



U.S. Citizenship
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File: WAC 04 176 50400 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 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)

IN 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, California 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 consideration and entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its vice president, business development 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 California corporation engaged in the import and distribution of hand-crafted furniture. The petitioner claims that it is the subsidiary of Evergreen International Limited, located in Gurgaon, India. The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States and was approved for a one-year extension of stay. The petitioner now seeks to extend the beneficiary's status for an additional one-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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 asserts that the record contains sufficient evidence describing the petitioner's operations and clearly establishes that the beneficiary, as the head of the petitioner's U.S. operations, is employed in a qualifying managerial or executive capacity. 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 (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 issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

The petition was filed on June 4, 2004. In a letter dated June 3, 2004 the petitioner stated that it employs six employees in the United States. With respect to the beneficiary's duties as vice president, business development, the petitioner stated that she "is currently in the process of developing a network of distribution centers and personnel to market our products," and has the following responsibilities:¹

Beneficiary is responsible for achieving the desired results within an allocated budget. She reviews business development proposals and determines time frames, funding limitations, procedures for accomplishing business plan objectives including: staffing requirements, and allotment of available resources to various phases of promoting the products of the company. She has already established a work plan to monitor the staffing requirements of our operations in the U.S. and will be involved in interviewing and hiring managers, supervisors and staff to manage our showrooms and distribution centers.

The petitioner submitted its California Form DE-6, Quarterly Wage and Withholding Report, for the first quarter of 2004, which confirmed the full-time employment of six employees other than the beneficiary. The petitioner also provided a proposed organizational chart indicating that the beneficiary supervises a vice president of finance, who in turn supervises a bookkeeper, as well as two area managers, who each supervise "distributors."

The director denied the petition on July 22, 2004, concluding that the petitioner had not established that the beneficiary would be employed by the United States entity in a managerial or executive capacity. The director observed that the petitioner had failed to provide job descriptions for the beneficiary's subordinates and concluded that the beneficiary "is performing, at most, as a first-line supervisor of non-professional employees, rather than as a manager or executive." The director also found that the petitioner "has failed to describe the employer's business activities in a manner that allows for a clear understanding of the products and services that are provided by the employer to its customers and how the beneficiary's position fits into its organizational hierarchy." The director concluded that the beneficiary would be directly providing the services of the organization and supervising three non-professional employees.

On appeal, counsel for the petitioner objects to the director's conclusion that the petitioner failed to provide a clear description of its business activities. Counsel emphasizes that the petitioner has "clearly explained that [the beneficiary] will be the overall head of the US operation" and "sufficiently explained and described the Managerial and/or Executive functions of the Petitioner." Counsel further describes the beneficiary's duties as:

She has independent supervisory authority over the US subsidiary. The Beneficiary is currently in the process of negotiating several contracts with large distribution networks, she will plan[,] direct and co-ordinate activities of designated business opportunities to ensure that goals or objectives of each opportunity is accomplished within the constraints of a given time schedule. . . . She will, as a part of her duties, be consulting with various professionals,

¹ The AAO notes that the third page of the petitioner's four-page June 3, 2004 letter, which apparently includes a portion of the beneficiary's job description, is not included in the record.

instructing such professionals such as lawyers, accountants and business analysts which she will hire and engage on a routine basis to assist her in expanding and increasing the business of the Petitioner.

In order to “plan[,] direct and co-ordinate activities of the business”, she has performed to consult with and instruct various professionals and specialists such as lawyers and accountants to do the same.

In order to “achieve the business goals within the allotted budget”, she has to engage[,] instruct and employ accountants and business professionals to advise [sic] and instruct her on best financial policies for the Petitioner.

In order to “review business development proposals and determine time frames etc” she has performed the need to engage suitable professionals, instruct them and take their advice so that she can effectively manage [sic] and provide impetus for sustained growth.

Further she will, as the business necessitates, be hiring in-house lawyers, accountants, business professionals and other “professionals” to expand the business.

Upon review, the AAO will withdraw the director’s decision and remand the petition to the director for further consideration and entry of a new decision.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

As the present petition is a request for an extension of the beneficiary's L-1A status, the petitioner was not required to submit supporting documentation pursuant to 8 C.F.R. § 214.2(l)(14)(i). The director examined the petitioner's evidence and determined that the petitioner failed to establish eligibility. The director's decision was based in part on a finding that the petitioner did not submit sufficient documentation regarding the staffing of the organization and the beneficiary's role within the organizational hierarchy. However the director did not point to any evidence of clear ineligibility that would justify his decision to deny the petition without first requesting additional evidence or issuing a notice of intent to deny the petition. See 8 C.F.R. § 103.2(b)(8); see also Memo. of [REDACTED] Associate Director, Operations, USCIS, to Regional Directors, et al, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2 (February 16, 2005).

Accordingly, as the evidence of record does not directly reflect that the petitioner or beneficiary is ineligible, the director should not have denied the petition based on a lack of evidence without first requesting additional explanation and documentation. *See* 8 C.F.R. § 103.2(b)(8); 8 C.F.R. § 214.2(l)(14)(i). The AAO agrees that the evidence of record raises underlying questions regarding eligibility. In such an instance, the director "shall request the missing initial evidence, and may request additional evidence . . ." 8 C.F.R. § 103.2(b)(8).

The job description provided by the petitioner provides little insight into the true nature of the tasks she will perform in the United States. For example, the petitioner indicated that the beneficiary "will plan direct and co-ordinate activities of designated business activities to ensure that goals or objectives of each opportunity is accomplished" and "achieve the business goals within the allotted budget." These general statements do not describe the actual tasks the beneficiary will perform on a daily basis. The petitioner identified the beneficiary's scope of authority, such as her discretion over financial decisions, yet it failed to account for how she will actually spend her time in the United States and what specific efforts she will take to achieve the petitioner's goals. The petitioner should provide a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time she will devote to those duties on a weekly basis, and a description of the duties she performs on a "typical day."

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The provided job descriptions do not allow the AAO to determine the actual tasks the beneficiary will perform, such that they can be classified as managerial or executive in nature, nor do they adequately indicate what proportion of the beneficiary's time will be devoted to qualifying duties.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

In addition to noting that the petitioner's job description failed to adequately describe the nature of the beneficiary's role within the company, the director found that the beneficiary would supervise only three non-professional employees. The director apparently relied on the petitioner's organizational chart, and, as no job descriptions were provided for the beneficiary's subordinates, assumed that the beneficiary's subordinates are not professionals, supervisors, or managers. However, the petitioner's Form DE-6, Quarterly Wage and Withholding Report for the first quarter of 2004 indicates that the petitioner had six full-time employees other than the beneficiary in the quarter immediately preceding the filing of the petition. This evidence suggests that the organizational chart submitted with the petition did not represent the petitioner's actual staffing at the time of filing. The petitioner should submit a detailed organizational chart reflecting its staffing as of June 2004, including the names, job titles, educational qualifications, annual salary and source of remuneration for all of its employees, along with its Form DE-6 for the second quarter of 2004. The petitioner should also provide a

description of the job duties performed by each employee, and clearly indicate the reporting structure within the company. In addition, the petitioner should submit evidence of payments made to any contracted employees, such as the lawyers, accountants and the "business professionals" referenced by counsel on appeal, and indicate the nature and scope of the services they provide to the petitioning company.

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, June 4, 2004. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's or beneficiary's eligibility and will not be considered.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the beneficiary meets the requirements for L-1A 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 he deems necessary.

ORDER: The decision of the director dated July 22, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.