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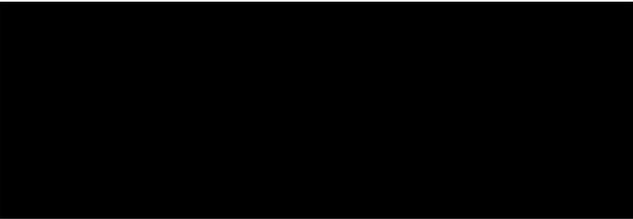
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

D7



File: EAC 07 205 51640 Office: VERMONT SERVICE CENTER Date: **APR 06 2010**

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).

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
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 Texas corporation, intends to operate a franchise retail pizza business. It claims to be a subsidiary of [REDACTED], located in Mexico. The petitioner seeks to employ the beneficiary as the president and chief executive officer 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 the U.S. company has secured sufficient physical premises to house the new office.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the U.S. company had in fact secured sufficient physical premises as of the date of filing. Counsel submits a brief and 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.
- (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 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 filed the Form I-129, Petition for a Nonimmigrant Worker, on July 2, 2007. The petitioner stated on Form I-129 that its address is [REDACTED] in Katy, Texas, and that the beneficiary would be working at this same address. The petitioner also listed this address as the beneficiary's current U.S. address on the Form I-129.

The petitioner indicated that it intends to operate a [REDACTED] restaurant and submitted a copy of an unsigned "development agreement" between the U.S. company, the foreign entity and [REDACTED], the franchisor. According to the terms of the development agreement, the petitioner, as developer, "must locate at least three available sites that appear suitable for a Store and submit for Company's evaluation a landlord's summary of the lease terms available for each site." The petitioner requires authorization from [REDACTED] to proceed with preliminary lease negotiations and before signing any lease agreement. According to the terms of the agreement, the developer will sign the franchise agreement only after securing a store lease.

The petitioner did not submit a copy of the lease agreement for the property located at [REDACTED] or any other lease agreement with its initial evidence.

Accordingly, on September 19, 2007, the director issued a request for additional evidence in which he requested, *inter alia*, the lease agreement and all attachments for the property located at [REDACTED] in Katy, Texas, and photographs of the interior and exterior of this premises.

In response, the petitioner stated:

[The petitioner] has leased an office space on [REDACTED] [REDACTED] This Office space is sufficient to house the corporate office within the leased space. The corporate office will serve as the main point of operations. The plans are to employ the necessary administrative personnel with full access to a receptionist, a large conference room, a copy room and all other items required to operate a business. As the business plan describes, [the petitioner] has purchased a franchise with [REDACTED] They plan to open several pizza stores, but the corporate office will be at the [REDACTED] A location.

The petitioner submitted a one-year lease for a 10' by 11' office space located on the first floor of [REDACTED] in Harris County Texas. The agreement was made and entered into on October 31, 2007, with a term commencing on that date. The space is authorized to be used as a general business office. The final page of the agreement states "the parties hereto have executed this Lease on the 1st day of July 2007." However, the lease was clearly signed and dated by the lessor on October 31, 2007.

The director denied the petition on March 31, 2008, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office as of the date of filing. The director acknowledged receipt of the lease agreement in response to the RFE, but emphasized that it was clearly executed on October 31, 2007, despite the July 1, 2007 date that appears in the lease agreement. The director determined that, as there was no evidence of a valid lease agreement in effect as of the date the petition was filed, the petition cannot be approved.

On appeal, counsel for the petitioner asserts that "the facts are that physical premises had already been secured." Counsel submits a revised lease agreement for the premises at [REDACTED] which indicates that the date of execution was November 1, 2007, rather than July 1, 2007 as originally stated. Counsel further states:

The Beneficiary, coming in as an Executive/managerial capacity under new office, had already secured premises at [REDACTED] which is the beneficiary's home. He later secured premises at [REDACTED] This office space is to serve as the corporate office for [the petitioner].

Counsel cites to *Matter of LeBlanc*, 13 I&N Dec. 816 (Reg. Comm. 1971) to stand for the proposition that the statute does not require the beneficiary of an L-1 petition to be coming to an already existing office, branch or other establishment of the foreign employer, as long as there is a bona fide intent to acquire physical premises and open an office in the United States.

Upon review, the petitioner has not established that it had secured sufficient physical premises to house the new office.

The evidence of record clearly shows that, as of the date the petition was filed, the only premises secured was a residential premises for the beneficiary that was clearly not intended nor suited to house the petitioner's retail pizza business. Counsel's reliance on *Matter of LeBlanc* is misplaced, as that decision predates the Immigration Act of 1990 and the implementation of the regulations governing "new office" petitions by nearly 20 years. If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office. 8 C.F.R. § 214.2(l)(3)(v)(A). Here, the petitioner acquired its business premises nearly four months after the petition was filed and did not anticipate leasing premises for its restaurant until March 2008, nearly eight months after the petition was filed.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, the director correctly determined that the petitioner failed to meet the evidentiary criteria at 8 C.F.R. § 214.2(l)(3)(v)(A), and the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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.

Here, it is apparent that the petitioner is not prepared to commence doing business upon approval of the petition. According to the milestones outlined in the petitioner's business plan, it does not anticipate opening its first pizza store until July 2008, a full year after the date the petition was filed. The petitioner indicates that it intends to hire a manager in February 2008, but has not clearly identified this position's proposed responsibilities. The petitioner also fails to indicate when it intends to hire workers to perform the day-to-day operations of the petitioner's restaurant, or whether it would be fully staffed within one year. In addition, the petitioner indicates that it intends to hire 6 to 12 employees for its store, such as pizza makers and cashiers, but it has not identified who would be responsible for administrative duties, day-to-day financial tasks,

training employees, purchasing, marketing, and other non-qualifying duties relating to the day-to-day operations of the business. As such, the evidence of record does not establish that the beneficiary would be relieved from performing these tasks within one year of approval of the petition. The petitioner indicates that its store will be open for 91 hours per week, but the limited evidence in the record suggests that it intends to hire a single manager. Therefore, it is unclear whether the beneficiary would be relieved from directly supervising non-professional personnel working in the restaurant during the hours when the manager is off-duty. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

The petitioner indicates that the beneficiary's duties will be managerial or executive in nature and that he will have authority to hire and fire personnel, develop the petitioner's stores, and make decisions on locations, marketing, and operations. However, the petitioner has not established that these would be the beneficiary's primary duties within one year of approval of the petition. 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 prove 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 level of authority over the new office in the United States as its president and chief executive officer, the petitioner has not established that he would be relieved from performing non-qualifying duties within one year.

Furthermore, the beneficiary himself stated the following in response to the request for evidence:

I personally believe that a new business or a new company is like a baby, I have to take care of every simply aspect to make it grow, I will work in every single position to understand and learn every little aspect of the new venture, the best way, starting from scratch. . . . I will work in every single store, from cleaning to preparation of food. I will roll on all the positions because I need to have the knowledge to motivate and to teach my successors.

Given that the petitioner does not intend to open its first location until July 2008, it appears that the beneficiary anticipates being involved in the day-to-day operations of the business after the first year. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary actually will perform the claimed managerial or executive duties after the first year of operations. In light of the foregoing discussion, the petitioner's anticipated delay in commencing business, and its vague personnel plan, the evidence collectively brings into question how much of the beneficiary's time could actually be devoted to managerial or executive duties at the end of the first year of

operations. The beneficiary must be primarily performing duties that are managerial or executive at that time. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive within one year. 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 it is shown 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.