

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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 20529-2090



U.S. Citizenship
and Immigration
Services



D7

DATE: APR 13 2012

Office: VERMONT SERVICE CENTER



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, 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 extend the beneficiary's employment as a 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 New York corporation, states that it operates an art gallery and provides consulting services to Russian clientele. It claims to be a subsidiary of [REDACTED] Liability Company, located in Russia. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend her status for two additional years.

The director denied the petition based on two independent and alternative grounds, concluding that the petitioner failed to establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) that the foreign entity continues to do business as a qualifying organization abroad.

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 explains that, although the director correctly noted errors on the foreign entity's balance sheets, the petitioner provided ample evidence of the Russian parent company's ongoing business activities. Counsel further asserts that the U.S. company's staff of five is sufficient to support the beneficiary in a position that is primarily managerial or executive in nature. The petitioner submits additional evidence in support of the appeal.

I. The Law

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)(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 (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.

II. The Issues on Appeal

A. Employment in the United States in a Managerial or Executive Capacity

The first issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity under the extended 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 filed the Form I-129, Petition for a Nonimmigrant Worker, on December 1, 2009. The petitioner indicated that it has five employees and anticipates that it will have eight employees "at year end." In a letter dated November 27, 2009, the petitioner stated that it was established in 2008 to provide consulting services and construction equipment procurement services for its parent company's Russian clientele. The company also intended to establish an art gallery in New York City to showcase Russian and international artists. Finally, the petitioner indicated that it plans "to make regular exhibitions of young artists from all over the world and possibly to establish an international artists exchange program."

The petitioner indicated that its actual activities during the first year of operations included coordination of projects and exhibitions showcasing newer artists, and provision of consulting services for the purchase and distribution of U.S. manufactured construction materials and products. The petitioner stated that it has continuously employed five people since June 2008 and anticipates hiring 6 to 10 professionals within the next two years.

The petitioner described the beneficiary's duties as vice president as follows:

The position requires that [the beneficiary]:

- (1) select programs or projects to be of significant interest and beneficial for our company including ultimate set-up and further development of an international art gallery in New York City (5 hours);
- (2) Inspect and analyze the performance of the contracts and agreements, execute new contracts and agreements with our current and prospective customers (8 hours);
- (3) Daily oversee interrelations with our customers (10 hours);
- (4) Conduct meetings to introduce the company's services and approaches to new projects, pricing for our services, and developing new customers bases (7 hours);
- (5) Supervise timely arrangement and submission of monthly business and financial reports to [the foreign entity] provided by the Company's accounting staff (5 hours); and
- (6) Select, interview and hire new personnel while expanding our company's intervention onto the U.S. market and supervise existing personnel in terms of performance of their corresponding duties (5 hours).

The petitioner submitted a copy of its New York Form NYS-45-MN, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return, for the third quarter of 2009. The petitioner reported three employees, including the beneficiary, Alexandre Tarelkine (identified in the record as "vice president") and [REDACTED]. The petitioner submitted copies of IRS Forms W-4, Employee's Withholding Allowance Certificate," for two additional individuals, [REDACTED], dated October 2009, along with copies of checks issued to the beneficiary, [REDACTED] on November 16, 2009, and annotated "wage for November."

On December 8, 2009, the director issued a request for additional evidence (RFE). The director instructed the petitioner to submit, *inter alia*, the following: (1) a list of the U.S. company's employees by name and position title; (2) a complete position description for all U.S. employees as well as a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary; and (3) an organizational chart depicting the beneficiary's position within the company's organizational hierarchy. The director also requested clarification and evidence related to the nature of the U.S. company's business operations, including evidence related to its establishment of an art gallery and evidence that it has been providing consulting services and procurement services for Russian clientele.

The petitioner responded to the RFE on January 22, 2010. In response to the director's request for a listing of employees along with their names, job titles and job duties, the petitioner provided a list of five workers, including the beneficiary. The petitioner provided the same list of duties for the beneficiary as it provided at the time of filing and added the number of hours she allocates to each of the six listed duties, as stated above. The remaining four employees included: (1) [REDACTED] Vice President & General Manager; (2) [REDACTED] The

petitioner submitted an organizational chart which reflects that each of these employees reports directly to the beneficiary.

The petitioner submitted copies of IRS Forms W-4 for each employee, including one for [REDACTED] dated January 15, 2010. The petitioner did not provide a copy of its state quarterly wage report or IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2010.

