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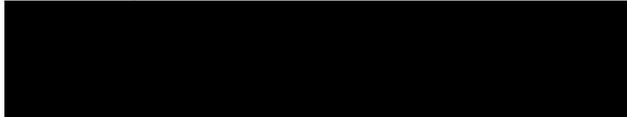


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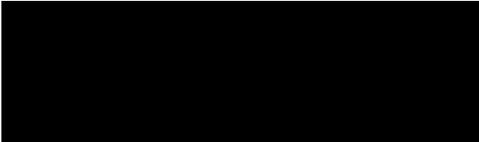


FILE: SRC 01 216 53376 Office: TEXAS SERVICE CENTER Date: **MAR 30 2004**

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 nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner states that it is a retail baby supply store. It seeks to employ the beneficiary temporarily in the United States as its president for one year. The director determined that the U.S. entity had been in operation for more than one year. The director also determined the evidence was not sufficient to establish that the beneficiary will be employed primarily in a qualifying managerial or executive capacity.

On appeal, the petitioner disagrees with the director's determination and asserts that the U.S. entity is a "new office" and that the beneficiary's duties will be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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(1)(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 (1)(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.

According to the documentary evidence contained in the record, the petitioner was incorporated under the name Babymart, L.L.C. d/b/a Babyworld on June 21, 2001. The petitioner claims that the U.S. entity is an affiliate of Calzados La Torress C.A.C.C., located in Venezuela. The petitioner claims to have two employees. The petitioner seeks the beneficiary's services as president for a period of one year, at a yearly salary of \$50,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

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.

In a letter of support, the petitioner stated that the beneficiary's duties for the U.S. entity would involve the management of the business enterprise operations including:

- The supervision of any employees or future employees employed with the company;
- Training of employees (hiring and firing of employees);
- Managing United States office finances;
- Planning, developing implementing company strategy;
- Developing and implementing policies and procedures for company operations;
- Determining mark-up percentages necessary to insure profit, based on estimated budget, profit goals and average rate of client acquisition;
- Developing policies and procedures for procurement of merchandise;
- Oversee the negotiating of contracts with merchandise providers;
- Authorizing purchase of merchandise based on estimates;
- Formulating pricing policies for sale of merchandise;

- Reviewing statements, invoices and insurance certificates;
- Coordinate the purchase of merchandise; supervising the contact with the different vendors to attain the desired merchandise. The President must travel frequently in order to maintain business relations with vendors and clients;
- Plan business objectives, develop organizational policies and establish responsibilities and procedures for attaining objectives;
- Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions;
- Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments and increase productivity;
- Plans and develops industrial, labor, and public relations policies designed to improve the business's image and relations with customers, the community, and the public;
- Evaluates market for new profitable opportunities in order to attain established policies and objectives of the company;
- Approve the budget for the company and determining allocation of funds; and
- Plan and implement new operating procedures to improve efficiency and reduce costs.

The petitioner submitted an organizational chart labeled "Babymart, L.L.C. d/b/a Babyworld" which depicts a hierarchy consisting of a president, manager, assistant manager, and sales representatives.

In the petition the beneficiary's employment with the foreign entity is listed from 1995 to the present, with no interruptions.

In the translated version of a letter of employment, the foreign entity represented that the beneficiary performs multiple duties abroad including: finance management (accounts receivable and accounts payable such as bank accounts and others); management of different administrative areas; in charge of the purchasing operations of the company as well as marketing and advertisement activities; employee training and personnel supervision; and the different aspects of the business enterprise management.

The petitioner also submitted copies of the beneficiary's passport and B-2 visas as evidence. The record reflects that the beneficiary was issued a B-2 visa, that he arrived in the United States on February 8, 2001, and that he remained in the United States at the time the petition was filed on July 10, 2001.

The director requested additional evidence in order to complete the processing of the petition. The director specifically stated:

1. Submit evidence that the foreign and U.S. entity have a qualifying relationship.

Please note that the U.S. entity has been in operation for more than one year and will not be considered a startup business.

