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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

DATE: **JUL 31 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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 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 petition seeking to extend the beneficiary's status 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, an Iowa limited liability company, states that it operates an agricultural post-harvest technologies business. It states that it is a subsidiary of the beneficiary's prior employer, Dryexcel Manutencao de Equipamentos e Comercial Ltda, located in Brazil. The beneficiary was previously granted L-1A classification from July 25, 2009 until April 12, 2010, in order to open a new office in the United States. The petitioner now seeks to extend the beneficiary's status so that she may continue her employment in the position of chief technical officer/chief of operations for two additional years.

The director denied the petition on July 16, 2010 concluding that the petitioner failed to establish: (1) that the U.S. company was doing business as defined in the regulations; and (2) that it secured sufficient physical premises to house the U.S. company.

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 asserts that the regulations do not require that sales have been made or that a particular type of premises have been secured for a company to be "doing business" in the United States. Counsel asserts that "the facts of the situation must be taken into account in considering whether the premises secured are 'sufficient' and whether the business is engaged in systematic economic activity." Counsel submits a brief and 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. DOING BUSINESS IN THE UNITED STATES

The first issue addressed by the director is whether the petitioner established that the U.S. company is a qualifying organization doing business in the United States.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term “qualifying organization” and related terms as follows:

- (G) *Qualifying organization* means 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[.]

The director specifically addressed whether the petitioner established that it is doing business in the United States, as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(H):

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.

A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 9, 2010. The petitioner stated on the petition that it employs two workers and one contractor. The petitioner indicated a gross and net annual income of "0.00." In a letter submitted in support of the petition, the petitioner stated:

[The U.S. company] unfortunately was established in the midst of the recession in April 2009. While numerous contacts with customers have been made (Exhibit E), and quotes have been presented (Exhibit F), a sale has not been completed as of the date of this letter. However [the petitioner] is engaged in continued communications with potential customers, and the price of just one piece of equipment is so significant (ranging from \$50,000 to \$1,000,000), that just one sale would result in huge income for the business.

The petitioner stated that its Brazilian parent company "opted to keep providing the entire financial source as is needed for [the U.S. company's] development." The petitioner further stated that due to the market characteristics, culture, behavior and weak economy present in the Midwest United States, the company expects to have its first sale "within 3 years after [the petitioner's] start-up." The petitioner noted that this timeframe is consistent with the parent company's entry into South American markets outside of Brazil, and is lengthy due to "the complexity of these technologies, the culture changing and the high price of the equipment." According to the petitioner's business plan, the company was established to "manufacture and sell a solution offering advanced post-harvest technologies to the grain and seed industry."

The petitioner noted that the beneficiary's duties to date have included one-on-one meetings with potential customers to teach them about the company's technology through meetings, presentations, comparisons, facilities studies, phone contacts, and brochures, and in seeking potential partners.

The petitioner submitted a copy of its IRS Form 1065, Return of Partnership Income, for 2009, which covers the period from April 1 through December 31, 2009. The Form 1065 indicates no income or deductions of any type. The company claimed \$23,762 in start-up and organizational expenses as assets. The most recent back statement provided for the U.S. company (February 2010), shows an ending balance of \$90.27.

The petitioner's supporting evidence included e-mail correspondence between the beneficiary and potential clients, copies of product informational materials, a virtual lease agreement, and a business plan. According to the petitioner's business plan, the petitioner intended to establish a demonstration facility in the United States requiring a \$3 million investment, and did not initially forecast any 2009 sales, while the petitioner anticipated selling at least four of its grain processing systems in 2010. The business plan indicates that the company would require an additional \$3 million investment at the beginning of its second year. The petitioner indicated that it has one or two individuals working as "investor searchers" who will receive a commission if they are successful in "soliciting investors for the establishment of a [company] grain drying and storage facility in a Midwestern state yet to be determined."

On May 10, 2010, the director issued a request for additional evidence (RFE). The director instructed the petitioner to submit, *inter alia*, additional evidence to establish that the U.S. company is doing business. Specifically, the director requested copies of major sales invoices, copies of utility bills for the previous year, and evidence of memberships in public or private professional business or trade organizations. The director also requested evidence of wages paid to employees and additional evidence related to the U.S. company's business premises.

In a response dated June 18, 2010, the petitioner submitted copies of sales proposals made to potential U.S. customers, copies of utility bills addressed to the beneficiary at her residential address, e-mails establishing working relationships with local business people in Iowa, and a revised version of the company's IRS Form 1065 for 2009, which also reported no income or expenses. The petitioner provided evidence that its claimed parent company continued to pay the beneficiary's salary in Brazil. The petitioner confirmed that it had yet to achieve any sales in the United States.

The director denied the petition on July 16, 2010, concluding that the petitioner failed to establish that it is doing business in the United States. In denying the petition, the director emphasized that the company has completed no commercial sales, and notes that the company appears to operate primarily from the beneficiary's apartment. The director determined that the petitioner has not been engaged in the regular, systematic and continuous provision of goods and/or services.