With respect to the nature of the petitioner's business activities, the petitioner noted that it was unable to carry out its plan to provide consulting and procurement services for its Russian clientele, as its company president was unable to secure an L-1A visa for entry to the United States. The petitioner also explained that, although it entered into a lease agreement for premises that were to be used as an art gallery, it took legal action against its landlord in February 2009 and never gained access to the premises. The petitioner provided a copy of its "current" lease which was signed in November 2009 for a one-year term commencing on January 1, 2010. The lease provides the petitioner with the use of a small office with one desk, as well as access to shared common areas and business services. The petitioner indicated that it has been primarily engaged in the coordination of art projects and exhibits showcasing newer artists, as well as the purchase of art and sculpture pieces. The petitioner explained that "there is still considerable planning being done."

The petitioner also submitted a business plan for a start-up business called "Artex New York." The petitioner stated that it is "seeking to purchase in the United States for export to Russia items including: art, antiques, furniture, porcelain, glass, mirrors, European and American art, and other art-related items. The AAO notes that this appears to be a prospective business plan for 2010.

The director denied the petition on February 3, 2010, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the petitioner failed to provide evidence that it employs five employees as claimed. The director further observed that neither the petitioner's art gallery nor consulting services business have commenced operations. The director acknowledged that significant sums of money passed through the petitioner's bank account in 2008, but found little recent evidence that the U.S. company is generating income through its business activities. The director concluded that the U.S. company is not operating at a level that requires the services of an individual serving in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the U.S. company did in fact employ five individuals as of the date the petition was filed. Counsel provides the same employee list submitted in response to the RFE. Counsel does not directly address the director's observations regarding the petitioner's recent level of business activities. In his brief dated March 26, 2010, counsel states:

Unfortunately, at this time, the Petitioner's operations has [*sic*] temporarily been ceased. The reason for the temporary suspension of business is that the Petitioner's assets, including its bank accounts, were seized by the United States Customs Service. On January 8, 2010, claims seeking the Government to file a complaint for forfeiture on the property of the Petitioner has

been submitted by the Petitioner's President on January 8, 2010. It [*sic*] the Government fails to file the complaint then the assets must be returned to the Petitioner.

The petitioner attaches a completed United States Customs Service Seized Asset Claim Form signed by the petitioner's president on behalf of Rouz USA Inc. The claim form indicates that a total of approximately \$580,000 was seized from the Citibank accounts of "Advanced Source International Inc." The petitioner requested that the U.S. Customs Service refer the matter to the United States Attorney for institution of judicial forfeiture proceedings. Counsel does not explain why this document references the bank accounts of a different company. However, the AAO finds no reason to doubt counsel's claim that the U.S. petitioner, Rouz USA Inc., has in fact ceased operations.

The petitioner submits a copy of its NYS-45-MN, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return, for the fourth quarter of 2009. The petitioner reported a total of five employees for the month of October 2009, and "0" employees for the months of November and December 2009. The employees paid in October 2009 included the beneficiary, [REDACTED]

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

As a preliminary matter, counsel states on appeal that the petitioner has temporarily ceased operations. Counsel offers no information as to when this cessation occurred, although it is evident based on the documentation submitted on appeal that it likely happened on or before January 8, 2010, prior to the petitioner's response to the RFE. As noted above, the petitioner's state quarterly wage report for the fourth quarter of 2009 indicates that the company paid no salaries or wages during the months of November or December 2009. The petitioner has consistently claimed that it employed five workers since June 2008; however, the evidence of record indicates that the petitioner employed two to three employees for most of 2009, five employees in October 2009, and no employees thereafter.¹

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. Regardless of when the petitioner actually ceased operations, the supplemental evidence submitted on appeal reflects that the petitioner had no employees at the time it filed the petition.

With respect to the company's level of business activities as of the date of filing, the AAO notes that the petitioner provided a letter dated November 25, 2009 indicating that the company had \$500,180.02 in its

¹ The AAO notes that the petitioner did submit copies of four paychecks dated November 16, 2009 drawn from the petitioner's account, and the petitioner's bank statements confirm that the checks were cashed. However, the petitioner has not explained why these payments were not reported on its state or federal quarterly tax returns. The record contains no evidence of any wages paid to employees in December 2009.

