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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

D7



File: WAC 08 203 51017 Office: CALIFORNIA SERVICE CENTER Date:

AUG 07 2009

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)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 North Carolina corporation, intends to operate an import/export and wholesale business specializing in furniture, materials and construction supplies. It states that it is the subsidiary of Kontrakt Plus Limited Liability Company, located in Russia. The petitioner seeks to employ the beneficiary as the director of its new office in the United States for a three-year period.¹

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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, the petitioner submits a more detailed description of the beneficiary's proposed duties in the United States and the petitioner's proposed business activities. The petitioner submits additional evidence in support of the appeal.

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 Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (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 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.

As a preliminary matter, the AAO notes that the director's notice of decision dated October 27, 2008 contains no reference to the regulations governing "new office" petitions at 8 C.F.R. § 214.2(l)(3)(v). Rather, the director determined that the petitioner currently has no employees and therefore lacks the "organizational complexity" to support a managerial or executive position.

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. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

Notwithstanding the director's failure to apply the new office regulations in the notice of decision, the AAO notes that the director issued an extensive request for additional evidence (RFE) addressing the evidentiary requirements for a new office petition on August 26, 2008. In the RFE, the director requested additional evidence pertaining to each of the regulatory requirements at 8 C.F.R. § 214.2(l)(3)(v) and allowed the petitioner six (6) weeks to submit a response. As such, the AAO finds that the petitioner has had ample notice of the evidentiary requirements for an L-1A new office petition, and sufficient opportunity to submit the required initial evidence.

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 AAO will therefore address the issue of whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity within one year.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant visa petition on July 16, 2008. In a letter dated July 14, 2008, the petitioner stated that the beneficiary would perform the following duties in his proposed position as director of the new U.S. office:

In his capacity as the Director, [the beneficiary] will plan, develop, and establish policies and objectives for [the U.S. company]. He will plan business objectives, will develop organizational policies, and will coordinate operations between the parent company and its US subsidiary. He will establish responsibilities and procedures, will review activity reports and financial statements to determine progress and status in attaining objectives, will review objectives and plans in accordance with current market conditions.

[The beneficiary] will direct and coordinate the formulation of financial programs to provide funding for new operations to maximize returns on investments, and to increase productivity. He will review reports and financials statements to determine policy changes due to changes of economic conditions. He will evaluate the performance of the department for compliance with policies and objectives. He will determine personnel needs and is directly responsible for hiring and firing.

The petitioner stated that the U.S. company was established for the purpose of exporting construction materials to Russia and for importing furniture to the United States. The petitioner indicated that it employed one employee, a general manager, as of the date of filing.

The petitioner did not submit evidence to demonstrate that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, supported by information regarding: the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals; 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 the organizational structure of the foreign entity. 8 C.F.R. § 214.2(l)(3)(v)(C).

Accordingly, on August 26, 2008, the director issued a request for additional evidence. As noted above, the director specifically cited to the regulations at 8 C.F.R. § 214.2(l)(3)(v). The director instructed the petitioner to submit an original letter from the foreign entity explaining: the need for the new office; the proposed number of employees and types of positions they will hold; the amount of the U.S. investment; the financial ability of the foreign company to pay the beneficiary and commence doing business in the United States; the size and staffing level of the foreign company; and an explanation as to how the proposed business venture will, within one year, support a managerial or executive position. The director also requested: a copy of the petitioner's business plan including specific details as to the business to be conducted, along with one-, three- and five-year projections for business expenses, sales, gross income and profit and losses; and documentary evidence showing the financial position and organizational structure of the foreign entity.

The petitioner, through counsel, submitted a response to the RFE on October 6, 2008. The petitioner's response included only documentation that had been submitted with the initial petition and included none of the items mentioned above, nor any other items requested in the RFE. Counsel indicated that he had "just received evidence from Russia" that he intended to submit, and requested additional time to translate the documentations for submission in support of the petition. Counsel did not indicate what specific evidence he wished to submit or how long it would take to translate the documentation. The AAO notes that the director did in fact wait nearly three additional weeks before issuing the adverse decision.

The director denied the petition on October 27, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director acknowledged the job description submitted in the petitioner's letter dated July 14, 2008, but determined that the petitioner has no employees and thus lacks the organizational complexity to support an executive position. The director further found that the petitioner described the beneficiary's proposed position in broad and general terms and provided insufficient detail regarding the beneficiary's actual duties. The director concluded that the petitioner had failed to establish that the beneficiary would be managing the organization, or a function of the organization, that he would be functioning at a senior level within an organizational hierarchy, or that he would be managing a subordinate staff of professional, managerial or supervisory personnel who relieve him from performing non-qualifying duties.

As noted above, the director erred in failing to apply the regulations pertaining to new office petitions at 8 C.F.R. § 214.2(l)(3)(v), and by basing the denial, in part, on the petitioner's current staffing structure and the lack of subordinate employees working for the petitioner as of the date of filing.

