

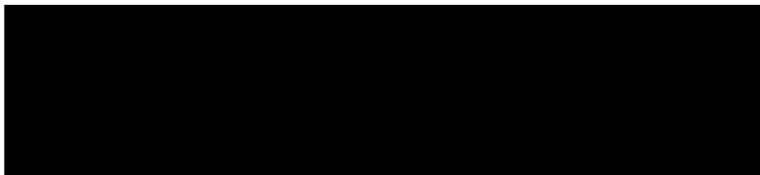
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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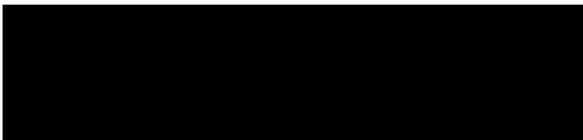
File:  Office: CALIFORNIA SERVICE CENTER Date: JUL 15 2010

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 is an Illinois corporation that previously filed a petition on behalf of the beneficiary in order to open a new office in the United States. The petitioner has now filed this nonimmigrant visa petition seeking to extend the employment of its business development manager for an additional five years 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 concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred in his conclusion and states that the beneficiary's duties are not primarily those of an executive or manager.

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(I)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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 the Form I-129, the petitioner submitted a letter dated November 18, 2008, which included the following description of the beneficiary's proposed employment:

As part of his responsibilities, [the b]eneficiary will continue to plan, direct and coordinate activities of designated business opportunities to ensure that goals or objectives of each opportunity is [sic] accomplished within the constraints of a given time schedule. It will remain [the b]eneficiary's responsibility to achieve the desired results within an allocated budget. He will review business development proposals and determine time frames, funding limitations, procedures for accomplishing projects, staffing requirements, and allotment of available resources to various phases. He will establish a work plan and monitor the staffing requirements. He will conduct interviews and select qualified candidates.

[The b]eneficiary will arrange for recruitment or assignment of personnel, confer with staff to outline work plans and to [sic] assign duties, responsibilities and scope of authority. He will review status reports, prepare project reports for management and the client.

[The b]eneficiary will continue to keep himself updated with [the] latest developments in the field by studying industry/technical manuals, periodicals and reports. He will utilize this knowledge to develop export models to meet customized requirements. He will formulate plans outlining steps required to develop exports, using structured analysis and design and submit plans to management for approval and implementation.

On December 17, 2008, the director issued a request for evidence (RFE) instructing the petitioner to submit a copy of its line and block organizational chart describing the company's managerial hierarchy and staffing levels and to provide evidence establishing that the beneficiary will manage supervisory, professional, or managerial employees or, in the alternative, that he will manage an essential function, department, or subdivision within the organization. The petitioner was also asked to provide IRS Form W-2 and W-3 statements for 2007 and quarterly wage reports for all employees for the last four quarters.

In response, counsel submitted a letter dated January 20, 2009, stating that the petitioner needs at least one more year to reach the business goals that were set at the time the initial new office petition was filed. Counsel stated that, while the business is profitable, it has experienced some setbacks due, in part, to the

economy. Counsel provided a list of the beneficiary's ten job responsibilities, which the director has incorporated into his decision. Counsel claimed that the petitioner is looking to hire 9-10 employees to fill the positions of office manager, secretary, accountant, bookkeeper, sales manager, and sales consultant.

The petitioner also provided an organizational chart that included the proposed positions the petitioner is looking to fill as well as its quarterly tax reports and internally generated payroll documents. The latter, which accounts for the one-month period prior to the filing of the Form I-129, shows that the beneficiary and the company president were the petitioner's only two employees approximately two weeks prior to filing with each employee receiving \$1,491.29 in gross wages.

In a decision dated February 3, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director observed the petitioner's limited staff and its reliance on the beneficiary to perform non-qualifying tasks and concluded that the petitioner had not reached the developmental stage that would require the employment of an individual who would primarily perform tasks within a qualifying capacity.

On appeal, counsel challenges the director's decision, asserting that the beneficiary functions at a senior level within the petitioner's organizational hierarchy. Counsel further asserts that the beneficiary is tasked with the key responsibility of expanding the petitioner's business by finding new business leads and developing a business and marketing strategy. Counsel states that such vast responsibility can only be assigned to someone that is employed in a managerial position.

Counsel's assertions are not persuasive in establishing that the beneficiary would be employed in a qualifying managerial or executive capacity. It is not clear that the beneficiary in the present matter is in fact employed within a senior level of the petitioning organization. The beneficiary cannot be said to occupy a senior level within the petitioner's organization if the organization is staffed with a total of two employees and the beneficiary's seniority is based entirely on his relationship to positions that have yet to be filled.

