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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**

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File: EAC 08 190 51282 Office: VERMONT SERVICE CENTER Date:

JUN 30 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, 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 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 Massachusetts corporation established in 2008, states that it intends to engage in the development, marketing and distribution of ingredients and technological processes for the food industry. The petitioner claims to be a subsidiary of Texpro, LLC located in Saint Petersburg, Russia. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a period of one year.

The director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner established by a preponderance of the evidence that the beneficiary will serve in an executive capacity and that the petitioner will be capable of supporting an executive position within one year of commencing operations in the United States. Counsel suggests that the director applied an inappropriate standard of review and erroneously denied the petition without challenging the credibility, relevance or probative value of any of the submitted evidence. Counsel submits a brief and documentary 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.

- (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.

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition.

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 indicated on Form I-129 that the beneficiary will serve as president of the U.S. company, and stated that the company currently has two employees. On the L Classification Supplement to Form I-129, the petitioner stated that the beneficiary's duties as general manager will be to "manage the company and new business development."

The petitioner further described the beneficiary's proposed duties in a letter dated June 18, 2008:

As [the petitioner's] president, [the beneficiary] will implement setting up the corporation, creating company structure and hire necessary personnel. This includes setting up a laboratory in order to test and select products supplied, which should comply to Russia's relevant regulatory certifications. One of the main goals of establishing U.S. based company is to have a testing lab where new technological processes can be tested and results effectively communicated back to suppliers. It is estimated that having such testing lab will reduce our new product time to market up to 4 times. At this point majority of such products do not pass such requirements. This should promote and increase penetration of American companies into Russian markets of various food ingredients. [The beneficiary] is estimated to spend approximately 50% of his time on this activity.

In addition to being an executive at [the petitioning company], [the beneficiary] is also one of the foremost experts in the area of Food Processing and Manufacturing, who knows specifics and

requirements of Russian Market's demands. [The beneficiary] will also set up a Marketing Department in order to research and implement variety of new and promising products offered by various American suppliers. He will set up and contract a Distributor/dealership network with such companies, thus adding them to the list of already participating suppliers. He will also control direct contacts with largest Russian manufacturers/clients, as well as assuring freight and delivery. This is expected to occupy approximately 40% of his time.

Finally, [the beneficiary] will organize training seminars for [the petitioner's] employees and suppliers in order to introduce them to Russian food manufacturing and processing market, specifics, requirements and regulations, which will help assure success of this enterprise. This will occupy [the beneficiary] the rest of his time.

The evidence of record indicates that the petitioner's Russian parent company intends to invest approximately \$200,000 in the U.S. entity over the first year of operations and otherwise guarantees the payment of all expenses related to new business development in the United States. The petitioner submitted copies of its bank statements for April and May 2008, which show deposits in the amount of \$45,300 and \$40,000.

The petitioner did not submit a business plan or hiring plan or otherwise describe the intended scope of the new entity, its organizational structure, and its financial goals, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(I).

The director issued a request for additional evidence (RFE) on July 9, 2008, advising the petitioner that additional evidence was necessary to establish how the new company will require the services of a bona fide manager or executive. The director advised that such evidence should demonstrate that the beneficiary, within one year of operation, will be relieved from performing the non-managerial day-to-day operations involved in producing a product or providing a service. The director instructed the petitioner to submit a list of proposed employees clearly delineating every proposed position, and clarifying how such subordinate positions would qualify as managerial or professional in nature.

In a letter dated July 29, 2008, former counsel for the petitioner further described the beneficiary's proposed duties as follows:

It is anticipated that upon transfer to the U.S., the beneficiary/president will commence the hiring of the positions as set forth in the enclosed hierarchy for the U.S. company. The beneficiary/president will be responsible for performing a very important function for the company, namely, he will be solely responsible for the start-up of the U.S. concern and he is responsible for its continued financial success. Once the beneficiary/president has hired the necessary employees, then he will be able to engage in the planning, organizing, directing and controlling of the company's major functions through said employees. The beneficiary/president will be the sole executive responsible for managing the U.S. company as set forth in the enclosed hierarchy.

In a letter dated July 22, 2008, the petitioner stated that it has already hired a director of marketing and sales, a marketing specialist and an office manager. The petitioner stated that the beneficiary will be responsible for hiring two sales associates, a head of the laboratory, two food technologists, and a laboratory assistant. The petitioner

provided position descriptions for each proposed position, excluding the office manager position. The petitioner stated that the beneficiary will:

- Implement setting up the corporation
- Create company structure
- Hire necessary qualified personnel
- Set up a R&D lab
- Set up a Marketing Department
- Set up and contract a Distributor/dealership network
- Control direct contacts with largest Russian manufacturers/clients
- Organize training seminars for [the petitioner's] employees and suppliers
- Coordinate industry, market and product research
- Establish working relationship with prospective trade partners
- Manage business, business development and operation support
- Set up a structure to comply with necessary Regulatory Requirements for Russian market.

