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Services

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FILE: EAC 06 007 52788 Office: VERMONT SERVICE CENTER Date: APR 05 2007

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its executive director 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 Virginia corporation, states that it is engaged in the import and export of medical equipment. It claims to be a subsidiary of All Well (Private) Ltd., located in Pakistan. The beneficiary was initially granted L-1A status in February 2001 in order to open a new office in the United States, and was subsequently granted two extensions of stay. The petitioner now seeks to extend the beneficiary's status for an additional two-year period.

The director denied the petition on January 6, 2006, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

On appeal, counsel for the petitioner asserts that the director erred by denying the petition based on a lack of business growth, noting that the company's slow growth can be attributed to the beneficiary's "unknown" immigration status as a result of U.S. Citizenship and Immigration Services' (USCIS) loss of his initial L-1A extension file. Counsel asserts that the director did not consider the beneficiary's position in the context of the current stage of development of the U.S. company. Finally, counsel emphasizes that the petitioner is currently showing a profit, and contends that the beneficiary's position is "clearly executive" in nature.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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 sole issue addressed by the director is whether the petitioner established that 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 nonimmigrant petition was filed on October 12, 2005. On Form I-129, the petitioner indicated that it intended to employ the beneficiary as the executive director of its one-person company. The petitioner

indicated that the beneficiary "will continue to direct and develop the investment in the United States. He will also formulate the business policies, develop, plan and organize the business."

In a letter dated October 5, 2005, the petitioner emphasized that much of the beneficiary's stay in the United States "has been with uncertain immigration status, which has restricted [the beneficiary's] ability to expand [his] company to any significant degree." The evidence in the record shows that the beneficiary was initially granted a period of L-1A classification valid from February 15, 2001 until February 15, 2002 in order to open a new office in the United States (EAC 01 097 50290). The beneficiary was granted an L-1 visa at the U.S. Consulate in Islamabad, Pakistan on April 3, 2001, but, for reasons that have not been adequately explained, was first admitted to the United States in L-1A status more than six months later, on October 22, 2001. He has remained in the United States since that time.

The petitioner filed a timely petition for an extension of the beneficiary's status on or about January 29, 2002 (EAC 02 097 54374). Unfortunately, the petition was subsequently lost by USCIS, and ultimately approved on June 1, 2004, with validity dates of February 15, 2002 through February 15, 2004. As noted by the petitioner, the validity period of the petition had already expired at the time the petition was approved. The petitioner filed another petition for an extension of the beneficiary's L-1A status on August 2, 2004 (EAC 04 224 53838). The petition was approved on August 9, 2004, with validity dates of February 16, 2004 through February 15, 2006. The petitioner emphasized that between January 2002 and August 2004, the beneficiary was unable to travel outside of the country, and was unable to "prove to creditors or business contacts that [the petitioner] was a legitimate business entity in the United States."

The petitioner noted that the beneficiary is solely responsible for all decision-making for the U.S. company, and discussed the business activities undertaken by the beneficiary since his admission to the United States, which are currently focused on the import and sale of textiles. The beneficiary, writing on behalf of the petitioner, further states:

My goal within the next year, is to hire a manager and three marketing/sales people. The manager will be responsible for handling all future shipments, maintain inventory and sales network control, communicate with all exporters and manage the sales network in my absence. This would free me to participate in delegations arranged under the supervision of the U.S. Department of Commerce. The marketing/sales people would cover the Philadelphia, Delaware and Baltimore areas.

Additionally, I plan to pursue U.S. products distributorship agreements with famous American manufacturers, especially in the medical and chemical fields. The export of U.S. products is a priority. Additionally, I plan to obtain distributorships from foreign companies for medical products. . . . I expect to import non sterile gauze swabs/pad/sponges to repack and sterilize in the United States and supply to local hospitals at very competitive rates.

I am hopeful that 2006 will be the turning point in our business and that [the petitioner] will hire the necessary employees and earn a healthy profit as well. I feel my company has made

significant strides despite the restrictions caused by the uncertainty of my status for almost three years.

On October 24, 2005, the director issued a request for additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition, including: (1) a complete position description for all of the petitioner's employees in the United States, including one for the beneficiary's position, along with a breakdown detailing the number of hours devoted to each of the employees' job duties on a weekly basis; (2) copies of IRS Forms W-2 issued in 2004; (3) copies of IRS Forms 941, Employer's Quarterly Federal Tax Returns, for the second and third quarters of 2005; (4) an organizational chart for the U.S. company; and (5) if applicable, evidence documenting the petitioner's use of contractors.

In a response dated December 23, 2005, the beneficiary, writing on behalf of the petitioner, submitted the following additional information regarding his duties as executive director of the U.S. company:

I spend a minimum of 50 hours per week on the job. I establish the company goals, policies and set the pace for its expansion. I also manage the day to day operations of the company. The business dealings I am establishing are setting the foundation for [the petitioner's] growth. My duties include servicing customer accounts, developing new accounts, product procurement, shipping, inland freight forwarding, and the development of marketing opportunities. I am the only employee at the present (no W-2 issued to date). However, this will change in 2006.