The only employee other than the beneficiary that the petitioner employed at the time of filing the petition was the company president, who occupied a position senior to the beneficiary. While the petitioner may alter its organizational hierarchy by hiring additional employees, which would result in a change in the beneficiary's placement within the hierarchy, the record does not support the finding that the beneficiary occupied a senior level within the organizational hierarchy at the time the petition was filed. A petitioner must establish eligibility at the time of filing. 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).

Additionally, counsel's assertion that the crucial nature of the beneficiary's tasks is indicative of his managerial capacity is equally unpersuasive. As previously stated in the director's decision, 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 the present matter, counsel

clearly states that the beneficiary's primary role is "[d]eveloping new leads and business opportunities,"¹ which includes attending trade shows and visiting clients. These responsibilities are indicative of sales-related tasks. While the petitioner has stated that the beneficiary would not carry out the sales function, the fact that he would be assigned tasks related to developing business leads contradicts this assertion, or else, requires further explanation distinguishing between one who travels to client sites to establish key client accounts and one who sells a company's products or services. Given that both counsel and the petitioner have indicated that developing leads for new business would be the beneficiary's primary responsibility, one that the AAO deems to be of a non-qualifying nature, it would appear that the primary portion of the beneficiary's time would be spent on tasks that are not within the definitions of managerial or executive capacity.

The AAO further notes that the beneficiary's supervision of four employees who are employed by the petitioner's foreign parent entity, as counsel contends, also cannot be deemed as time spent within a qualifying managerial or executive capacity. The claim that the foreign entity's employees support the beneficiary's position and somehow relieve the beneficiary from having to perform non-qualifying tasks is not supported by the evidence of record.

While devoting a small fraction of the beneficiary's time to non-qualifying tasks would not render the petitioner ineligible for approval of the nonimmigrant visa petition, an analysis of the beneficiary's job description and the petitioner's organizational composition at the time of filing strongly indicates that the beneficiary would be required to spend a significant portion of his time performing the petitioner's daily operational tasks. Despite counsel's statements that indicate possibly justifiable reasons for the setbacks to the petitioner's continued organizational development, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the petitioning business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached a point in its development that justifies the employment of a predominantly managerial or executive employee. As such, the AAO cannot conclude that the beneficiary would be employed in a primarily managerial or executive capacity and for this reason cannot approve the instant petition.

Furthermore, the AAO finds the petitioner ineligible based on additional grounds that had not been previously addressed in the director's decision. First, the petitioner has failed to establish that it has been doing business for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B).

A visa petition which involved the opening of a "new office" may be extended by submitting evidence that the petitioner "has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). "Doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services." In this matter, the current petition was filed on December 10, 2008. As such, the petitioner must establish that it had been doing business during the 12-month period prior to the time of filing. While the petitioner has provided invoices to show ongoing business transactions from August through October 2008, no evidence has been submitted to establish that business transactions were ongoing from January through July 2008. Going on record without supporting documentary evidence is

¹ See counsel's appeal brief, p. 3.

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)). Accordingly, the petitioner has failed to establish that it has been doing business for the previous year, and the petition may not be approved for this additional reason. 8 C.F.R. § 214.2(l)(14)(ii)(B).

Second, the petitioner has failed to establish that the beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition. 8 C.F.R. § 214.2(l)(3)(iii). Although the petitioner's initial support letter, subsection C, indicates that the beneficiary's foreign and prospective job duties would be described, the discussions provided in subsection C.1 and C.2 are both in reference to the beneficiary's employment with the U.S. entity. It is therefore unclear what specific job duties the beneficiary performed during his employment abroad. Published case law supports the relevance of a job description to a determination of whether or not a particular position can be deemed as one within a qualifying managerial or executive capacity. *See 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). Here, the AAO cannot examine this relevant information, as it has not been provided.

While the petitioner also provided the foreign entity's organizational chart depicting the beneficiary as one of two assistant managers of export, overseeing one import and two export executives, it is unclear whether these individuals were professional employees. As these subordinate employees did not have subordinates of their own, they also cannot be deemed managerial or supervisory employees. As such, the petitioner has failed to establish that the beneficiary supervised the work of supervisory, professional, or managerial employees. In light of the above analysis, the AAO is unable to conclude that the beneficiary was employed abroad within a qualifying managerial or executive capacity and for this additional reason the instant petition cannot be approved.

The initial approval of an L-1A new office petition does not preclude USCIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361. 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, the instant petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.