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U.S. Citizenship and Immigration Services

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[redacted]

File: EAC 07 108 52366 Office: VERMONT SERVICE CENTER Date: SEP 03 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, 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 petition seeking to employ the beneficiary in the position of "general manager/director" 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 business entity organized under the laws of the State of Hawaii, is allegedly in the "hotel management and asset acquisition" business.[1]

The director denied the petition concluding that the petitioner failed to establish (1) that the United States operation will support an executive or managerial position within one year; or (2) that the United States operation has secured sufficient premises to house the new office.

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 and that the petitioner has secured sufficient premises to house the operation.

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.

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[1]Although the petitioner describes itself as a limited liability company, both the supporting documents in the record and the public corporate records maintained by the State of Hawaii indicate that the petitioner is actually a corporation called [redacted]

(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 main two issues in this proceeding are (1) whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position or; (2) whether the petitioner secured sufficient physical premises to house the new office.

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.

Counsel claims in a letter dated March 7, 2007 that the petitioner "was incorporated to operate its Hawaii business in the hotel management, asset liquidation and real estate in the State of Hawaii, USA." Other than this vague description provided by counsel, the record is devoid of evidence pertaining to the proposed United States operation. Although the table of contents appended to the petition indicates that a lease was attached, the record does not contain a lease.

On April 30, 2007, the director requested additional evidence. The director requested, *inter alia*, a copy of a business plan, evidence establishing that the United States operation will grow to be of a sufficient size to support a managerial or executive position within one year, evidence that the petitioner has secured sufficient physical premises to house the new office, and photographs of the secured premises.

In response, counsel submitted a document described as a "business plan" and titled "Exhibit A." Generally, the petitioner claims that the beneficiary will "begin contacting the Japanese and local hotel owners in Hawaii for the purpose of undertaking contractual management and assistance in the hospitality industry for the Japanese hotel owners in Hawaii acting as the owner's agent." The petitioner also claims that it will act as a "special consultant" to hotels on construction, operations, and special events and that the "Sheraton Hotel

chain" will be its primary customer. Furthermore, the petitioner claims that it will hire between two and five additional employees to assist in the provision of its management services. Finally, in response to the director's inquiry regarding the growth of the business, the petitioner admits that "it is very difficult to project whether the new company will grow to sufficient size to support a managerial or executive position," that "for at least the first year or two" the beneficiary will be required to perform non-qualifying tasks, and that "it is anticipated that it will require more than one year for [the beneficiary] to be able to relinquish the non-managerial functions of the company."

Moreover, while the petitioner submitted photographs of its claimed "business office" in downtown Honolulu, the petitioner did not submit a lease for this location.

On August 21, 2007, the director denied the petition concluding that the petitioner failed to establish (1) that the United States operation will support an executive or managerial position within one year; or (2) that the United States operation secured sufficient physical premises to house the new office.

On appeal, counsel asserts that the petitioner has established that the beneficiary will perform qualifying duties within one year of petition approval and that the United States operation has secured sufficient physical premises. In support, counsel submits a copy of the lease which was listed in the table of contents appended to the initial petition but was omitted from the record.

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. Specifically, 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; has failed to establish that a sufficient investment has been made in the United States operation; has failed to sufficiently and credibly describe the nature, scope, and financial goals of the new office; and has failed to establish that the United States operation has secured sufficient physical premises. 8 C.F.R. § 214.2(l)(3)(v)(C).

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 be primarily performing non-qualifying operational or administrative tasks after the petitioner's first year in operation. For example, the petitioner claims that the beneficiary will act as an "agent" or "special consultant" to hotels in Hawaii and that "it is anticipated that it will require more than one year for [the beneficiary] to be able to relinquish the non-managerial functions of the company." Accordingly, it appears more likely than not that the beneficiary will be primarily performing non-qualifying tasks after the petitioner's first year in operation. In fact, the petitioner appears unsure whether the business will ever grow to the point that it will support a managerial or executive position. 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).

Consequently, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to "primarily" perform the non-qualifying tasks inherent to his duties and to the operation

