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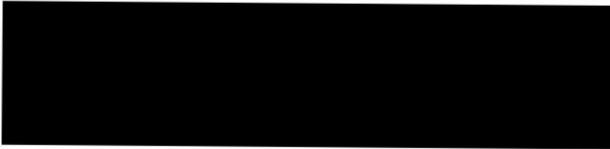


File: SRC 05 093 51254 Office: TEXAS SERVICE CENTER Date: **DEC 22 2006**

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:

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the petition to the director for further action and entry of a new decision.

The petitioner seeks to employ the beneficiary temporarily in the United States 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 is a Pennsylvania limited liability company that indicates it will be engaged in "diversified investments." The petitioner claims to be a subsidiary of [REDACTED] located in Kalupur, India. The petitioner seeks to employ the beneficiary as the chief executive officer of its new office in the United States for a one-year period.

The petitioner indicated that the instant beneficiary was previously the beneficiary of an approved new office L-1A petition filed on his behalf by [REDACTED] (LIN 04 088 54642), which was valid from May 4, 2004 until February 11, 2005. The petitioner explained that the [REDACTED] never commenced business operations, and that the beneficiary formed the new U.S. company rather than seek an extension with his previous L-1A employer. The instant petitioner was organized in January 2005, and accordingly, the petitioner requested that the U.S. company be treated as a new office pursuant to the regulation at 8 C.F.R. 214.2(l)(1)(ii)(F).

The director denied the petition, determining that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director determined that the petitioner did not qualify as a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) and therefore did not apply the regulations at 8 C.F.R. § 214.2(l)(3)(v) in adjudicating the petition.

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 for the petitioner contends that the director overlooked the fact that the instant petition was filed by a new petitioner seeking to employ the beneficiary as chief executive officer of a new start-up company. Counsel contends that the director denied the petition "on the unrelated and irrelevant basis that the first petition did not show sufficient evidence of employees and successful growth." Counsel further asserts that the law and regulations do not preclude a second petition for a one-year start-up L-1A visa. Counsel submits a brief in support of the appeal.

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 (I)(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)(3)(v) also provides that 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 involves 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.

As a preliminary matter, the AAO will address whether the petitioner qualifies as a "new office." The term "new office" is defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) as an organization which has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one year.

The term "doing business" is defined at 8 C.F.R. § 214.2(l)(ii)(H) 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.

The nonimmigrant petition was filed on February 14, 2005. The petitioner indicated on Form I-129 that the beneficiary is coming to the United States in order to open a new office. The petitioner submitted its operating agreement, which indicates that the company filed its Articles of Organization with the Commonwealth of Pennsylvania on January 15, 2005. The petitioner indicated that the beneficiary was currently in the United States in L-1A status pursuant to an approved I-129 petition filed by [REDACTED] which was valid from May 4, 2004 until February 11, 2005, and therefore sought an extension of his L-1A status. The petitioner states that [REDACTED] is an Illinois limited liability company established in October 2003.

In a letter dated February 9, 2005, counsel for the petitioner noted that the beneficiary had only been granted nine months in order to establish [REDACTED] and had further complications due to a delay in obtaining a U.S. social security number. Counsel further explained:

During that shortened time period, [the beneficiary] researched the market for opportunities to acquire a business with growth prospects and on going operations, however this did not occur in the limited time provided. Rather than seek an extension of this L-1A start-up, a new start-up was established.

On March 28, 2005, the director requested additional evidence, including evidence that the U.S. company has been doing business for one year. In a response dated June 16, 2005, counsel emphasized that the petitioner is seeking L-1A status for the beneficiary so that he may direct a start-up operation. Counsel indicated that the petitioner had completed acquisition of the first of its operations, which would involve management of a motel.

The director denied the petition on August 31, 2005, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director acknowledged that the petitioner is requesting an extension of stay and seeks to employ the beneficiary to direct the start up operations for a new company. The director determined the following:

[T]he petitioner is not currently being considered a new office. The Citizenship and Immigration Services (CIS) granted the beneficiary L-1A status to establish its business and to support an executive or managerial position. Further projections of company expansions cannot be used to establish intercompany [sic] transferee status where, the petitioning entity is not a new office. In order to qualify for an L-1A visa after the organization becomes operational, the petitioner must establish the duties and need of the beneficiary as a managerial or executive employee.

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Since the beneficiary has already been granted L-1A status to establish an initial U.S. company, this company cannot be still considered in a start-up phase. No evidence was submitted initially or in response to the request for additional evidence to demonstrate that the previous start up business became operational.

On appeal, counsel for the petitioner states that "the Decision appears to overlook the fact that this is not an extension of L-1 status for a 3-year period with the same previous petitioner. This is a new petitioner seeking to employ the beneficiary as CEO for a new start-up corporation." Counsel asserts that the issues raised by the director regarding the staffing or activity of the previous petitioner are not germane to this petition. Counsel requests that the petition be adjudicated as a new office pursuant to the regulations at 8 C.F.R. § 214.2(l)(3)(v).

Upon review, the AAO concurs with counsel's assertions and will withdraw the director's August 31, 2005 decision. The director incorrectly determined that the petitioner could not qualify as a "new office" pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F). As noted above, the regulations define "new office" as an organization which has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one year. The record suggests that neither the instant petitioner, nor the beneficiary's previous L-1A employer, which is claimed to be an affiliate of the petitioner, had been doing business in the United States for one year or longer as of the date of filing. Accordingly, the petitioner, based on the evidence submitted, should have been considered as a new office. As noted by counsel on appeal, the regulations do not prohibit the filing of a second "new office" petition by a different U.S. employer on behalf of a beneficiary who was previously granted L-1A classification in order to open a new office in the United States.

