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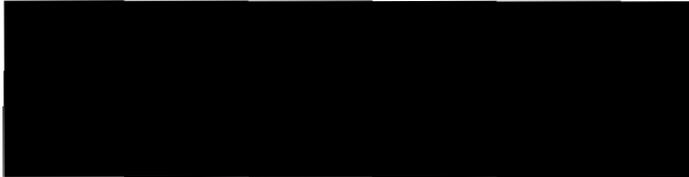
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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File: EAC 08 183 51064 Office: VERMONT SERVICE CENTER Date: JUN 04 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)

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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting 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 operations manager 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 director denied the petition on the basis of two grounds of ineligibility: 1) the petitioner failed to establish that it would be able to employ the beneficiary in a qualifying managerial or executive capacity within one year; and 2) the petitioner failed to establish that it had secured sufficient physical premises to house its 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 for the petitioner argues that the director's conclusions and underlying observations are erroneous. Additional evidence is submitted to address the director's adverse findings. After conducting a thorough review of the record, the AAO finds that the petitioner submitted sufficient evidence to establish that it had secured sufficient physical premises to house its new office at the time of filing the petition and on this basis the second ground for denial must be withdrawn. As such, this decision will focus on the remaining issue of the beneficiary's employment capacity in his proposed U.S. position.

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.

In addition, the regulation at 8 C.F.R. § 214.2(1)(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 (1)(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.

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 issue in this matter is whether the intended United States operation, within one year of the approval of the petition, will employ the beneficiary in an executive or managerial position.

In support of its Form I-129, the petitioner provided a business plan, which included a discussion of the responsibilities the beneficiary plans to undertake during its first two stages of development. *See* Tab 6 of the initial supporting evidence. The petitioner stated that it plans to hire a sales representative, an administrative assistant, and a project engineer within its first year of operation. In a separate addendum to the Form I-129, the petitioner discussed the beneficiary's job responsibilities during its initial stage of development. However, it did not provide a discussion of the job duties the beneficiary would ultimately perform after the completion of the petitioner's first year of operation.

Accordingly, the director issued a request for additional evidence (RFE) dated June 27, 2008, instructing the petitioner to provide, *inter alia*, a comprehensive description of the beneficiary's proposed job duties, establishing the beneficiary's level of seniority with the organizational hierarchy and discussing the subordinate staff members, who would relieve the beneficiary from having to primarily perform non-qualifying tasks. The petitioner was also asked to provide an hourly breakdown of job duties for all of the petitioner's proposed employees, including the beneficiary.

In response, the petitioner provided the following hourly breakdown for the beneficiary:

1. Personnel Management and General Management: 14 Hours
 - a. Recruiting local employees. During 2008, this recruitment will include hiring an Administrative Assistant, a Sales Representative and a Project Engineer. At a later date, he expects to hire engineers, with input from the Project Engineer for various projects. . . .
 - b. Evaluating the performance of the local employees and deciding their bonus structure. Locally recruited employees might be awarded a bonus in the middle and at the end of each year. [The beneficiary] will develop a bonus system and decide a bonus structure for those employees according to their overall performance.
 - c. Overseeing the interactions with service providers such as C.P.A., legal counsel and insurance brokers. [The beneficiary] will select and establish company relationships with these providers. He will direct the Administrative Assistant to administer the ministerial aspects of the agreements that do not require a substantive decision. Proposals (such as insurance policies, legal service agreement, and accounting service agreement) and expenses to be incurred for services to be provided shall be approved (or rejected) by [the beneficiary].
 - d. Developing and Implementing Operation Budget. [The beneficiary] will oversee and approve operation expenses and approve reimbursements.
 - e. Reviewing bank statements and financial reports and reporting the financial status to the Board of Directors.
 - f. Any other managerial duties as authorized by the President and/or Vice President of [the petitioner].
2. Directing Marketing and Sales Activities: 16 Hours
 - a. Visiting important clients in the United States on behalf of the President of [the petitioner].
 - b. Visiting important clients upon the request of the Sales Representative.
 - c. Reviewing and Approving Marketing Plans prepared by Sales Representative which include "Exhibiting and Advertising Plan", "Client Visiting Schedule", "Marketing Analysis", and "Quarter Sales Target". [sic]