checking account as of that date. The transaction journal for the same bank account, which the petitioner submitted in response to the RFE, shows that the petitioner had a negative balance of (\$1,319.98) on November 24, 2009. The journal reflects a \$500,000 deposit on November 25, 2009, the day the petitioner obtained the letter from its bank. On December 4, 2009, the transaction journal shows a debit in the amount of \$498,471.87, the entire remaining balance of the account. This withdrawal marked the last transaction. The record contains some evidence of business activities conducted by the company in the area of art dealing and coordination of artist exhibitions during 2009. However, the AAO concurs with the director's determination that the company was not operating at a level that would support a managerial or executive employee as of December 2009. The fact that it reported no employees in December 2009, had \$0.00 in its bank account days after filing the petition, and has at least temporarily ceased operations further supports such a finding. The record also reflects that the petitioner was not occupying commercial premises as of the date of filing, although it had secured a small office with one desk beginning on January 1, 2010.

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. 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. Furthermore, after one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Although the petitioner submitted a business plan for a proposed new area of business and indicates that it intends to hire 6 to 10 additional staff, 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'r 1978).

As the record reflects that the petitioner had no employees as of the date of filing, limited business activities during the previous year, and has ceased operations, the AAO concurs with the director's determination that the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

B. Qualifying Organization Abroad

The second issue the director addressed is whether the petitioner's foreign parent company continues to do business as a qualifying organization abroad. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) defines the term "qualifying organization" as a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a

parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

"Doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad. 8 C.F.R. § 214.2(l)(2)(H).

In its letter dated November 27, 2009, the petitioner stated that the foreign entity, Rouz Russia, is engaged in the interior and exterior design and construction of buildings, as well as the provision of property management services. The petitioner stated that the foreign entity has approximately 2,000 employees.

As initial evidence of the foreign entity's ongoing business activities, the petitioner submitted: (1) Rouz Russia's balance sheets as of December 31, 2008, September 30, 2008, December 31, 2007, and December 31, 2006; and (2) a "Registry of Contracts entered into in 2008 by Limited Liability Company "Rouz" Russia, with 116 entries for the year.

In the RFE issued on December 8, 2008, the director requested additional documentary evidence of the foreign entity's business activities for the past year. The director advised the petitioner that such evidence may include, but is not limited to, copies of purchase contracts, purchase orders, invoices, bills of lading and U.S. customs documentation.

In response, the petitioner submitted: the foreign entity's Balance Sheets as of September 30, 2009, December 31, 2008 and September 30, 2008; a "Motor Transportation Agreement" dated August 1, 2006 between the foreign entity and Firma Aurora; a contract for transport services between the foreign entity and Tilant Ltd., with services to be provided between September and December 2009; two request forms and service provided agreements between the foreign entity as provider and Kozlov A.S. as customer, dated June 11, 2009; and a registry of agreements the foreign entity entered in 2009.

The director denied the petition, concluding that the petitioner failed to establish that the foreign entity continues to do business as defined in the regulations. The director observed that the petitioner's self-prepared balance sheets have little probative value, as the records from September 2008 and December 2008 contain the exact same figures, while certain figures are also identical when comparing the 2008 balance sheets to the September 2009 balance sheets. In addition, the director found that the contracts and agreements between the foreign entity and its clients have limited evidentiary value because they are not supported by any corroborating evidence such as purchase orders, invoices, bills of lading or other evidence of business transactions.

On appeal, counsel addresses the director's findings noting that "these balance sheets were clerical mistakes in that the individual responsible for preparing these internal documents on behalf of Rouz Russia essentially used the same figures in several items of the balance sheets." Counsel further contends that the translator also made errors. Counsel indicates that the petitioner is submitting revised balance sheets for September 2008, December 2008 and September 2009, along with the foreign entity's December 2009 balance sheet.

The petitioner also submits "numerous invoices from August 31, 2009 through December 31, 2009 issued by Rouz Russia to various of its customers for services rendered," along with the copies of the foreign entity's bank statements for the first nine months of 2009.

Upon review, the AAO will withdraw the director's finding that the foreign entity is not doing business, but uphold the director's ultimate conclusion that the petitioner and foreign entity are not qualifying organizations.

As discussed above, counsel for the petitioner has conceded that the U.S. company has temporarily ceased operations and therefore ceased doing business in the United States. While the petitioner has not indicated the exact date of this cessation, the record reflects that the seizure of assets that led to the temporary halt in company activities occurred, at the latest, while the petition was pending. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer that is doing business. See 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

For this additional reason, the appeal will be dismissed.

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 conducts appellate review on a *de novo* basis). 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.

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. 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.