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Washington, DC 20529

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U.S. Citizenship
and Immigration
Services



D7

FILE: LIN 02 219 51677 Office: NEBRASKA SERVICE CENTER Date: AUG 01 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

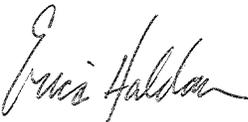
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in May of 2002 and claims to be in the business of importing and exporting dyes, chemicals, pharmaceuticals, and bulk drugs. The petitioner claims that the U.S. entity is a subsidiary of United Chemical Industries, located in Gujarat, India. It seeks to employ the beneficiary temporarily in the United States as the vice president and general manager of its new office for one year, at an annual salary of \$64,000.00. The director determined that the evidence was not sufficient to establish: (1) that the foreign entity has the financial ability to remunerate the beneficiary and commence doing business in the United States; or (2) that the U.S. entity will support a managerial or executive position within one year of the approval of the petition.

On appeal, the petitioner disagrees with the director's determination and asserts that there has been sufficient evidence submitted to show that the foreign entity will be able to remunerate the beneficiary and commence doing business in the United States, and will be able to support a managerial or executive position within one year of the approval of the petition.

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(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 (I)(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 first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the foreign entity has sufficient capital to capitalize the U.S. entity and commence doing business in the United States, and remunerate the beneficiary for his services.

In a letter dated June 4, 2002, the petitioner stated that the foreign entity had been established since May 8, 1990, and was owned by the same three partners who own the U.S. entity. The petitioner asserted that within the first year of operation the U.S. entity anticipates employing four full-time employees, and estimates a net income after taxes to be \$2.1 million. As evidence, the petitioner submitted copies of the foreign entity's income tax returns, auditor's reports, and banker's certificate from Bombay Mercantile Co-operative Bank Limited. The petitioner also submitted copies of the U.S. entity's Articles of Incorporation, bank statements from the Mutual Bank, company business plan, company organizational chart, stock certificates, and stock transfer ledger.

In response to the director's request for additional evidence to address the financial issues, the petitioner stated, in part:

The U.S. entity has opened a bank account with [sic] and transferred funds to make a total deposit of US \$25,000 as of the last statement enclosed dated October 9, 2002. An provision [sic] of a further funds [sic] to the tune of US\$50,000 has been made by the Indian parent company by way of application filed with the bankers in India on the prescribed A-2 Form A project report had been made prior to deciding the set up of the US subsidiary for ongoing business, which highlights the end out comes [sic] with financial projections of the US Corporation to become self-sufficient and start to make profits. The U.S. Corporation will have sales exceeding gross turn over [sic] of about US\$3.3 million. The estimated net of the first year before tax is US\$1.2 million.

In reference to the foreign entity's ability to remunerate the beneficiary, the petitioner stated:

The US entity has opened a bank account with \$25,000.00 towards the initial set up and start up of business. Once the business is up and running, the money generated would be used by the US corporation to expand the business. The beneficiary will be paid the salary from the Indian corporation till such time, as the corporation is not making enough money to support the beneficiary. Also, once the visa is approved, the Reserve Bank of India officially would be able to transfer funds to the US corporation vide [sic] form A 2 under the category of "Repatriation of foreign investment in subsidiaries/branches[.]"

In reference to the foreign entity's ability to commence doing business in the United States, the petitioner stated, in part:

that the Indian corporation is operating at a deficit and that the business is operating at a loss is not true. Due to the economical [sic] instability of the State of Gujarat, India due to [e]arthquake, [d]rought, and riots, the businesses are suffering a great loss. But, the corporation has been granted loans to do business and invest in business, hence the corporation will be able to support the beneficiary based on the facts that the banks will be funding the project. Also, due to the instability in the business, the Indian corporation has opted to set up a subsidiary in the United States and do business with the third world countries through the United States and make up the losses that the corporation is suffering.

In a letter of support, dated October 31, 2002, the petitioner stated that the foreign entity had submitted a loan application with the Reserve Bank of India for the release of funds through Form A2 application and anticipates the transfer of such funds to the United States by the first week of December 2002. The petitioner also stated that the foreign entity had made a loan application with IDBI Bank.

The petitioner submitted as evidence copies of its organizational chart, a bank letter from the Mutual Bank of Chicago, a proposed business plan, a letter from the foreign entity indicating its intent to financially support the U.S. entity, a loan application to Allahabad Bank requesting funding for the U.S. corporation, and statements of account from Bombay Mercantile Co-operative Bank Limited in India.