- d. Reviewing and Approving Bidding Proposals prepared by Sales Representative.
 - e. Reviewing and Approving Sales Contracts/Purchase Orders for [the petitioner]. [The beneficiary] must approve the final pricing and the commitment for delivery schedule of each sales contract.
 - f. Reviewing the North America Market and overseeing the development of a Marketing and Strategy for [the petitioner].
3. Directing Project Coordination: 10 Hours
- a. Directing Sales Representative and Project Engineer in their management of a contract/project.
 - b. Making decisions for any critical issue that arises for a specific project, which includes, but is not limited to, decisions to claim extra cost or to allocate additional resources.
 - c. Organizing regular meetings to listen to progress reports for existing projects; giving advice and instructions to Project Engineer(s) for executing projects.
 - d. Listening to regular reports made by Project Managers of [the petitioner] concerning existing Morimatsu Group projects in North America; directing them to execute contracts/purchase orders.

The petitioner also provided a brief breakdown of the duties to be performed by the beneficiary's subordinate staff as well as their educational and skill requirements.

After reviewing the submitted documentation, the director determined that the petitioner failed to establish eligibility and therefore denied the petition in a decision dated August 13, 2008. Although the AAO concurs with the director's overall determination of ineligibility based on the petitioner's failure to establish that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of operation, a number of the director's underlying findings were erroneous and must be withdrawn.

First, the AAO finds that the director's inquiry regarding the lack of a nexus between the beneficiary's educational background and the subject matter of the petitioner's business entirely irrelevant. The petitioner has provided sufficient information about the beneficiary's employment abroad and thereby has established a strong similarity between the nature of the business in which the beneficiary's foreign employer is engaged and the business in which the petitioning entity plans

to engage in under an approved petition. Moreover, there is neither a statutory nor a regulatory requirement that such a nexus be present.

Second, the director repeatedly referred to the petitioner in such a way as to imply that the business is currently operational and already has the requisite employees in place. Such statements indicate that the director failed to take into account the petitioner's claim that it wishes to open a new office and is not, in fact, currently operational with a working staff already in place. It is not reasonable for the director to instruct the petitioner to provide evidence regarding staff members whom the petitioner has not yet hired.

Third, the director briefly commented on the petitioner's failure to establish that the beneficiary's proposed position is professional. While the definition of managerial or executive capacity may imply that the proposed employment would be of a professional nature, as counsel properly points out in her appellate brief, there is no mandate requiring the petitioner to meet this added burden.

Accordingly, the AAO hereby withdraws the above three findings, as they are not based on relevant statutory or regulatory requirements that address the petitioner's overall eligibility.

Additionally, the petitioner has submitted sufficient documentation to overcome the director's finding regarding the authenticity of the documents that establish the beneficiary's educational credentials.

Notwithstanding the above criticisms of the director's decision, the AAO has conducted its own independent analysis of the record and concludes that the petitioner has failed to establish eligibility. This conclusion is primarily based on the insufficient information regarding the beneficiary's proposed employment and the petitioner's failure to establish its ability to employ the beneficiary in a qualifying managerial or executive capacity after one year of operation. Despite the various shortfalls in the denial, the director properly determined that the petitioner's description of the beneficiary's proposed position was deficient in that it provided only general information and failed to convey an understanding of the beneficiary's proposed daily tasks during the relevant time period. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. Case law has firmly established that the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In general, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks. In the present matter, the record lacks a comprehensive discussion of what the beneficiary's day-to-day tasks will be after one year of operation, nor is there sufficient information upon which to conclude that the limited support staff the petitioner plans to have in place within that first year will be sufficient to relieve the beneficiary

from having to primarily focus on the petitioner's daily operational tasks. In fact, despite the director's express request that the petitioner provide an hourly breakdown of the beneficiary's proposed job duties, the petitioner assigned time constraints to each of three main areas of concentration, thereby precluding a realistic assessment of the amount of time that would be devoted to specific tasks rather than general job responsibilities. **These include personnel and general management, direction of marketing and sales activities, and direction of project coordination.**

