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U.S. Citizenship
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File: EAC 03 188 54964 Office: VERMONT SERVICE CENTER

Date: SEP 26 2006

IN RE: Petitioner:
Beneficiary:



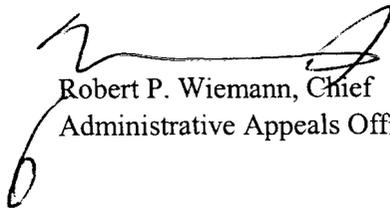
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 New York that is engaged in import and export of garments. The petitioner claims that it is the subsidiary of H&H Corporate Buying House, located in New Delhi, India. The petitioner seeks to employ the beneficiary as the president and chief executive officer of its new office in the United States for a one-year period.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed 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 asserts that sufficient evidence was submitted to establish that the beneficiary will be primarily performing executive and managerial duties within one year of obtaining classification as an L-1A nonimmigrant intracompany transferee. Counsel contends that the director erred in determining that the beneficiary's proposed subordinates will not be managerial, professional or supervisory. Counsel notes that the organization has already grown to a staff of five employees within the first three months of operations and is in need of a president to perform executive and managerial functions. 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) further provides 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 (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 issue in the present matter is whether the petitioner has established that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity within one year.

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 June 12, 2003. In a June 10, 2003 letter submitted with the initial petition, the petitioner indicated that as president and CEO of the U.S. company, the beneficiary will be responsible for the development and expansion of the U.S. market, managing and directing the operations of the company, implementing a system integrating purchasing, inventory, sales and accounting information, and ensuring adherence to the policies, practices and strategies of the parent company in India. In addition, the petitioner submitted a detailed description of the beneficiary's proposed duties.

The petitioner also submitted a proposed "short-term" organizational chart for the U.S. company showing that the beneficiary will oversee the following subordinates: a marketing manager who would in turn supervise marketing and sales representatives and production/technical advisors; a finance and administration manager, who would in turn supervise finance and accounts, administration and warehouse staff; and an office secretary/receptionist. The petitioner submitted evidence that it had leased an office/showroom and warehouse space from which to operate the business.

On June 22, 2003, the director issued a request for additional evidence, and instructed the petitioner to submit: (1) a comprehensive business plan for the U.S. company; (2) evidence to show how the new company will grow to be of sufficient size to support a managerial or executive position, and demonstrating that the beneficiary will be relieved from performing the non-managerial day-to-day operations involved in providing a service; and (3) a description of the staff the company intends to hire during the first year of operations, including the position titles and educational requirements for each proposed position.

In a response dated July 28, 2003, counsel for the petitioner stated that the U.S. company has already hired two full-time employees, expects revenues in excess of \$4 million during the first year of operations, and has already obtained orders for apparel from major department store chains. Counsel provided that the company will employ a president and CEO, sales and marketing/general manager, accounts and finance manager, secretary/executive assistant, designer, merchandiser, marketing representatives, warehouse manager and warehouse clerks within one year.

The petitioner also stated that the beneficiary's responsibilities will be "executive level only" within one year and will include developing corporate strategy, long term planning, establishment of goals, profitability analysis and assessment of productivity of the business's various divisions. The petitioner further provided that the beneficiary's key areas of responsibility will be to establish and expand business relationships, oversee the entire production process, hold weekly sales, production and operations meetings, and establish the company's organizational hierarchy and a competent subordinate staff.

The petitioner provided detailed job descriptions and educational requirements for its proposed positions and noted that it had already hired a full-time designer and a sales and marketing manager/general manager, both of whom have bachelor's degrees. The petitioner stated that with a subordinate staff of at least seven to eight professionals and managers by the end of the first year of operations, "there would be absolutely no need for [the beneficiary] to be involved in any day-to-day activities." Finally, the petitioner submitted its business plan, projected income statements, and evidence of business conducted during the company's first month of operations. The business plan indicates that the company anticipates paying officer wages, regular wages and commissions of \$382,000 during the first year of operations, and anticipates sales of \$4,000,000.

On August 1, 2003, the director denied the petition. The director determined that the proposed United States office would not employ the beneficiary in a managerial or executive capacity after one year of business operations. The director noted that the record did not establish that the beneficiary would supervise professional, supervisory or managerial subordinates who would relieve her from performing non-managerial duties. The director also determined that it did not appear that an organization of the petitioner's proposed size and nature would require the beneficiary to perform primarily executive or managerial job duties, but rather, that she would be engaged in the non-managerial, day-to-day operations involved in providing a service.

On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence that it will employ managerial, professional or supervisory employees who will relieve the beneficiary from performing non-managerial and non-executive duties by the end of the first year of operations. Specifically, counsel states that the sales and marketing/general manager positions and finance and accounts manager, subordinate

to the beneficiary's position, both require a bachelor's degree and will also involve significant supervisory duties. Counsel reiterates that the company has already hired employees, intends to conduct business in excess of \$4 million during its first year of operations, and reasonably expects to hire up to ten employees in the first year alone. The petitioner also submits a letter from its certified public accountant, who states that the petitioner's financial goals and proposed staffing for the first year of operations are reasonable, and that the company employs four full-time employees as of September 2003. Counsel concludes that the beneficiary's duties at the end of the first year of operations will be primarily managerial or executive in nature.

Upon review of the petition and evidence, the petitioner has established that the United States entity will support the beneficiary in a primarily managerial or executive capacity within one year.

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(1)(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.

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 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. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy.

Although the director based his decision primarily on the proposed size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, although the proposed organization will not be large, the totality of the record supports a conclusion that the majority of the beneficiary's direct subordinates will be supervisors, managers, or professionals. *See* section 101(a)(44)(A)(ii) of the Act. Further, as proposed, the petitioner's staffing levels by the end of the first year of operations will be sufficient to relieve the beneficiary from performing non-qualifying day-to-day operational and administrative duties associated with the import, sale and distribution of the company's products. The evidence of record establishes a realistic expectation that the petitioner will be able to support a primarily managerial or executive position within one year.

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. Here, the petitioner has sustained that burden. Accordingly, the appeal will be sustained and the decision of the director will be withdrawn.

ORDER: The appeal is sustained. The petition is approved.