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File: WAC 04 208 51316 Office: CALIFORNIA SERVICE CENTER Date: **MAY 11 2006**

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, Chief
Administrative Appeals Office

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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 action and consideration 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 corporation organized in the State of California that intends to import and wholesale readymade garments. It claims to be an affiliate of Misr-Taiwan, located in El Kheima Kalubia, Egypt. The petitioner seeks to employ the beneficiary as the chief executive officer of its new office in the United States for a three-year period.

The director denied the petition, determining that the petitioner had failed to establish that the U.S. entity would employ the beneficiary in a primarily managerial or executive capacity within one year.

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 misstated facts throughout his September 22, 2004 notice of decision. Counsel also asserts that the director denied the petition based on insufficient evidence in the record, yet failed to request additional evidence prior to rendering a decision. Counsel suggests that the failure to request additional evidence resulted in a premature and inaccurate decision. Counsel submits a brief and additional evidence 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 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 (l)(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 primary issue in this proceeding is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity within one year of the approval of the petition.

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 nonimmigrant petition was filed on July 19, 2004. In a July 16, 2004 cover letter, counsel for the petitioner stated that the beneficiary will serve in an executive capacity by performing the following duties:

1. The beneficiary will "direct the management of the organization or a major component or function for the organization." (Title 8 C.F.R. Section 214.2(l)(ii)(C)(1) [sic] the beneficiary will direct all company functions. The beneficiary . . . has been responsible for establishing the U.S. company and will be responsible for coordinating, directing and managing all United States and international development and marketing efforts. In addition, [the beneficiary] will negotiate on behalf of [the petitioner] and represent the company in dealings with the government and major customers. All department heads will report to [the beneficiary] and all hiring or terminating of management and executive level employees will require his authorization.
2. The beneficiary will "establish goals and polices of the organization, component or function." (Title 8 C.F.R. Section 214.2(l)(ii)(C)(2)) [sic] The beneficiary will determine the goals and policies of [the petitioner]. As CEO, [the beneficiary] will set company-wide goals regarding sales, marketing and product development for the petitioning U.S. company.
3. The beneficiary will "exercise wide latitude in discretionary decision-making." (Title 8 C.F.R. Section 214.2(l)(1)(ii)(C)(3)). The beneficiary will have the power to enter

into, negotiate and execute contracts on behalf of [the petitioner]. [The beneficiary] will hold full authority to make final decisions on the major finance, sales, marketing and administration issues.

4. The beneficiary will “receive only general supervision or directions from higher level executives, the board of directors, or stockholders of the organization.” (Title 8 C.F.R. Section 214.2(l)(1)(ii)(C)(4)). [The beneficiary] will hold the highest position in the company and receives no supervision.

The petitioner indicated on Form I-129 that it had one employee at the time of filing and indicated an estimated gross annual income of \$1,152,000. The petitioner did not submit a business plan or any information or evidence regarding its proposed business operations or organizational structure for the first year of operations. The petitioner provided a copy of its lease agreement, photographs of its office and warehouse space, bank statements, a business license application, and invoices, packing lists, shipping and customs documentation showing that the U.S. company had begun importing and selling garments in the United States in 2004.

Based on this limited evidence, the director denied the petition on September 22, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition. The director observed that the petitioner’s job description for the beneficiary’s position is too vague to convey an understanding of the actual duties he will perform in the United States. The director also found insufficient evidence to establish that the U.S. company would support an executive or managerial position within one year, noting that the petitioner had not provided adequate supporting documentation of the proposed nature of its office or its organizational structure. Specifically, the director stated that the petitioner’s explanation of its proposed business was vague and general and “the petitioner’s statement that it does not plan to hire more than five to six employees in the first two years of operation, does not support a finding that the petitioner will be able to support an executive or managerial position within one year from the approval of the petition.”¹

On appeal, counsel for the petitioner emphasizes the “myriad of factual errors contained within the decision,” and asserts that, pursuant to 8 C.F.R. § 103.2(b)(8), the director should not have denied the petition based on insufficient evidence without first issuing a request for additional evidence to complete the record. The petitioner submits an expanded job description for the beneficiary, a November 2004 business plan for the U.S. company, and a proposed organizational chart. Counsel asserts that the petitioner intends to hire nine full-time employees in 2005 and will support the beneficiary in a qualifying executive capacity.

