance and retirement of gaming machines and games.
- Act as a recognized expert in the filed [sic] of gaming, in order to resolve issues or uncertainties regarding machine programming and operation raised by gaming authorities or important clients, as needed.
- Develop internal quality controls, processes and procedures for personnel assigned to the distribution, sale, and lease of gaming products.
- Assure product compliance with local laws and regulations in all markets in which they are offered.
- Establish formulas and procedures for the preparation of revenue and payout projections for gaming product acquisitions and sales and present same to the board of directors of the [p]arent [c]ompany or to major clients, as appropriate.
- Develop internal quality control, processes and procedures for personnel assigned to the provision of gaming products.
- Maintain [sic] the [p]arent [c]ompany's board of directors informed of progress and request funding as appropriate for large acquisitions of new gaming products and general expansion of operations, as needed.
- Appoint supervisors and managers, and assign or delegate responsibilities to them, with complete discretion to hire and fire as he deems fit.
- Develop budgets and acquire the appropriate funding for new operations from the [p]arent [c]ompany, as necessary.

- Handle all large financial transactions, acquire funding, loans, and lines of credit as necessary, supervise accounting and bookkeeping procedures.
- Acquire necessary insurance, and ensure compliance with federal, state and foreign laws and regulations, as well as tax, corporate and licensing laws.

On December 14, 2007, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) in an effort to address various key issues, including the beneficiary's employment capacity in his proposed position with the U.S. entity. Specifically, the petitioner was instructed to provide a comprehensive description of the beneficiary's job duties and to discuss any employees that are subordinate to the beneficiary, providing their job duties and educational credentials. The petitioner was also asked to provide various tax and payroll documents, including W-2 wage and tax statements and quarterly wage reports.

In response, the petitioner provided a letter dated January 22, 2008 in which CIS's concerns were duly addressed. With regard to the beneficiary's job duties, the petitioner provided an additional list of responsibilities, stating that the beneficiary would develop and implement optimal business strategy regarding the petitioner's slot and game machine products; oversee commercial activities and financial transactions regarding the selection, purchase, and subsequent sale of slot machines and parts; manage and expand business relationships with the providers and distributors of slot and gaming machines; establish and oversee the implementation of the petitioner's gaming machines and parts; report to the foreign entity's board of directors; analyze and evaluate the petitioner's performance; and hire and fire employees.

With regard to staffing, the petitioner stated that it currently employs the beneficiary and a general manager on a full-time basis and expects to hire a sales manager in February 2008. The petitioner also provided its quarterly wage reports for the third and fourth quarters of 2007. It is noted that the beneficiary was listed as the petitioner's only employee during both quarters.

After reviewing the petitioner's submissions, the director issued a decision dated March 19, 2008 denying the petitioner's Form I-129 on the basis that the beneficiary would not be employed in a qualifying managerial or executive capacity. The AAO has since reviewed the petitioner's record, including its submissions on appeal, and concludes that the director's decision to deny the petition on this basis was warranted. However, a number of the comments issued by the director in support of the denial were inaccurate or irrelevant to his overall conclusion regarding the petitioner's eligibility. First, the director commented on the beneficiary's salary and educational credentials, concluding that the amount of the beneficiary's compensation and "the beneficiary's apparent lack of a college degree" are both indicative of an employee who is not performing qualifying managerial or executive job duties. However, the AAO finds that both observations place undue emphasis on factors that have little or nothing to do with whether or not an individual is employed in a qualifying capacity. Second, the director commented on a 2006 federal income tax return, which showed that the amount paid in salaries was \$28,720, an amount that did not match the beneficiary's salary either for 2006 or for 2007. However, as properly pointed out in counsel's statement on appeal, the tax return referenced by the director is that of Evolution Games Technology Corp., not that of the petitioner. Accordingly, the director's irrelevant and erroneous comments will not be considered by the AAO in determining whether the beneficiary would be employed in a qualifying capacity.