2. Submit a copy of the last four state quarterly reports (including wage report) for the U.S. entity. This must be the state quarterly report.
3. Submit an organizational chart for the U.S. entity. This must show the names, positions and the date started.
4. Submit evidence of ownership of the foreign entity.
5. Submit evidence of the business conducted by the foreign entity during the past year, such as copies of corporate income tax returns, accountant statements, invoices, bills of sale, bills of lading, shipping receipts, etc.

In response to the director's request for additional evidence, the petitioner submitted:

1. A copy of the U.S. entity's Certificate of Organization dated June 21, 2001;
2. Copies of the U.S. entity's Articles of Organization;
3. Notification of assignment of an employer identification number (EIN) for the U.S. entity;
4. A Sales and Use Tax Permit for the U.S. entity;
5. A Commercial Lease Agreement between [REDACTED] and Babymart, L.L.C. dated July 30, 2001, effective August 15, 2001, for the premises known as [REDACTED];
6. A letter of explanation written by the beneficiary and dated August 6, 2001, explaining the U.S. entity's business transactions leading up to the establishment of Babymart, L.L.C.;
7. A duplicate copy of the diagram prepared by the beneficiary depicting the corporate entity's relationship and the shareholder's interests in the U.S. and foreign entities;
8. Summary translations relating to the commercial registration of the foreign entity, including the distribution of company stock;
9. A prospective organizational chart for the U.S. entity, which depicts the beneficiary as president, [REDACTED] as manager, [REDACTED] as accountant;
10. A letter written by [REDACTED] of R&R Business Management dated July 19, 2001, acknowledging financial management services rendered to Mr. [REDACTED] d/b/a Babyworld for the year ending December 31, 2000;
11. Untranslated and illegible documents from the foreign entity to include: financial statements for 2000, 1999 and 1998, tax returns, invoices, salary payment receipts, phone bills, electricity bills, consumer and wholesale tax certificate, and an organizational chart.

The director, in denying the petition, determined that the petitioner failed to submit the last four state quarterly reports and an organizational chart for the U.S. entity that included the dates start for the employees as was requested. The director also states that the evidence submitted establishes that Babyworld has been conducting business for more than one year prior to filing the instant petition. The director states further that, contrary to the petitioner's contentions, the beneficiary purchased an established business that has been in operation for more than one year. The director states that even though the ownership has changed and the name of the original business has changed the Service does not consider it a new office since the business has been in existence and doing business for more than one year prior to filing the instant petition.

On appeal, counsel states that the U.S. entity is a "new office," that the size of the employer cannot be a basis for denial, and that the duties that the beneficiary will perform are managerial and executive. Counsel submits a brief and additional evidence to support his contentions. The petitioner resubmits a copy of the U.S. entity's Certificate of Incorporation; notification of assignment of employer identification number (EIN); Sales and Use Tax Permit; and a copy of the commercial lease agreement. The petitioner also submits a

revised version of the U.S. entity organizational chart and a letter verifying business ownership of the U.S. organization.

Counsel contends that Babyworld was formed as a limited partnership and was not affiliated with the foreign entity. Counsel also states that Babymart was incorporated as a limited liability corporation on June 21, 2001, less than one year before the filing of the instant petition and therefore qualifies as a "new office."

Contrary to counsel's assertions, the U.S. entity will not be considered a new office. In the instant case, the evidence demonstrates that the beneficiary owned 70 percent of Babyworld and acquired the remaining 30 percent ownership interest from his partner. The evidence also demonstrates that the business had been operational for more than one year at the time the petition was filed. Evidence of a name change (d/b/a), a change in the form of the organization, and the lease of previously leased premises is not sufficient to establish that the petitioning entity is a "new office." The business in the name of Babymart, L.L.C. d/b/a Babyworld may have been incorporated just prior to the filing of this petition, however, the business of retail sales of baby clothes had been established and functioning for more than one year at the time the petition was filed. The intent, in fashioning the intracompany transferee regulations, was not to allow old established businesses to reincorporate under a new name and different form of organization in order to take advantage of "new office" status. Alterations in name and form do not interrupt the ongoing operations of the business.