The AAO finds sufficient evidence in the record to conclude that the instant petition should have been adjudicated under the regulations pertaining to new office petitions at 8 C.F.R. § 214.2(l)(3)(v). The director's failure to recognize that the petitioner qualifies as a "new office" consequently led to a flawed analysis of the beneficiary's proposed employment in a managerial or executive capacity. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS regulation, that allows for a more lenient approach to petitions filed on behalf of managers or executives that are entering the United States to open a new office. Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). 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 house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

Although the director's decision will be withdrawn, the AAO finds insufficient evidence to establish the petitioner's and beneficiary's eligibility for this visa classification under the "new office" regulations at 8 C.F.R. § 214.2(l)(3)(v). Accordingly, the petition will be remanded to the director for further action and entry of a new decision in accordance with the following discussion.

The petitioner did not submit a lease agreement or other evidence that the petitioner had secured sufficient physical premises to house the new office as of the date of filing, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner indicated a business address of 175 Stafford Avenue, Wayne, Pennsylvania 19087. The director is instructed to request evidence that the petitioner had a valid lease agreement for this premises, or other physical premises sufficient to operate the business, as of February 14, 2005. The petitioner also failed to outline the type and amount of space required for its proposed business.

Further, the record as presently constituted does not contain sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition. 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner provided only a vague position description for the beneficiary that fails to specify the actual managerial or executive duties to be performed by him on a day-to-day basis as chief executive officer of the petitioner's new office in the United States. 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 petitioner should be instructed to submit a comprehensive description of the beneficiary's proposed duties, including the percentage of time he will devote to each duty on a weekly basis, and a description of the beneficiary's "typical day." If the petitioner states that the beneficiary will "direct," "manage," "oversee," or "supervise" an aspect of the petitioner's business, it should clarify who would perform non-qualifying duties associated with the activity or function.

Furthermore, in order to establish that the U.S. company will be capable of supporting the beneficiary in a managerial or executive position within one year of approval of the petition, the petitioner is required to submit evidence regarding the proposed nature of the office, describing the scope of the entity, its organizational structure, and its financial goals, and evidence regarding the size of the United States investment. See 8 C.F.R. §§ 214.2(l)(3)(v)(C)(2) and (3).

The record at the time of filing contained no detailed description of the type of business to be operated by the petitioner, no business plan outlining the proposed scope, nature and objectives of the organization, no evidence regarding the types of positions to be filled during the first year of operation, and no evidence of the size of the investment in the U.S. company. The petitioner merely stated that it anticipated hiring three to five employees and estimated its gross income at \$150,000. The director is instructed to request further evidence to establish that the beneficiary will be employed in a primarily managerial or executive position by the end of the first year of operations. The petitioner should provide a business plan providing specific dates for each proposed action for the next two years, beginning with the filing date of this petition. The business plan should document the anticipated volume of business, gross income predictions and staffing issues.

If not included in the business plan, the petitioner should provide a hiring plan outlining when it intends to staff each of its open positions. The petitioner should also provide job duties and educational requirements for each position, and indicate whether the beneficiary's subordinates will be employed on a full-time, part-time or commissioned basis. The evidence submitted should establish who will be responsible for performing the petitioner's administrative, clerical and operational functions, including, if applicable, market research,

marketing, advertising, purchasing, sales, customer service, administrative and clerical tasks and any other functions inherent to the type of business to be operated by the petitioner.

In addition, the record as presently constituted contains no evidence regarding the petitioner's financial goals. There is also no evidence of the size of the United States investment, nor evidence that the company's shareholders had actually transferred any monies to the petitioner as of the date of filing. See 8 C.F.R. § 214.2(l)(3)(v)(C)(2). Again, the director is instructed to request additional evidence to provide the petitioner with an opportunity to address these deficiencies.

The AAO acknowledges the petitioner's submission of a lease agreement for a Super 8 Motel located in West Virginia, dated April 25, 2005. The lease agreement references the landlord's franchise agreement with Super Motels and notes that the petitioner, as tenant, must comply with all terms, conditions, restrictions, and stipulations contained in the franchise agreement. The petitioner did not however, provide a copy of the franchise agreement or otherwise clarify its relationship with Super 8 Motels.

The remaining issue to be addressed is whether the petitioner and the foreign entity have a qualifying relationship as required by 8 C.F.R. § 214.2(l)(3)(i). The petitioner claims that it is a majority-owned subsidiary of the foreign entity, [REDACTED]

As evidence of the U.S. company's ownership, petitioner submitted the U.S. company's operating agreement which indicates that [REDACTED] holds a 51 percent interest in the company, and that the beneficiary holds a 49 percent interest, and indicates that the members' initial capital contributions were in the amounts of \$2,550 and \$2,450, respectively. The petitioner did not, however, submit evidence that the foreign entity actually paid for its membership interest in the company, nor does the record contain the company's articles of organization or membership certificates. The director is instructed to request additional evidence to establish the ownership and control of the U.S. company. If available, the petitioner should also submit its 2005 federal tax returns with all required schedules. The AAO notes that there are several business documents in the record which identify the beneficiary as the "owner/operator" and sole member of the petitioning company. 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).

It is emphasized that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, February 14, 2005.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for this nonimmigrant visa classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence she deems necessary.

ORDER: The decision of the director dated August 25, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.