The director determined that the evidence submitted was not sufficient to establish that the petitioner had substantially complied with the requirements of 8 C.F.R § 214.2(l)(3)(v), concerning the capitalization of the U.S. entity.

On appeal, the petitioner argues that sufficient evidence has been submitted to demonstrate that the foreign entity has sufficient capital to capitalize the U.S. entity's start-up and to remunerate the beneficiary for his services. The petitioner asserts that the U.S. entity was established to import and export various dyes, chemicals, pharmaceuticals, and bulk drugs. The petitioner anticipates a first year net profit by the U.S. entity, after taxes, of \$1.2 million. The entity's bank statements show that at the time of filing the petition, it had \$25,000 in its' business bank account. On appeal, the petitioner submitted a verification letter from the Mutual Bank, which indicated that the U.S. entity's bank balance as of February 25, 2003, was \$59,942.75, with an average balance of \$25,722.45. The petitioner submitted evidence that demonstrates that the foreign entity had submitted a business loan application in the amount of \$50,000.00, which had not yet been approved. The petitioner stated that the beneficiary's salary in the United States would be \$64,000.00. The petitioner also submitted a business plan containing inventory and profit projections.

The evidence submitted demonstrates that the foreign entity does not have sufficient start up capital to remunerate the beneficiary or to commence doing business in the United States. The beneficiary's proposed salary is in excess of the \$25,000 deposited in the U.S. entity's business account. The business plan does not contain sufficient information to determine the U.S. entity's financial viability. Furthermore, the foreign entity's bank records, corporate income tax records, and audited financial statements demonstrate that the entity is operating at a deficit and has more than ten secured and unsecured loans outstanding. Although the petitioner stated that the foreign entity had made a loan application with IDBI Bank, there is no indication in the record that any such application was approved. Contrary to the petitioner's contentions, there is nothing

in the record that demonstrates that the foreign bank's willingness to approve the A-2 loan application is predicated upon the approval of the instant petition. A visa petition may not be approved based on speculation of future eligibility or after the beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Even if the AAO were to take into consideration the U.S. entity's current bank balance of \$59,942.75 there still would be insufficient evidence to show that there was sufficient capital to commence doing business and to remunerate the beneficiary. There is nothing in the record to substantiate that there are sufficient start up funds to cover employee's salaries, cost of doing business, cost of inventory, rent, transportation, and other incidental costs of doing business in the United States.

A second issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the U.S. entity would be in a position to support a managerial or executive position within one year of operation.

Based upon a review of the record and evidence submitted in this matter, the AAO must conclude that the petitioner has failed to establish that the U.S. entity will be able to support a managerial or executive position within one year of operation. 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 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 response to the director's request for additional evidence, the petitioner noted that it anticipated employing four additional employees within the first year of operation. Based upon the financial and staffing projections made, it would be unrealistic to conclude that the U.S. entity will be able to support a managerial or executive position within one year of the approval of the petition. Furthermore, with the foreign entity's current financial status, it is unlikely that the U.S. entity will receive the monetary support needed to sustain its operations, let alone a managerial or executive position. The requirements of 8 C.F.R. § 214.2(l)(3)(v)(C) have not been met. Accordingly, the appeal will be dismissed.

Although not directly addressed by the director in his decision, there is insufficient evidence contained in the record to show that the petitioner has secured sufficient physical premises to house the new office. The petitioner submitted a lease agreement, dated May 1, 2002, which demonstrates that a lease agreement was entered into by the U.S. entity as lessor and Bharti Patel as the lessee. The record shows that the U.S. entity leased premises to an individual. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, the photographs submitted by the petitioner depicting the leased premises fail to demonstrate that size and space requirements have been met. Although the petitioner claims that the U.S. entity is in the dye, chemical, pharmaceutical, and bulk drugs business, there is nothing in the record to show that adequate storage or warehouse facilities have been acquired by the

organization. In addition, there is insufficient evidence to show that the foreign entity will continue doing business, as required by 8 C.F.R. § 214.2(l)(1)(ii)(G)(2), during the beneficiary's stay in the United States. The evidence demonstrates that the foreign entity is operating at a deficit and has not been guaranteed any business loans by lending banks. For these additional reasons, this petition may not be approved.

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.