of the business in general. While the petitioner claims that it will hire between two and five additional employees during its first year in business, the petitioner has failed to establish that it will truly be able to hire these workers and, even if it could, that these workers will relieve the beneficiary of the need to primarily perform non-qualifying tasks. The petitioner's "business plan" vaguely describes the proposed United States operation as a hotel management consulting enterprise. However, the plan and associated financial projections are entirely unsupported by evidence. The record does not specifically describe the operation's marketing strategy, and fails to identify any business relationships or potential customers, other than a single uncorroborated claim to work for the Sheraton hotel chain. The petitioner failed to establish the proposed cost of hiring the additional workers or explain in detail what, exactly, they will do on a day-to-day basis. Finally, the record does not contain any purchase orders or contracts, and is devoid of evidence of any assets. 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's claim that its newly formed operation, with no proven assets, will hire between two and five workers who will eventually relieve the beneficiary of the need to primarily perform non-qualifying tasks is not credible and is not supported by any evidence. Simply alleging that the petitioner will hire employees who will perform all the non-qualifying tasks inherent to the business does not establish that the United States operation will truly grow and mature into an active business organization which will reasonably require the services of a beneficiary who will primarily perform managerial or executive duties. Rather, the petitioner must clearly define the scope and nature of a United States operation and establish that it has, and will continue to have, the financial ability to support the establishment and growth of the business. However, as the record in this matter is devoid of any such evidence, the petitioner has failed to establish that the beneficiary will more likely than not perform "primarily" qualifying duties after the petitioner's first year in operation.

Furthermore, even assuming that the petitioner will have the ability to hire the workforce proposed in the petition, the record is not persuasive in establishing that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees. It appears that any workers hired by the petitioner will perform the tasks necessary to the operation of the business, and the beneficiary will be their first-line supervisor. Given the size and nature of the vaguely described consulting 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 after the first year in operation. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). It is not credible that a business, such as the petitioner's proposed United States operation, will develop an organizational complexity within one year which will require the employment of a subordinate tier of managers or supervisors who will ultimately be supervised and controlled by a primarily managerial employee. Therefore, it appears that the beneficiary will be, at most, a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

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 it failed to establish that a sufficient investment was made in the enterprise. 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*). In this matter, the record is devoid of evidence that any investment has been made in the United States operation. Furthermore, given that the business plan does not contain any corroborated, specific financial projections related to rent, salary expenses, and other start-up costs, it would be impossible to discern what size of an investment would be necessary for the new business to grow and thrive even if the record contained evidence of an investment. 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.

Accordingly, as the petitioner has failed to establish that it has received a sufficient investment, the petition may not be approved for this additional reason.

Third, 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 vaguely describes the United States operation as a hotel management consulting business. However, the plan and associated financial projections are entirely unsupported by evidence. The record does not specifically describe the operation's marketing strategy, and the petitioner fails to submit sufficient evidence of having established any business relationships or identified any potential customers. The record does not contain any independent analysis, contracts, list of business contacts, or copy of a proposed lease for the "business" location. Absent a detailed, credible description of the petitioner's proposed United States business operation specifically addressing the petitioner's proposed services, marketing plan, and customers, 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.

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.

Finally, with regard to the second main issue in this proceeding, the petitioner failed to establish that it has secured sufficient premises to house the new office. 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner claims to have secured a "residential office" and a "shared business office location in downtown Honolulu." However, while the petitioner submitted photographs of the two locations, the petitioner failed to submit a copy of a lease for the "business office." 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. Therefore, as the terms of the lease for the "business office" have not been disclosed, it cannot be discerned whether this location would be sufficient to house the new office.

Furthermore, the photographs and lease, ultimately submitted on appeal, for the "residential office" fail to establish that this location will sufficiently house the new office. It appears that this office is in a private residence. It is not credible that this "residential office" will permit the enterprise described in the business

plan to 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 location and size of the office is incongruous with the projected growth and nature of the business vaguely described in the record.

Accordingly, the petitioner failed to establish that it has secured sufficient physical premises to house the new office, and the petition may not be approved for this reason.

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 legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(*2*).

In this matter, the petitioner submitted a translation of a Japanese document titled "Statement of Evaluation regarding Affiliated Company" which indicates that the foreign employer is majority owned by [redacted] However, the petitioner also claims in its "business plan" that the foreign employer is owned by [redacted] Regardless of which description of the foreign employer's ownership is correct, the petitioner submitted stock certificates for the petitioner which indicate the following ownership structure: [redacted] (20%), [redacted] (20%), [redacted] (30%), and [redacted] (30%). Therefore, as the two entities are not owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, the organizations are not "affiliates" and, thus, are not qualifying organizations.

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.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years. 8 C.F.R. § 214.2(l)(3)(v)(B).

In this matter, the record indicates that the beneficiary last worked for the foreign employer in 2000. The instant petition was filed on March 12, 2007. From 2000 until 2006, the beneficiary was studying in the United Kingdom. The record is devoid of evidence establishing that the beneficiary was "employed" for one year within the preceding three years by the foreign employer. Accordingly, the petitioner is not eligible for the benefit sought.

Second, the petitioner failed to specifically describe the beneficiary's job duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties will be primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates, if any. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for Citizenship and Immigration Services (CIS) to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary has been employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and the petition may not be approved for this 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. 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.