The petitioner's proposed organizational chart shows a total of ten positions to be filled, including the beneficiary's.

The director denied the petition on August 6, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity within one year. The director found insufficient evidence that the beneficiary would be supervising professionals given the nature of the petitioner's "new, modest-sized food equipment company." The director also observed that while some of the beneficiary's duties would normally be associated with a manager or executive, "USCIS is not convinced that the beneficiary will actually be carrying out these duties" on a full-time basis.

On appeal, counsel for the petitioner asserts that the beneficiary will serve in an executive capacity, as he will have overall control of hiring and firing employees, supervise the laboratory, and oversee and participate in the development of the budget. Counsel emphasizes that the food technologists to be hired will in fact be professional employees. Counsel contends that the director applied a standard of review far stricter than the preponderance of the evidence.

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year. While the AAO finds that the director's adverse determination was warranted based on the evidence of record, it is noted that the director's underlying analysis reflected an incomplete application of the regulatory requirements to the facts of the case and consisted mostly of conclusory statements, with few specific references to the evidence entered in to the record. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

Notwithstanding the director's reasoning, the director properly found insufficient evidence to establish that the beneficiary would be relieved from having to devote the majority of his time to the performance of non-qualifying tasks within one year. 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).

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.* The AAO will then consider this information in light of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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)(A).

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions

for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

The 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. The petitioner has failed to sufficiently describe the beneficiary's proposed duties after the petitioner's first year in operation; and has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C).

First, the petitioner has failed to 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 general description of the beneficiary's proposed duties that fails to demonstrate what the beneficiary will do on a day-to-day basis after one year in operation. While it is evident that the beneficiary will exercise the appropriate level of authority, which includes the responsibility for hiring employees and creating the company's structure, several of the listed duties are not clearly managerial or executive in nature. For example, it is not clear what specific tasks the beneficiary will perform to "coordinate industry, market and product research," "assure freight and delivery," and "control direct contacts" with Russian manufacturers and clients. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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 addition, based on the submitted position descriptions, it appears that the beneficiary alone will be responsible for establishing relationships with suppliers, dealers/distributors and trade partners, and that he will personally deliver training to the petitioner's employees and suppliers. There is no indication that the beneficiary would be delegating such tasks to lower-level sales, marketing or technical personnel, and therefore it must be concluded that he will continue to be directly involved in procuring new business for the company.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While it appears that the beneficiary would exercise the

requisite authority over the U.S. company as its president, based on the current record, the AAO is unable to determine whether the claimed managerial or executive duties would constitute the majority of the beneficiary's duties within one year, or whether the beneficiary would primarily perform non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties would be managerial in nature, and what proportion would be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. While the petitioner claimed to employ three employees at the time it responded to the RFE, the record does not contain evidence corroborating their employment. Furthermore, it is not clear at what point the additional positions for sales and laboratory staff would be filled. The petitioner has not submitted a business or hiring plan outlining the company's intended staffing for its first year which would document the positions to be filled, the intended timeline for hiring staff, and the petitioner's financial ability to hire subordinates during the first year of operations. 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)).

The petitioner concedes that it has only leased an office and has not begun the process of searching for a location for its proposed food testing laboratory. Counsel notes on appeal that only the beneficiary has the experience to set up the lab facility. Without a business plan outlining the petitioner's planned actions, financial goals, start-up costs, licensing requirements, equipment needs, etc., it is not clear whether the setup of the laboratory would be accomplished within one year. Furthermore, the foreign entity's stated purpose for establishing the new office, which is outlined in a meeting of the board of directors dated February 15, 2008, makes no mention of establishing a testing laboratory. The foreign entity stated that the branch office in the United States "will provide for the basic representative functions of a "guide" for our dealers and manufacturers," and will allow the company's management to quickly find out about new inventions in the meat processing industry based on attendance at industry expos and closer contact with industry representatives. The foreign entity indicated that the U.S. company will be able "to develop new products for the Russian market in U.S.-based manufacturing facilities." This evidence raises questions as to whether there is any immediate intention to open a laboratory in the United States.

While the petitioner may intend to establish a full operation in the United States with ten employees, there is insufficient evidence to conclude that the company would be fully operational and staffed within one year. The proposed organizational chart alone is insufficient to establish that the company will realistically be able to relieve the beneficiary from performing non-managerial duties. The petitioner has not adequately described how it 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. Again, 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.

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(1)(3)(v)(C), and the petition may not 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.

ORDER: The appeal is dismissed.