¹ As noted by counsel on appeal, the petitioner made no such statement regarding its intended staffing levels. The initial filing included no information regarding the petitioner’s proposed staffing or organizational structure. The director also misstated the facts regarding the type of business operated by the petitioner. The director stated that the petitioner will be engaged in the manufacturing, trade and distribution of appliances, electronics and consumer products. The petitioner is in fact engaged in the importation and wholesale distribution of garments. The director did correctly cite the beneficiary’s proposed position description in his notice of decision; however, the presence of these factual errors in the director’s decision suggests that the director did not conduct a thorough review of the record.

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

The director examined the petitioner's evidence and determined that the petitioner failed to establish eligibility. The director's decision was based entirely on a finding that the petitioner did not submit sufficient documentation regarding the beneficiary's actual job duties, the proposed nature of the new U.S. entity, or its organizational structure. 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 William R. Yates, 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 petition will be remanded to the director, who is instructed to request additional evidence consistent with the discussion below.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In this matter, because the petition involves the opening of a new office in the United States, Citizenship and Immigration Services (CIS) must also consider evidence regarding the funding of the U.S. entity, the intended scope of the U.S. operations, and its proposed organizational structure. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). Overall, the evidence submitted should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away 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.

The director correctly observed that the job description provided by counsel in support of the petition was too vague to convey an understanding of the actual duties to be performed by the beneficiary for the U.S. entity. On appeal, the petitioner submits the following expanded job description:

- Establish the U.S. affiliate including the selection of location and staff, creation of accounts and transfer of resources.
- Appoints or terminates management and executive level employees;
- Reviews decisions by management to hire or terminate lower level employees;
- All department heads report to CEO
- Sets sales, product, finance and operational policies, procedures and goals for entire company.
- Examines and evaluates trends in the market to determine business strategy.
- Identify needs and goals of the company and allocates company resources accordingly.
- Develop and maintains business relationship with major vendors and customers.
- Negotiate major purchases of fabric and accessories with executives from different vendors.
- Negotiate with major customers involving the purchase of an average of 80,000 dozen pieces of garments per season, per customer.
- Communicate with executives of corporations such as Walmart, Kmart, JcPenny, etc[.] to confirm and plan in advance of each clothing season.
- Address quality control issues.

This job description, while slightly more detailed, is not sufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity. For example, the petitioner indicates that the beneficiary will be involved in examining and evaluating market trends, and performing duties associated with sales and purchasing. Although the petitioner states that he will perform these duties at the managerial or executive level in connection with major transactions, the record as presently constituted does not establish that the petitioner will have lower-level employees who would relieve the beneficiary from performing routine sales, purchasing and marketing functions within one year.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Based on the current record, the AAO is unable to determine whether the claimed managerial and executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary would primarily perform non-qualifying operational or first-line supervisory duties at the end of the first year of operations. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial or executive in nature, and what proportion is actually non-managerial or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

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, along with 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.

In addition, the record as presently constituted does not include sufficient evidence regarding the intended scope of the United States entity, its organizational structure, or its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(1). On appeal, the petitioner has provided a proposed organizational chart identifying nine

employees and contract staff subordinate to the beneficiary's position. Counsel states that nine employees will be hired within the first year of operations, as stated in the business plan, but the submitted business plan does not provide a timeline for the hiring of the beneficiary's subordinates. Further, the submitted business plan was not created until after the denial of the petition, more than four months after the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). 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 market research, marketing, advertising, product design, purchasing, sales, customer service, communicating with manufacturers, arranging import, transportation and delivery, and warehousing.

In addition, the record as presently constituted contains no evidence regarding the petitioner's financial goals, other than stating an estimated gross annual income figure on the Form I-129. There is also no evidence of the size of the United States investment, nor evidence that the foreign entity 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.

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, May 11, 2004.

Finally, the record reflects that the petitioner did not file the request for a change and extension of the beneficiary's nonimmigrant status within the required time frame. In the present case, the beneficiary's authorized period of stay in B-1 status expired on July 17, 2004. However, the petition for a change and extension of the beneficiary's status from B-1 to L-1A was filed on July 19, 2004. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

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 he deems necessary.

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