On appeal, counsel for the petitioner asserts that the evidence submitted establishes that the beneficiary "has been working hard to sell the product that her company can provide to farmers to make their post-harvest processes more fuel efficient." Counsel contends that "it is not an indication of fraud or lack of activity that no sales have as yet been consummated. It is instead an expected outcome given the market [the beneficiary] is trying to enter."

Counsel further asserts that "the point of the L regulations is to promote trade and allow foreign companies to start business in the United States. An interpretation such as that taken by the Service Center is counter-productive to this purpose as it would necessarily foreclose the development of a business with a product that is difficult to sell." Counsel concludes that "this outcome is illogical and does not comport with the regulations."

In support of the appeal, the petitioner submits: (1) evidence that the company is one of 15 Midwest companies selected as a 2010 CleanTech Open semi-finalist; (2) a copy of its business plan; (3) a feasibility study for the U.S. company completed in July 2008 by the Iowa State University; (4) numerous support letters from Iowa

business people and organizations serving as mentors to the beneficiary and the petitioning company; and (5) additional information regarding the Cleantech Open competition, for which the grand prize at the national level is \$250,000 in investment and services.

B. Discussion

Upon review, and for the reasons stated herein, the petitioner has not established that the U.S. company was doing business at the time of filing or during the validity of the beneficiary's initial period of L-1A approval.

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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations 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. The term "doing business" is defined in the regulations as "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)(1)(ii). There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

Upon review of the current petition, it is apparent that the petitioner was not prepared to commence doing business upon approval of its initial new office petition. Moreover, the record does not support a finding that the petitioner has been doing business throughout the validity of the new office petition approval.

The extension of the new office petition hinges on the petitioner's ability to demonstrate that it has been doing business as defined in the regulations, and as proposed in the business plan that formed the basis of the new office approval, for the previous year. Neither the petitioner's feasibility study, original business plan nor revised business plan anticipated that the U.S. company, at the end of the first year of operations, would still be seeking financing for the establishment of its demonstration facility in the United States, or that the beneficiary would be essentially operating the company on her own primarily from her residence.

For example, the petitioner explicitly states at section 7.2 of its business plan that "an initial investment from seed stage investors of \$3 million will be required to begin operational activities and will fund the creation of a demonstration facility and provide sufficient operational capital for related expenses." The initial business plan called for the demonstration facility to commence normal operations by October 2009 (business plan at page 28). The initial business plan anticipated that there would be 13 employees on the payroll by January 2010 and \$1.7 million in sales in the second quarter of 2010. The revised outlook prepared in October 2009 calls for eight employees to be hired by June 2010 and \$1.7 million in sales during the second quarter of 2010. While the record shows that the beneficiary is working to achieve sales, there is no evidence that the petitioner has received any of the financing needed for the company to carry out its business plan or that it has hired any employees other than the beneficiary and the chief financial officer (the beneficiary's sister), neither of whom is paid as an employee of the U.S. company. It appears that the petitioner has commissioned one or two individuals to attempt to secure investors for the petitioner's project, but offers no explanation as to why the company did not secure the required investment prior to filing the initial petition. The U.S. company has no regular payroll employees as of

the date of the appeal, and still has not provided evidence that it has completed sales or moved towards carrying out its plans to operate a demonstration facility.

While the AAO acknowledges the barriers to the petitioner's immediate entry into the United States market, it should be able to demonstrate that it had the financing in place and the means to carry out its business plan as of the date the initial petition was filed.

The record shows that the beneficiary and the U.S. company have support from members of the local business community in bringing the petitioner's technologies to the U.S. agriculture industry. The AAO will take into account the nature of the petitioner's business and industry and understands that high-priced agricultural equipment will necessarily require a different and lengthier sales process than typical consumer products. Nevertheless, the petitioner represented to USCIS that it would in fact open a demonstration facility and achieve its first sales within approximately one year of the date it filed the new office petition. The record does not establish that the U.S. company is doing business as contemplated in its business plan or as defined by the regulations. Accordingly, the appeal will be dismissed.

III. PHYSICAL PREMISES

The second issue addressed by the director is whether the petitioner established that it maintains physical premises to house the U.S. business.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires that a petitioner seeking to open a new office in the United States submit evidence that it has secured sufficient physical premises to house the new office. The AAO observes that the "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business will 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.

A. Facts and Procedural History

The petitioner indicated on the Form I-129 that its mailing address is located at 309 Court Avenue, Suite 812 in Des Moines, Iowa, and the petitioner indicated at Part 5 of the petition that the beneficiary would be working at this address.

