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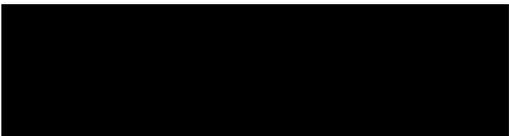
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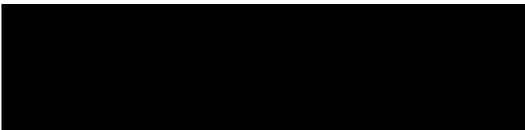
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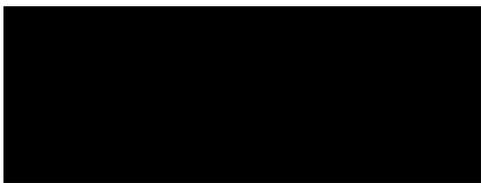
Date: FEB 5 2004

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a new office engaged as an importer, exporter, and supplier of merchandise from Bangladesh. The petitioner seeks to employ the beneficiary as its president for three years in the United States. The beneficiary is currently in the United States on a B-2 visa. The petitioner filed a petition for the beneficiary to be classified as an L-1A intracompany transferee. The director denied the petition concluding that the petitioner had failed to demonstrate that within one year of approval of the petition, it would support a managerial or executive position.

On appeal, counsel for the petitioner asserts that the director's decision is contrary to the laws and facts of the case. Counsel contends that the director ignored the beneficiary's job description, and that the director "appears to be applying an [incorrect] standard."

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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)(v) further states if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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;
- (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:
 - a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - b. 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
 - c. the organizational structure of the foreign entity.

The issue in this proceeding is whether within one year of approval of the petition, the beneficiary will be employed in a primarily managerial or executive capacity as required in the regulation at 8 C.F.R. § 214.2(l)(3)(v)(B).

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.

On the petition, the petitioner indicated that a description of the beneficiary's proposed job duties would be included on an attached sheet. A review of the record revealed no attachment. Therefore, in a notice dated March 21, 2002, the director requested that the petitioner submit a comprehensive description of the beneficiary's proposed duties in the U.S. corporation. The director noted that in order to be considered a manager or executive, the petitioner must demonstrate: (1) that the beneficiary will function at a senior level

within an organizational hierarchy as well as in position title; or, (2) that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties.

In response to the director's request, the petitioner submitted the following description of the beneficiary's proposed job duties:

1. Contacting potential clients to develop new leads.
2. Hiring and firing personnel.
3. Contact [h]ead office in Bangladesh instructing employees to coordinate the sales consummated.
4. Negotiating with [b]uyers in regard [to] price, terms of payments and shipping schedule.
5. Day to day operatins [sic]

The petitioner also stated in a letter submitted in response to the director's request that there are three subordinate supervisors under the beneficiary's management, including a finance director, a general manager, and an export manager. However, it is not clear from the evidence in the record whether these individuals are employed in the foreign company or the U.S. company. The petitioner also included an outline of the U.S. company's estimated gross profit and expenses for the years 2002 and 2003. Included in this was the company's expected staffing needs, which reflected one clerk and one sales representative for the first year, and "1 & ½ clerk" and 2 sales representatives for the second year. No additional evidence was provided by the petitioner to substantiate its claim that the beneficiary would perform in a primarily managerial or executive capacity.

In his decision, the director concluded that the petitioner had failed to demonstrate that it would support the beneficiary in a managerial or executive position within one year of approval of the petition. The director noted that the description of the beneficiary's proposed job duties is vague and general, and that "the record is equally vague with regard to the business plan for [the] United States entity." The business plan did not include dates or a timetable for the proposed business activities, which would demonstrate that the U.S. business would grow sufficiently to support a managerial or executive position. Furthermore, the director noted that the petitioner failed to identify any employees who would perform accounting, public relations, personnel management, and other non-qualifying functions for the petitioner. Consequently, the director determined that the petitioning organization would not support a managerial or executive position.

On appeal, counsel for the petitioner asserts that the director's decision ignores the fact the beneficiary is already performing executive and managerial functions. Counsel claims that the director's sole basis for concluding the beneficiary would not function in a managerial or executive capacity is because "the beneficiary 'will not be managing managerial level personnel'." Counsel contends that the description of the beneficiary's job duties satisfies the criteria in the regulations for a manager or executive. Counsel also submits on appeal a copy of four employee earnings statements, which reflect that the petitioning company employed four individuals for four days in August 2002.

Counsel further asserts that the director improperly considered the operating plan for the petitioning organization. Counsel claims that "where the U.S. subsidiary is already in operation, and has already hired workers in the U.S., then the need for an operating plan has little or no significance."

