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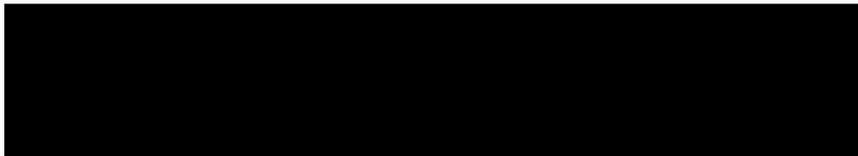
File: LIN 01 126 56389 Office: NEBRASKA SERVICE CENTER Date: SEP 05 2006

IN RE: Petitioner:
Beneficiary:



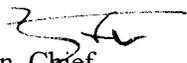
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of general manager to start a new office 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, a limited liability company organized under the laws of the State of Michigan, claims to be engaged in the business of importing and exporting frozen food products and alleges that it is the affiliate of [REDACTED] a business entity located in Cairo, Egypt.

The director denied the petition concluding that the petitioner failed to demonstrate that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, or that sufficient premises to house the new office have been secured.

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, the petitioner asserts that it has submitted adequate evidence that the position will be managerial or executive in nature, that the foreign entity has the financial ability to remunerate the beneficiary, and that sufficient premises have been secured.¹

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(I)(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.

¹ Although counsel indicated that a brief would be provided in support of the petitioner's arguments, this office has not received a brief or any additional evidence since the appeal was filed.

- (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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(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, 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 (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 first issue in this proceeding is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

In the initial petition, the petitioner states that it intends to establish a frozen food export business in Detroit, Michigan, and that it is hiring three additional people. Other than a copy of a lease, petitioner submitted no evidence relevant to the establishment, structure, scope, or goals of the U.S. entity. Moreover, the petitioner failed to submit any evidence regarding the size of the United States investment and the organizational structure of the foreign entity.

On March 16, 2001, the director requested substantial additional evidence regarding both the foreign entity and the United States entity including evidence of the size of the United States investment, a detailed business plan, and photographs of the premises leased in Michigan.

In response to the request for evidence, the petitioner submitted a letter from Standard Federal Bank of Michigan indicating that the petitioner had opened a business checking account; a business plan unsupported by any contemporaneous or financial information; and the requested photographs of the leased premises.

On May 12, 2001, the director denied the petition. The director determined that the petitioner failed to demonstrate that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, or that sufficient physical premises to house the new office have been secured.

On appeal, the petitioner asserts that the petitioner has submitted adequate evidence proving that the position will be managerial or executive in nature, that the foreign entity has the financial ability to remunerate the beneficiary, and that sufficient premises have been secured. The petitioner does not address its failure to provide any evidence of an investment in the United States entity.

Upon review, the petitioner's assertions are not persuasive.

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 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.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions

for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

The petitioner has failed to present evidence sufficient to prove that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. The petitioner provided no information regarding an investment in the United States entity other than evidence that a business checking account had been opened. The petitioner declined to provide the current balance of this account, a history of transactions, or a record of transfers into the account from abroad. Moreover, the petitioner declined to provide any information regarding assets purchased for the United States entity even though the director specifically requested this information in his request for evidence.

Likewise, the business plan submitted by the petitioner fails to prove that the enterprise will likely 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 plan does not outline a credible plan, especially when coupled with the lack of evidence of any U.S. investment, for expansion beyond the initial start-up phase. Also, the petitioner failed to corroborate its plan with any documentation, studies, or independent analyses. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Even accepting as true the petitioner's assertions regarding its business viability during its first year in operation, the petitioner did not establish that the four person export business described by the petitioner in its business plan would support an executive or managerial position within one year of the petition's approval.²

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;

² The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

- (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.

In the current petition, the petitioner intends to employ four people, including the beneficiary. These employees are the beneficiary, an assistant manager, a secretary, and a clerk. While the beneficiary's duties are described in the business plan as managing exports, supervising the business and staff, negotiating contracts, budgeting, finding vendors, overseeing shipping and invoicing, and carrying out the business plan, this description is vague such that it is difficult to determine what the beneficiary will be doing on a day-to-day basis. The description for the subordinate assistant manager is similarly vague. Given the evidence of record, it appears that, even accepting the growth predicted in the business plan, all three subordinate employees will be providing services directly to customers, or the beneficiary will be either supervising the day-to-day operations of non-professional subordinates or providing services to customers as well. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Either way, the petitioner has failed to present evidence probative of how the U.S. entity will be able, after one year, to support a primarily executive or managerial employee by failing to explain how the export services will be provided and by whom. It is

appropriate for Citizenship and Immigration Services to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The second issue in this proceeding is whether sufficient premises to house the new office have been secured.

In the initial petition, the petitioner provided a copy of a lease for 1,400 square feet of space at [REDACTED] Detroit, Michigan. On March 16, 2001, the director requested that the petitioner provide photographs of the inside and outside of the leased premises. In response to the request for evidence, the petitioner submitted the requested photographs of the leased premises.

On reviewing the lease and the photographs, the director concluded:

The photographs submitted for the U.S. entity were of a business that needed significant renovations before any type of business could be conducted. The petitioner indicated that renovations were being performed after the photographs were taken. This assertion is simply not persuasive. The record indicates the petitioner signed a lease in November, 2000. The petitioner's response was filed with this Service on May 1, 2001. In the approximate six months from the signing of the lease until the petitioner's response to the Service request for evidence, no work has been performed.

On appeal, the petitioner asserts that renovations cannot begin because it "needs the beneficiary['s] assistance in doing so."

Upon review, the petitioner's assertion is not persuasive.

Title 8 C.F.R. § 214.2(l)(3)(v)(A) requires L-1 "new office" petitions to prove that "sufficient physical premises to house the new office have been secured." In this case, the petitioner has secured office space which needs to be completely renovated and furnished. Coupled with the petitioner's failure to provide any evidence of an investment in the U.S. entity, it has not been established that the petitioner has secured "sufficient" physical premises.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.