Nevertheless, the director properly considered the petitioner's organizational hierarchy and the availability of a support staff in determining whether the beneficiary would be employed within a qualifying capacity. Namely, the director noted that the beneficiary was the petitioner's only employee at the time the Form I-129 was filed. The director further noted that the petitioner does not have employees to sell its products or provide other related services to the petitioner's clientele. Based on these observations, the director concluded that the beneficiary would not be relieved from having to primarily perform daily operational tasks that would not be deemed as being managerial or executive. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, counsel asserts that the petitioner is merely a start-up company "with barely a year of operation." However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

Next, counsel asserts that as a result of the petitioner's business relationship with Evolution Games Technology Corp., the beneficiary now manages several additional employees. However, the RFE specifically addressed the issue of the beneficiary's subordinates by asking the petitioner to name such individuals and to provide their respective job descriptions to establish how they assist in relieving the beneficiary from having to primarily engage in non-qualifying tasks. In its response, the only individual named as the beneficiary's subordinate was a general manager, whom the petitioner did not employ at the time the Form I-129 was filed and therefore will not be considered, as 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). Similarly, while the petitioner indicated its intent to hire a sales manager, this projected hire was scheduled to take place in February 2008 and also will not be considered by the AAO in deciding whether the Form I-129 at the time of filing merited the director's approval.

Furthermore, even if, *arguendo*, the AAO were to accept counsel's assertion that the petitioner's business relationship with Evolution Games Technology Corp. resulted in the latter entity providing the petitioner with personnel in exchange for the petitioner's consulting services, the petitioner has not provided the names, job titles, or job duties of the individuals the beneficiary purportedly manages; nor did the petitioner provide documentation to establish the official exchange between the two entities. While the petitioner has provided a document entitled "Strategic Alliance and Consulting Agreement," which shows that some type of business relationship has been created between the petitioner and Evolution Games Technology Corp., this document does not establish that the latter company provides the petitioner with any personnel that would somehow relieve the beneficiary from having to primarily perform tasks that are directly associated with repairing, refurbishing, and distributing slot machines. 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)).

Lastly, counsel asserts that the beneficiary is employed within an executive capacity. However, he provides nothing to support this assertion except a restatement of the statutory definition of executive capacity. Counsel fails to specify which of the beneficiary's job duties actually fit each of the four qualifying criteria for the definition of executive capacity. Nor does counsel address the fact that the petitioner did not employ anyone other than the beneficiary at the time of filing such that the only logical conclusion is that the beneficiary was carrying out all the duties, regardless of their nature, as a direct result of having no other employees to perform the primary portion of the non-qualifying tasks. Moreover, counsel fails to take into account the petitioner's own description of the beneficiary's job duties as initially provided in the support letter dated October 8, 2007. While that description refers to personnel who would promote, launch, maintain, and retire gaming machines, as well as follow through with processes and procedures set up to ensure quality control, such personnel was not in place at the time the Form I-129 was filed. This clear lack of any supporting personnel leads the AAO to believe that the performance of non-qualifying tasks would continue be the beneficiary's responsibility unless and until the petitioner is able to reach the stage of development where non-qualifying tasks no longer consume the primary portion of the beneficiary's time.

In summary, counsel's statements on appeal are not persuasive and do not warrant a withdrawal of the director's decision. Accordingly, the appeal will be dismissed.

Additionally, beyond the decision of the director, the petitioner has failed to establish that it has been doing business for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B).

A visa petition which involved the opening of a "new office" may be extended by submitting evidence that the petitioner "has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). "Doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services."

In this matter, the initial "new office" petition was approved from October 9, 2006 until October 9, 2007 (EAC 06 234 53626). However, the record does not establish that the petitioner began "doing business" as defined in the regulations at the time of the initial petition's approval. The only evidence that shows the petitioner previously engaging in business transactions during the relevant one-year time period are two invoices dated December 22, 2006 and September 24, 2007, respectively. These two invoices, however, do not establish that the petitioner was doing business in a regular, systematic, and continuous manner during the remaining ten months of the relevant period. Accordingly, the petitioner has failed to establish that it has been doing business for the previous year, and the petition may not be approved for this additional reason. 8 C.F.R. § 214.2(l)(14)(ii)(B).

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. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.