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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 20529-2090



U.S. Citizenship  
and Immigration  
Services

D7

[Redacted]

DATE: **FEB 13 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

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)

ON BEHALF OF PETITIONER:  
[Redacted]

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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a California corporation, claims that it is engaged in the “research, sale & distribution of value-added special applied materials products, such as optical data storage, solar cell, etc.” The petitioner states that it is a subsidiary of [REDACTED] located in Taiwan. Accordingly, the United States entity petitioned United States Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 seeks to employ the beneficiary to fill the position of regional sales manager for a three-year period.

The director denied the petition on December 28, 2009, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business.

On January 26, 2010, the petitioner’s counsel timely filed the instant appeal. On appeal, counsel for the petitioner asserts that the petitioner has met the requirements for a “new office” petition. In particular, counsel asserts that the beneficiary is “coming to US to set up a new sales department to sell and market petitioner’s and the parent company’s ‘Green’ products.” Counsel also states that the petitioner currently employs one individual and has “only nominal sales of \$8,500 in the year of 2008.” Counsel explained that the U.S. petitioner “had engaged in the technology research and development over the past 6 years in US with only nominal sales activities,” and the purpose of the transfer is for the petitioner to “establish its own sales team to target the entire North America market including USA and Canada and the beneficiary will serve as the Regional Sales Manager in [the petitioner] and be responsible for sales and marketing activities and business development and sales personnel recruitment and training.” Furthermore, counsel explained that the petitioner became a fully owned subsidiary of the foreign parent company on October 7, 2008 “which prompted the necessity for setting up a new sales office to market and sale of the company products in USA.”

The preliminary issue in this proceeding is whether the director should have applied the regulations at 8 C.F.R. § 214.2(l)(3)(v) to the facts of the instant case.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) provides:

*New office* means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states:

*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.

The petitioner submitted the U.S. company's Form 1120, U.S. Corporation Income Tax Return, for 2008 that stated that the U.S. company made \$8,514 in gross sales and did not hire any employees. The petitioner also submitted the petitioner's quarterly wage reports for the second and third quarter of 2009 showing that the petitioner employed one individual. As the U.S. entity has minimal business activity, and the company's federal tax returns indicate minimal gross sales and receipts for 2008, it is reasonable to conclude that the U.S. entity has not been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States. Furthermore, the documentation submitted by the petitioner indicated that the beneficiary will enter the U.S. in order to begin a new sales office. Thus, the current petition may be reviewed as a new office petition pursuant to the regulations at 8 C.F.R. § 214.2(l)(3)(v).

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 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 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 issue to be addressed in this proceeding is whether the petitioner has demonstrated that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means 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), provides:

The term "executive capacity" means 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.

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 addition, if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. 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 commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business "for the previous year" through the regular, systematic, and continuous provision of goods or

services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

In a support letter, dated October 28, 2009, the chairman of the foreign parent company described the duties to be performed by the beneficiary in the U.S. as follows:

[The beneficiary] will fill the position of Regional Sales Manager for [the petitioner]. This position is a key managerial one within [the petitioner] because it is the Regional Sales Manager who is responsible for sales and marketing as well as business development and sales personnel recruitment and training. He is also responsible to coordinate the sales force between [the petitioner] and its home office in Taiwan, upgrade the company internal management control and improve the company's efficiency in its business operation.

In response to the director's request for evidence, the petitioner provided the following breakdown of duties that the beneficiary will perform in the U.S.:

- 20% - New business development including business issues discussions and Negotiations
- 20% - new sales team members recruiting and training
- 20% - maintain business growth and responding customers' inquiries and Technical support requests.
- 20% - Collect market information including attending exhibition. Regular sales reports to [foreign parent company]
- 20% - management of sales department including the reviews of sales activities and the progress of new employees.

The petitioner also submitted a proposed organizational chart indicating the Chief Executive Officer who will supervise the beneficiary as the sales manager, the chief financial officer and the operational manager. The beneficiary will supervise the account managers, sales assistants, support engineer and logistic department. The chart indicated that all of the employees that the beneficiary will supervise have not yet been employed.

The director denied the petition on December 28, 2009 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary would be employed in a primarily executive or managerial capacity by the U.S. company.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. 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.*

The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states vague duties such as the beneficiary will be responsible for "new business development;" "maintain business growth;" and, "management of sales department." The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the sales department and the duties to be performed by the subordinates in the department that the beneficiary will supervise. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will "collect market information," and will undergo "negotiations." It appears that the beneficiary will be developing and marketing the services of the business rather than directing such activities through subordinate employees. 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. at 604.

In addition, although the petitioner claims that the U.S. entity will hire additional employees, the petitioner did not submit the job descriptions for the prospective employees, or a timeline for hiring all of the additional personnel listed in the proposed organizational chart. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, as contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should

explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

*Id.*

The petitioner submitted a half page document entitled "2010 Work Outline." The document outlines some general and basic goals for the year but does not provide any detail of how these goals will be achieved. The outline does not provide any market research, a financial plan to achieve the goals, or any strategies to set up a new sales office and grow. Without a business plan, it is impossible to conclude that the U.S. company will support a managerial or executive position within one year. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Upon review, the petitioner has not submitted sufficient evidence to establish that the intended United States operations, within one year of approval, will support an executive or managerial position.

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.