However, the AAO must conclude that the petitioner's failure to submit the evidence requested in the RFE would have nevertheless mandated the denial of the petition. The record of proceeding before the director contained none of the initial evidence required pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C). The director was therefore correct in concluding that the petitioner did not establish that the petitioner failed to submit evidence that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. There was no evidence in the record that would have assisted the director in determining whether the beneficiary would have performed primarily managerial or executive duties within one year or whether the U.S. company would reasonably be expected to grow to a point where it would require the services of a managerial or executive employee as those terms are defined by the statute.

Therefore, while the director's reasoning was flawed in part, the AAO concurs with the director's conclusion that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Any 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).

On appeal, the petitioner submits, among other documents: (1) a letter from the petitioner dated March 26, 2009, which includes a description of the beneficiary's proposed duties as "director/vice president of export"; and (2) a five-page business plan which includes a proposed organizational chart for the U.S. company.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

The AAO notes for the record, that even if the evidence submitted on appeal were considered, the record remains devoid of evidence of 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 evidence of the organizational structure of the foreign entity. The business plan submitted on appeal is lacking in detail and provides little insight into the anticipated financial position and staffing structure of the company within one year. The proposed organizational chart included in the business plan depicts a total of 30 proposed positions, 18 of which would report to the beneficiary's proposed position. However, there is insufficient information in the business plan to establish which, if any, subordinate staff would be hired within 12 months. The business plan is also lacking any discussion of the company's anticipated financial goals and objectives for the first year of operations and therefore does not establish the number of employees that could reasonably be supported. The business plan indicates that the company will require capital and funding in the amount of \$65,200 from its claimed parent company, but there is no evidence that these funds have been transferred to the U.S. entity.

Therefore, the minimal evidence submitted in support of this petition, even if the AAO were to consider the evidence submitted on appeal, does not demonstrate a realistic expectation that the new U.S. 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. 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)).

Beyond the decision of the director, the petitioner has not established that it has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner indicated in its

letter dated July 14, 2008 that the petitioner has secured "temporary office space located at 7000 Chadwyck Farms Dr. Charlotte NC 28226," and that "[t]he initial term of the Company's lease stipulates a term of 6 months commencing July 14, 2008." The petitioner did not submit a copy of its signed lease agreement.

Accordingly, in the RFE issued on August 26, 2008, the director requested, *inter alia*: a copy of the petitioner's executed lease agreement indicating the total square footage of the leased premises; photographs of the leased premises; a copy of the U.S. company's floor plan for all leased premises; a letter from the owner or property manager confirming that the petitioner is occupying the leased premises; a copy of the petitioner's occupancy permit; and other evidence to establish that the petitioner has secured sufficient physical premises to operate its import, export and wholesale business.

The petitioner submitted none of the requested evidence in response to the RFE. On appeal, the petitioner reiterates that the U.S. company leased temporary office space, free of charge, at 7000 Chadwyck Farms Drive in Charlotte, North Carolina for a term of six months commencing on July 14, 2008.

The record remains devoid of documentary evidence to substantiate the petitioner's claims that it has secured sufficient physical premises to house the new office in the United States. 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. Again, 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). For this additional reason, the petition cannot be approved.

Another issue not addressed by the director is whether the petitioner established that the beneficiary 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, as required by 8 C.F.R. § 214.2(l)(3)(iii).

The petitioner submitted a certificate of employment issued by the petitioner's claimed parent company, Kontract Plus Ltd., indicating that the beneficiary has been employed as a director of the foreign entity since January 10, 2007. The petitioner indicated on Form I-129 that the beneficiary has been physically present in the United States since July 14, 2007 in B-2 status as a nonimmigrant visitor.

The regulation at 8 C.F.R. § 214.2(l)(ii)(A) states, in pertinent part:

Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

Accordingly, the beneficiary has only six months of continuous employment abroad with the petitioner's claimed parent company. Although the petitioner indicates that the beneficiary was sent to the United States in order to establish a subsidiary for the foreign entity, the time the beneficiary has spent in the United States as a visitor does not count towards fulfillment of this regulatory requirement.

In addition, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner provided only a brief description of the beneficiary's responsibilities as director of the foreign entity at the time of filing, and failed to respond to the director's request for a detailed description of the beneficiary's duties, an organizational chart for the U.S. entity, and information regarding the number and types of subordinate employees the beneficiary supervised while employed by the foreign entity in Russia. 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).

For these additional reasons, the petition cannot be approved.

The remaining issue in this matter is whether the petitioner established that the foreign entity is a qualifying organization doing business in Russia. 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 evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in the regulations.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
 - (1) 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;
 - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as:

Doing business means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

At the time of filing, the petitioner submitted a copy of the foreign entity's state registration, indicating that the company was registered in the City of Novosibirsk, Russia on October 31, 2005. The director subsequently requested additional evidence to establish that the foreign entity is a valid, active business entity, including photographs of the company, copies of the company's balance sheets and financial statements, bank statements, a list of clients, copies of business licenses, sales invoices, and a telephone

directory listing. Once again, the petitioner submitted none of the requested evidence in response to the RFE and offers no additional evidence on appeal to establish that the foreign entity is a qualifying organization doing business in Russia. 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. 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). 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 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 he or 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.