In support of the petition, the petitioner submitted a month-to-month Virtual Office Agreement with Court Avenue Business Suites which commenced on April 1, 2009. Under the terms of the agreement, the petitioner agreed to pay \$50.00 monthly service charge for a "mail box package." This package includes the use of the 309 Court Avenue, Suite 812 business address, receipt and sort of mail, and the display of the company's name on the building's reception area window. The basic agreement does not explicitly provide the petitioner with an office or access to an office.

The petitioner referenced its "lease" at [REDACTED] and noted that the company's business "is still conducted primarily via telephone and email, as well as in-person visits to potential investors and customers."

In the request for evidence issued on May 10, 2010, the director instructed the petitioner to provide a floor plan for the U.S. premises, color photographs, a lease agreement specifying the total square footage of the leased premises, additional explanation regarding the type of business, worksite and type of building occupied, its business hours and telephone number, an occupancy permit, and proof of insurance for the company's premises.

In response, the petitioner explained that the business is located at the Court Avenue Business Suites, but noted that the beneficiary "usually works from her apartment on Grand Avenue, sending e-mails and making phone calls." The petitioner indicated that she sometimes meets at the Court Avenue Business Suites conference room, when pre-scheduled by phone. The petitioner submitted a letter from [REDACTED] of Court Avenue Business Suites, who states that the petitioner "has been a virtual tenant of ours in which we provide a business address for them and receive their mail. On a regular basis [the beneficiary] picks up her mail and, on occasion, hosts a business meeting in our conference room."

The director denied the petition, concluding that the petitioner failed to establish that the petitioner has secured sufficient physical premises to house the business.

On appeal, counsel for the petitioner asserts that "extensive evidence was submitted to show that the physical premises secured are 'sufficient' for the needs of [the petitioner] at this stage in its development." Counsel emphasizes that the record shows that the beneficiary conducts much of her business through e-mail, and that such method of business is appropriate. Counsel asserts that the petitioner's agreement with Court Avenue Business Suites provides a mailing address and access to a conference room. Counsel contends that "no requirement exists in the regulation . . . that a particular type of premises been secured for a company to be 'doing business' in the United States."

B. Discussion

Upon review, counsel's assertions are unpersuasive. The petitioner stated at the time of filing that the beneficiary will work at the [REDACTED]. The record shows that the petitioner has not leased any physical premises at this address, but rather rents a mailbox and pays \$10.00 per month to have its company name on a directory. The virtual office agreement with Court Avenue Business Suites does not satisfy the physical premises requirement.

In response to the request for evidence, the petitioner stated that the beneficiary works primarily from her apartment, but did not provide a lease, photographs of the actual work site or any other evidence corroborating its claims. The AAO acknowledges that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office, and observes that there may be cases in which a home office would satisfy the regulatory requirement. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). USCIS may consider evidence that the company has obtained a license to operate the business from a home office, if required, evidence that the landlord has authorized the use of residential space for commercial purposes, evidence that the company has established separate phone lines or made other accommodations for the use of the premises by the U.S. company, or any other evidence that would establish that a residential dwelling will meet the company's needs. Finally, photographs and floor plans of the leased

premises may assist in determining that the premises secured are sufficient to accommodate the petitioner's business operations.

Here, the petitioner has not offered any additional evidence on appeal to demonstrate that the specific premises secured are sufficient to accommodate the petitioner's business. The petitioner simply states that the beneficiary works from her apartment without providing any evidence related to the premises. 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. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

Further, the petitioner claims to have a second employee, the chief financial officer, and as well as an "investor searcher" who works on commission. It has not indicated where these individuals work or provided evidence that the beneficiary's apartment could reasonably accommodate them. For this additional reason, the appeal will be dismissed.

IV. EMPLOYMENT IN A MANGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the director, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition, or submitted evidence that the company has grown to the point that it can support a primarily managerial or executive position. The petitioner indicates that it employs a chief financial officer who handles the company's financial affairs and two individuals (an investment advisor and an investor searcher) who are tasked with seeking venture capitalists and investors to provide financing to the U.S. company. The petitioner has not established that the chief financial officer or commissioned employees relieve the beneficiary from performing the majority of the non-qualifying tasks associated with launching the U.S. company, which remained in a start-up phase at the time the petition was filed.

Further, the beneficiary's tasks, as described in the record, consist of contacting potential customers to attempt to sell the petitioner's product, seeking distribution channels, looking for manufacturing partnerships, and other tasks required to market, promote and sell the petitioner's products in the United States. Given that the company has yet to establish its demonstration facility or achieve any sales, these must be considered ongoing start-up tasks, rather than duties that can be considered primarily managerial or executive in nature pursuant to the statutory definitions at section 101(a)(44) of the Act. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as personally marketing and selling the company's products, do not fall directly under managerial or executive duties as defined in the statute. For this reason, the AAO cannot conclude that the beneficiary is primarily performing the duties of a manager or executive. *See, e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The petitioner indicates that it plans to hire additional managers and employees in the future. However, 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 primarily managerial or executive position. 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

V. CONCLUSION

The petition is denied and the appeal is 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, *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.