

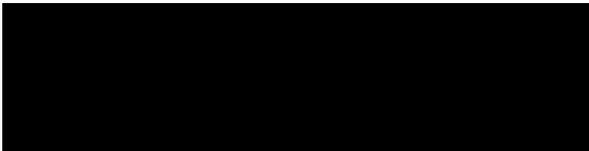
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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File: EAC 08 048 50796 Office: VERMONT SERVICE CENTER Date: **MAY 29 2009**

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

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

IN BEHALF OF PETITIONER:
[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.

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 based on the finding that the petitioner would not employ the beneficiary in a qualifying managerial or executive capacity within one year of commencing its operations in the United States.

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 disputes the director's conclusion and submits a brief with supporting arguments.

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(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 primary issue in this matter concerns the beneficiary's employment capacity. Specifically, the AAO will review the record to determine whether the petitioner has established that it would employ the beneficiary in a qualifying 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.

In support of its Form I-129, the petitioner provided a letter dated November 28, 2007 in which the petitioner provided the following description of the beneficiary's proposed position:

He will oversee the overall performance of the [petitioner] ensuring the preservation of company policies and procedures and attainment of company goals and objectives.

[He] will plan, direct and evaluate the operations of the retail business. He will identify and measure key performance indicators for the company and analyze business performance.

[The beneficiary] will manage retail personnel and assign duties to them. [He] will develop resource management in terms of manpower planning, work allocation, staffing and scheduling. He will provide supplementary training for key employees and staff.

[He] will conduct market and trend studies to determine consumer demand, potential sales volumes and effects of competitor's operations on sales. He will determine the merchandise and services to be sold and implement price and credit policies. He will locate, select and procure merchandise for resale and implement marketing strategies.

In addition, [he] will plan budgets and authorize expenditures and resolve customer complaints.

[The beneficiary] will set-up various operations processes in relation to the quality control and customer service. He will create and implement program/company-wide protocols. In summation, [the beneficiary] will be responsible for the overall operational functions of the [petitioner].

* * *

[The beneficiary] will develop and direct the management and operations of the [petitioner] to ensure that all relevant business operations are effectively monitored and maintained. The transfer will enhance the [petitioner's] competitiveness by assuring the cross fertilization of expertise and skills between personnel in both the parent company and U.S. Affiliate.

[The beneficiary] is tasked to undertake a U.S. assignment His assignment is to secure the effective application and implementation of proven Sales, Marketing and Operational techniques.

As head of Operations, [the beneficiary] will ensure smooth transition, stable and time-tested implementation of policies. He will implement and oversee the overall Advertising, Marketing, Inventory system, logistic, Quality Assurance/Control, Supplies and other Services of the business.

In terms of human resources management, [the beneficiary] will conduct performance reviews and ensure that the staff and crew will follow corporate procedures and policies. He will likewise supervise the work of functional employees.

He will exercise direct supervision over the key employees of our branch, and she [sic] will have the authority to implement personnel actions with the aforementioned-employees such as hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals.

In summary, [the beneficiary] has independent control and power to exercise wide latitude and discretionary decision-making authority in establishing the most advantageous course of action for the successful management and direction of the [petitioner] and the parent company in Israel.

On February 19, 2008, the director issued a request for additional evidence (RFE). The director requested, *inter alia*, a comprehensive description of the beneficiary's proposed job duties, including the percentage of time assigned to each duty and an explanation of how the duties fit the definition of managerial or executive capacity. The petitioner also requested job descriptions for the

beneficiary's proposed U.S. employees, including an hourly breakdown of the duties they would perform, as well as the credentials for the positions that would be filled.

In response, the petitioner provided a letter dated May 15, 2008 from counsel, who divided the beneficiary's time into three main areas of responsibility. According to counsel, 10% of the beneficiary's time would be devoted to operation-related tasks, 50% of the beneficiary's time would be devoted to general management/administration, and the remaining 40% of the beneficiary's time would be devoted to sales-related duties. The following tasks were attributed to operations:

- Approval of the calendar for any promotional events;
- Review of the questionnaires;
- Review of the sales strategies;
- Review of the design of the store;
- Review of the analysis and final product for the customer;
- Quality control of all the processes of information;
- Communication with the clients (Exporters) to set up the project and delivery;
- Consulting in marketing strategies;
- Moderation in qualitative studies that require professional moderation.

Next, the following tasks were attributed to general management/administration:

- Developing policy, and operation manual;
- Formulation of direction and strategy;
- Training of the employees in qualitative and quantitative areas;
- Hiring and firing employees;
- Provide of [sic] the best available technology of market research, including quality control international standards;
- Identify weakness and opportunities of the company to improve;
- Communication with clients and setting up the accounts and payments;
- Financial budgeting and control of the bank accounts;
- Planning and organizing the payments;
- Authorize weekly payments.