Moreover, the job duties used to expand on each of the three main job categories contain little more of the specific information that is needed in order to convey a comprehensive understanding of the beneficiary's daily tasks. For instance, the petitioner claimed that the beneficiary would evaluate employee performances and determine their respective bonus structures. However, the petitioner provided no explanation of how he would perform the evaluations. The petitioner also claimed that the beneficiary would establish relationships with various service providers and then direct the administrative assistant in handling the "ministerial aspects of the agreements that do not require a substantive decision." However, there is no clarification as to what "ministerial aspects" actually means in the course of the petitioner's business operation, nor does the petitioner clarify which types of agreements the administrative assistant would handle. While the petitioner also claimed that the beneficiary would be charged with developing an operational budget and reviewing bank statements and financial reports, there is little to indicate that any of these actions would require tasks that would be performed on a daily basis. The fact that the petitioner did not assign specific time constraints to the job duties underlying the general objectives precludes a thorough analysis of how the beneficiary's time would be apportioned.

Similar criticisms apply to various job duties within the next category—directing marketing and sales activities—which would consume 16 hours of the beneficiary's time on a weekly basis. For instance, the petitioner indicated that the beneficiary would review marketing plans prepared by the sales representative. However, the petitioner omitted specific information that would explain why the reviewing of a marketing plan is something that the beneficiary would have to do on a daily basis. In other words, if reviewing various aspects of the plan translates into multiple tasks, the lack of a detailed explanation leaves the AAO without any ability to determine exactly what those tasks would be. The petitioner also indicated that the beneficiary would review and approve bidding proposals and sales contracts/purchase orders. Again, the petitioner failed to clarify the specific tasks that would be involved in the review process, i.e., what factors the beneficiary would consider and how he would obtain the necessary information to make the final decision. Although the act of visiting various clients is self-explanatory, this can best be termed an operational task necessary to provide a product or service. Regardless of who the client is, without further explanation, the act of visiting a client is indicative of a sales-related activity and would not be deemed qualifying.

Lastly, with regard to the job duties that fall under the category of directing project coordination, which would consume 10 hours of the beneficiary's time, the necessary level of detail is also lacking. For example, the petitioner claimed that the beneficiary would direct the sales representative and project engineer in their respective job assignments. However, this broad statement is not accompanied by an explanation of the specific tasks that would be involved in such oversight. Next,

while the petitioner claimed that the beneficiary would make critical decisions in the course of a project's progress, there is no explanation as to the factors involved in making the decisions or who provides the information that formulates the basis for the beneficiary's decisions.

In summary, the petitioner failed to thoroughly explain what tasks the beneficiary would undertake on a daily basis after the petitioner has completed its first year of operation. This information is particularly crucial when taking into account the size of the organizational hierarchy the petitioner intends to have at the end of the designated time period. Although staffing is clearly not the only consideration in determining the petitioner's eligibility, federal courts have generally agreed that U.S. Citizenship and Immigration Services (USCIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). When the petitioner presents the beneficiary's position in the context of a limited organizational hierarchy and fails to provide a specific description of the beneficiary's job duties, the AAO cannot determine how exactly the petitioner plans to relieve the beneficiary from having to primarily perform non-qualifying operational tasks. Thus, in light of the considerable deficiencies described above, the AAO cannot conclude that the petitioner adequately established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of commencing its U.S. operation. For this reason the petition cannot be approved.

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.