On review, counsel's assertions are not persuasive in establishing that the U.S. business, as a new company, will within one year sufficiently support a managerial or executive position. When examining the managerial or executive capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The description must be sufficient to determine that the duties to be performed are primarily managerial or executive in nature. *Id.*

Contrary to counsel's assertion on appeal, the job description provided by the petitioner fails to establish that the beneficiary would be employed in a primarily managerial or executive position within one year of approval of the petition. The petitioner submitted five statements in response to the director's request for a "comprehensive description" of the proposed job duties. Two of the named job responsibilities, "hiring and firing personnel" and "day to day operations," are vague and simply re-state the meaning of managerial capacity, as that term is defined in the regulations. See Section 101(a)(44)(A)(iii) and (iv). The lack of clarity in the petitioner's description makes it impossible to determine that the beneficiary will be performing as a manager or executive in the U.S. business. Simply 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). Further, the failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The remaining statements in the job description, "contacting potential clients" and "negotiating with buyers," clearly establish that the beneficiary will be performing the non-qualifying functions of the U.S. business, rather than managing those who perform the functions. The AAO recognizes that as a new company, the petitioning organization is allowed one year from the date of the approval of the petition to develop a managerial or executive position. See 8 C.F.R. § 214.2(l)(3)(v)(C). However, as noted by the director, the petitioner failed to identify any employees it anticipates hiring who would perform such functions as accounting, personnel management or advertising. The only employees identified by the petitioner are two proposed sales representatives and "1 and ½ clerks."¹ There is no evidence regarding the functions these employees will perform or how they will relieve the beneficiary from performing non-qualifying duties. Therefore, it can only be assumed, and has essentially been acknowledged by the petitioner itself, that the beneficiary will perform the sales, negotiations, and personnel functions of the U.S. entity, as well as other non-qualifying duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In regards to the employee earnings statements submitted on appeal by counsel, the statements are not persuasive in establishing that the beneficiary is managing or directing any subordinate employees. First, the AAO is not obligated to consider new evidence on appeal where the petitioner was put on notice of evidentiary requirements and given a reasonable opportunity to provide it for the record before the petition was adjudicated by CIS. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the present matter, the director specifically requested that the petitioner submit evidence to demonstrate that the beneficiary will be managing a subordinate staff that will relieve him from performing non-qualifying duties. As the petitioner was put on notice of the need for additional evidence, and that evidence was available to the petitioner at the time of its response, the statements submitted on appeal will not be considered. Additionally, even if the AAO were to acknowledge the earnings statements, the petitioner failed to provide supplemental information that would identify what position each employee holds in the company, the duties performed by each, or their

¹ The petitioner has failed to explain what is meant by its use of the phrase "1 and ½ clerks."

educational background. Therefore, the earnings statements submitted by counsel are irrelevant in establishing that the beneficiary is managing any subordinates.

Furthermore, counsel has given no explanation or evidence supporting his claim that the director should not consider the petitioner's business plan. The regulations state that in order to establish that a new company will support a managerial or executive position within one year of approval of the petition, the petitioner shall provide information regarding the scope of the entity, its organizational structure, and its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Further, the regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the director may request any additional evidence that he deems necessary. It is reasonable to conclude that the best resource for identifying a company's scope, organizational structure or financial goals would be the company's business plan. Therefore, counsel's assertion that the director improperly considered the petitioner's business plan is a direct contradiction to the analysis required by the regulations.

For the foregoing reasons, the petitioner has failed to establish that within one year of approval of the petition it will employ the beneficiary in a primarily managerial or executive capacity.

Beyond the decision of the director, the record does not sufficiently establish that the foreign and U.S. companies are qualifying organizations as defined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G). In the petition, the petitioner identified the U.S. business as a subsidiary of the foreign company. However, evidence subsequently submitted by the petitioner identified the beneficiary as the majority owner of the U.S. company's common stock. Additionally, the only evidence in the record that identifies the ownership of the foreign company is a trade license, which names the beneficiary as the "proprietor" of the business. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, simply 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*, *supra*.

Moreover, the record lacks sufficient evidence that the beneficiary was employed abroad in a managerial or executive capacity for the year prior to his requested employment in the United States. The regulation at 8 C.F.R. § 214.2(l)(3)(iv) requires that the beneficiary's prior year of employment abroad be in a managerial or executive capacity. The petition filed by the petitioner indicates that the beneficiary has been in the United States since May 8, 2001, approximately nine months prior to filing the petition, on a B-2 visa. The petitioner has not established that the beneficiary has been employed abroad for the requisite period of time, and in the requisite capacity, prior to filing this application.

The petitioner also failed to establish that the beneficiary's employment in the United States is temporary. While the petitioner for an L classification generally need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily, where the beneficiary is claimed to be the owner or major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982). As noted above, the record indicates that the beneficiary is the majority owner of the petitioning organization. Therefore, the petitioner is obligated to submit evidence that the beneficiary's services will be used for a temporary period. *See* 8 C.F.R. § 214.2(l)(3)(vii).

A final issue not discussed by the director is whether the petitioner has secured sufficient premises to house the new U.S. office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). In response to the director's request for evidence, the petitioner submitted a copy of a lease in which the leased premises were identified as "37-56, 83RD ST APT#2ND FL." However, the six pictures provided by the petitioner as evidence of an office identify the office location as "76-11 37th Ave., Suite 206F." Moreover, on the petition, the petitioner noted its address as "37-06 83rd Street" and did not include any apartment number. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho, supra.*

For these additional reasons, the petition will not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.