Lastly, the following tasks were attributed to sales:

- Develop logotype for the company and applications of it;
- Contact new possible clients through [sic] websites, expos and conventions;
- Creating alliances with networks of providers worldwide;
- Creating alliances with market research companies with additional products;
- Designate time to plan and organize the appointments with new clients;
- Producing ad-hoc presentations for each client;
- Sign agreements with clients;
- Advertising and marketing the company.

On August 5, 2008, the director denied the petition concluding that the petitioner failed to establish that the United States operation will employ the beneficiary in an executive or managerial capacity within one year.

On appeal, counsel stresses that the beneficiary's employment in the United States is crucial to the success of the petitioning entity and claims that the beneficiary is "indispensable" due to his experience in the retail industry and his established connections in the U.S. fashion industry. Counsel also restates the breakdown of duties that was previously provided in response to the RFE and asserts that such duties fit the statutory definition.

Upon review, the AAO finds that counsel's assertions are not persuasive. First, despite counsel's general reference to "the statutory requirements," there is no indication that counsel acknowledged the petitioner's initial claim that the beneficiary's proposed employment would be in an executive capacity. Second, counsel fails to explain just how the proposed job duties fit the statutory definition of executive capacity as specifically instructed in the RFE.¹

Furthermore, counsel's assertion regarding the petitioner's extreme need for the beneficiary's employment with the U.S. entity is irrelevant to the issue of the beneficiary's employment capacity in his proposed position. In other words, the petitioner's need to employ the beneficiary in order to ensure its own business success will not override the petitioner's burden of having to establish that the beneficiary's proposed employment is within a qualifying managerial or executive capacity. Here, the job description provided by counsel is deficient in that it attributes numerous non-qualifying tasks to the beneficiary's proposed employment, but fails to establish how much of the beneficiary's time would be attributed to those duties. For instance, under the general management/administration heading, providing technology for conducting market research, communicating with clients, controlling bank accounts, and organizing payments are all indicative of non-qualifying administrative and operational tasks. However, there is no indication as to the portion of time allotted to these tasks. Additionally, the beneficiary would be charged with a significant portion of the petitioner's sales-related tasks, including marketing the retail operation and cultivating and maintaining client relationships. However, no time allocations were specifically assigned to these non-qualifying tasks. The AAO notes that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition to the job description, which seemingly indicates that the primary portion of the beneficiary's time would be spent performing non-qualifying tasks, the petitioner has failed to establish that the petitioner would, within one year of approval of the petition, progress to a stage of development wherein it would be capable of relieving the beneficiary from having to primarily

¹ See page three, paragraph one of the RFE.

perform non-qualifying tasks. Despite the director's request for further information about the employees the petitioner plans to hire and their respective job duties, the petitioner failed to address this issue, thereby precluding the AAO from being able to gauge the type of organizational hierarchy the petitioner anticipates after its first year of operation. Without this highly relevant information, the AAO is unable to conclude that the petitioner intends to relieve the beneficiary from having to primarily perform non-qualifying tasks.

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. In the present matter, the petitioner has not provided such evidence. This deficiency, coupled with the inadequate description of the beneficiary's proposed employment, indicate that the petitioner has not established eligibility. Therefore, this petition cannot be approved.

Furthermore, while not specifically addressed in the director's decision, the petitioner has failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity within the preceding three years. 8 C.F.R. § 214.2(l)(3)(v)(B). Although the petitioner failed to specifically describe the beneficiary's job duties abroad as operations manager, it claimed that the beneficiary's duties with the foreign entity are the same as the duties he would be expected to perform for the U.S. entity. Although the petitioner was instructed to provide additional information regarding the beneficiary's foreign job duties, it failed to do so and instead provided an organizational chart where the beneficiary was named as the "Executive VP," rather than an operations manager, the position title that was previously attributed to the beneficiary's position abroad. It is noted that 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). Although the organizational chart that was submitted in response to the RFE depicted the beneficiary as overseeing fourteen employees, the AAO cannot conclude that the beneficiary primarily performed tasks in a qualifying managerial or executive capacity without a specific description of job duties.

Lastly, despite counsel's assumption that the only ground for ineligibility is the one cited in the director's decision, the fact remains that 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). Accordingly, as the petitioner has not established that the beneficiary was 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(1)(3)(v)(B), the petition may not be approved for this additional reason.

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.