The petitioner submitted copies of an Income Tax Return for the year ending December 31, 2000, "on behalf of Aboulhosn & Vilalobos, Ptr. (currently known as Babymart, L.L.C. d/b/a Babyworld,)" invoices "on behalf of Babymart, L.L.C. d/b/a Babyworld,)" and other commercial transaction documents for the years 2000 and 2001. The record reveals that the petitioner has been doing business for more than one year. Therefore, it is not a new office pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F).

Even if the AAO were to consider the petitioner as a new office, the evidence of record fails to establish: (1) that sufficient physical premises to house the new office have been secured; (2) that the beneficiary was employed for one continuous year in the three-year period preceding the filing of the petition in a managerial or executive capacity; or that (3) the U.S. entity will be in a position to support an executive or managerial position within one year of the approval of the petition. The evidence shows that the instant petition was filed on July 10, 2001. The evidence also demonstrates that the petitioner signed a commercial lease agreement on July 30, 2001, to take effect August 15, 2001. 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. 1978). There has been no evidence submitted to establish that the beneficiary had been employed by the foreign entity for one continuous year within three years preceding the filing of the petition. There have been no tax records or payroll records submitted to substantiate the beneficiary's term of employment abroad. Finally, based upon the lack of evidence submitted to support the petitioner's proposed financial posture, it does not appear that the petitioner would be in a position to remunerate the beneficiary or to support a managerial or executive position within one year of operation. See 8 C.F.R. § 214.2(l)(3)(v)(C).

Counsel refers to unpublished decisions involving L-1 intracompany transferee classifications. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to

those in the unpublished decisions or that the basis for denial by the director in the instant case was similarly premised. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. See *Chan v. Reno*, 113 F.2d 1068, 1073 (9th Cir. 1997) (citing 8 C.F.R. § 3.1(g)). As the Ninth Circuit says, “[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference.” *Id.* (citing *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)).

Regarding the claimed managerial or executive status of the beneficiary, the petitioner has failed to describe the beneficiary’s job duties with specificity. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. V. Sava*, 724 F.Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). The beneficiary’s position description abroad does not describe his responsibilities in detail, indicate whom he directs, or the percentage of time he spends performing each task. In addition, the petitioner submitted an untranslated version of the foreign entity’s organizational chart.

In the instant case, the director determined that the record did not demonstrate that the petitioner has any qualifying employees to relieve the beneficiary from carrying out the day-to-day operations of the U.S. entity. The director further determined that as of the filing of the petition the U.S. entity had not grown to a point where it could remunerate the beneficiary, or where the beneficiary would function at a senior level within the organizational hierarchy, or with respect to a function. The director concluded that the petitioner had not sufficiently demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity.

The beneficiary’s proposed duties described as being responsible for the supervision and training of future employees, planning, developing and implementing company strategy; developing policies and procedures for procurement of merchandise; coordinating the purchase of merchandise; and planning and implementing new operating procedures are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive in nature. The petitioner has not demonstrated that the beneficiary will manage or direct the management of a department, subdivision, function, or component of the organization. Neither has the petitioner established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing the services of the corporation. The petitioner has failed to comply with the director’s request for the last four state quarterly reports for the U.S. entity. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

Although the petitioner indicates its intent to hire other professional and managerial staff, futuristic projections are not sufficient to show that the U.S. entity has employees who are currently in a position to relieve the beneficiary from performing non-qualifying duties. The fact that the petitioner is in a preliminary stage of organizational development is considered, but does not relieve it from meeting statutory requirements. 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., supra*. Based upon the evidence of record, the beneficiary will be performing the services of the organization, rather than managing a function or the overall day-to-day activities of the organization. Furthermore, there is no evidence to show how much of the time spent by the beneficiary will be allotted to managerial or executive duties and how much to other non-managerial or non-executive functions. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title.

On review of the complete record, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity.

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

ORDER: The appeal is dismissed.