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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20520-2090

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U.S. Citizenship
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DATE: **NOV 10 2011**

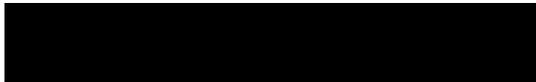
OFFICE: CALIFORNIA SERVICE CENTER

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IN RE:

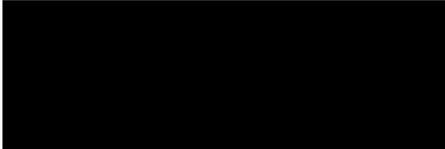
Petitioner:

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:

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 \$630. 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 of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner stated that the United States entity is engaged in the wholesale, retain, export and import of gemstones, minerals, and other related items. The petitioner, an Arizona corporation, claims to be an affiliate of [REDACTED] located in South Africa. Accordingly, the United States entity petitioned U.S. Immigration and Citizenship Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The beneficiary was initially granted a one-year period of stay to open a new office, and the petitioner now seeks to extend the beneficiary's stay as president and CEO. See 8 C.F.R. § 214.2(l)(14)(ii).

The director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity. The director noted that the beneficiary is the only employee of the U.S. entity and would perform all of the non-qualifying duties for the business.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states:

New offices. A visa petition under section 101(a)(15)(L) 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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 AAO will affirm the decision of the director. As presently constituted, the record does not demonstrate that the beneficiary has been or will be employed in an executive capacity, as defined by the Act. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

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 petitioner's description of the

job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In the present matter, the petitioner specifically stated that the beneficiary is primarily employed in an executive capacity. The statutory definition of the term "executive capacity," on the other hand, focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Second, to establish that the petitioner has staffed the new operation, the petitioner must submit a description of staffing, including the number of employees and the types of positions, as well as evidence of the wages paid to the employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). The petitioner has failed to satisfy this requirement. The petitioner indicates that it employed three persons to perform the necessary non-managerial or non-executive level functions of the business. However, the record clearly indicates that the petitioner engaged these three individuals as independent contractors, not as permanent employees, for a limited two-week period to help with a gem show in Tuscon, Arizona. The petitioner submitted a letter dated April 21, 2009 from accountant [REDACTED] which indicates that two of the three individuals were paid \$3,000 each and the third individual was paid \$2,000 for the two week period.

Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's daily non-managerial or non-executive tasks, especially considering the short, two-week period of their engagement. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

And while the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a

managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Even if the three independent contractors were engaged for more than a two-week period, the beneficiary could not be deemed to be primarily acting in a managerial capacity because he would be primarily supervising a staff of non-professional employees.

Counsel correctly notes that USCIS must take into account the reasonable needs of the petitioner. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

Counsel for the petitioner also implies that the petitioner is not fully operational because of difficult economic circumstances and because the beneficiary had an unspecified surgery during the petitioner's initial one-year start-up period.

Despite the petitioner's unfortunate setbacks, there are no exceptions for the new office extension requirements. The regulation at 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 business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Furthermore, beyond the decision of the director, the petitioner has not established that it acquired sufficient physical premises to conduct the claimed business. The petitioner repeatedly notes that the beneficiary is searching for an office or business premises in California or other states. In a letter dated February 9, 2009, the petitioner explained that its plan to purchase a retail establishment in Santa Fe fell through because "we called again for their balance sheet toward the end of 2008 and they had not performed as we expected and their sales were down considerably."

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 and that it will support the beneficiary in a managerial or executive position within one year of approval. 8 C.F.R. § 214.2(l)(3)(v)(A). The AAO observes that the "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business immediately commence doing business so that it will support

a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). A petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business. In this case, the lack of sufficient business premises fails to establish that the petitioner has been and will be doing business in a manner that will support the beneficiary's claimed position.

As an additional issue beyond the decision of the director, the petitioner has not established that it has conducted and will continue to do business, as defined by the regulations. To extend a "new office" L-1A visa petition, the petitioner must demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

The [REDACTED], indicates that the petitioner has been administratively dissolved, effective May 10, 2011. [REDACTED], State of [REDACTED] (last accessed November 7, 2011) (copy incorporated into record of proceeding).

Since the petitioner was administratively dissolved, the petitioner may not carry on any business except that necessary to wind up and liquidate its business and affairs. *See* Arizona Revised Statutes, Corporations and Associations, § 10-1421 (2011). Thus, for this additional reason, the petition may not be approved and this appeal must be dismissed.

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. The petitioner has not met this burden.

ORDER: The appeal is dismissed.