I have worked diligently to make up for lost time due to the uncertainty of my immigration status for a large portion of my time in the United States. As noted above, I set the goals for the company, which includes its expansion to 3 employees in addition to myself for 2006. Soon the contacts/contracts I have made will permit [the petitioner] to hire sales representatives for the Philadelphia, Delaware and Baltimore areas. I will train these individuals regarding our business development and sales techniques and manage that portion of the business as well. Since I am currently the only employee, there is no organizational chart to provide at this time. However, the projected organizational chart will include my position, administrative assistant, a secretary, and three sales representative positions.

The beneficiary went on to discuss the petitioner's current and prospective sales contracts, noting that the company has started importing textile products to the United States. The beneficiary concluded: "If I am granted an extension for the next 2 years I shall be able to make a sizable profit for the company, pay regular taxes, hire employees and manage a good volume of trading business too."

In a cover letter dated December 23, 2005, submitted in response to the director's request for evidence, counsel for the petitioner emphasized that due to the beneficiary's uncertain immigration status, he "could not travel abroad or be deemed 'business worthy' for client companies to pursue transactions. Since obtaining his status in 'real time,' [the beneficiary] has taken significant steps to establish the company in Pennsylvania."

The director denied the petition on January 6, 2006, concluding that the petitioner failed to establish that he beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director fully acknowledged the petitioner's arguments that the company's progress was slowed by the beneficiary's "uncertain" immigration status, but noted that the most recent two-year extension, valid from February 2004 to February 2006, was granted to compensate the petitioner for any difficulties resulting from USCIS's mishandling of the initial extension request, and to allow the petitioner additional time to establish the United States office. The director further stated: "[A]t this juncture the beneficiary has remained in the United States for a period of almost five years, for the past 16 months with knowledge of having L1A status that was valid, but it is not evident that there does exist an actual United States company that has employees who can relieve the beneficiary from performing the duties of the daily operation of the United States company." The director noted that, including the initial new office petition, the beneficiary has had at least two years in L-1A status that were fully available for the establishment and growth of the U.S. company.

The director noted that the beneficiary, as the only employee of the U.S. company, is necessarily required to perform a number of duties that are not executive or managerial in nature, and which are normally performed by lower-level employees. The director concluded that the beneficiary would not be supervising and controlling the work of supervisory, professional, or managerial employees, managing an essential function of the organization, or directing the management of the organization, and therefore would not be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director erred in concluding that the beneficiary will not be employed in a managerial or executive capacity, and again emphasizes that "the absence of legal status was a serious impediment" to the growth of the U.S. company. Counsel states that the beneficiary's position "is clearly executive," and contends that the director failed to consider the beneficiary's position in the context of the current stage of development of the U.S. company, noting that the "initial stunted growth of the company (aided by uncertain immigration status) did not permit the hiring of additional employees." Counsel further asserts that the evidence submitted demonstrated that the company has undergone "significant growth in the past six months, including the hiring of a sales representative and sales receipts in excess of \$20,000 from September to December 2005." Counsel states that this growth is evidence of the beneficiary's executive duties, and that "a short extension would have allowed him to realize corporate goals."

Counsel's assertions are not persuasive. Preliminarily, the AAO acknowledges counsel's contention that the beneficiary should be granted additional time to establish the United States office due to the lengthy delay in the adjudication of the petitioner's first request for an extension of his L-1A status, which, regrettably, took nearly two and one half year to be processed by USCIS. Essentially, the petitioner and counsel are requesting that USCIS take into consideration the company's future hiring plans and business prospects, as if the U.S. company were a brand new office. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low level 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 that first year. In an accommodation that is more lenient than the strict

language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

As discussed by the director, there is no justification for the application of a more lenient standard in the instant matter. The beneficiary was granted a one-year approval in order to establish its new U.S. office in February 2001. The record shows that the beneficiary obtained his L-1 visa at a U.S. Consulate on April 3, 2001, but, inexplicably, did not enter the United States until October 22, 2001, more than eight months after the petition was approved. While the beneficiary may have remained in "uncertain" status between the months of February 2002 and August 2004, when the most recent extension was granted, the petitioner has not adequately explained how the delay in the adjudication of the extension request prohibited the U.S. company from doing business. An L-1A petition deals solely with the entry and employment authorization of one non-U.S. worker and does not decide a corporation's right to invest and do business in the United States. If the petition had ultimately been denied, it would have meant that the company could not employ the beneficiary under the requested nonimmigrant classification. The petitioner was not prohibited from doing business in the United States or from hiring any U.S. citizen or permanent resident at will.

The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. By granting two extensions to the petitioner, USCIS has already made more than sufficient accommodations for any harm caused by the delay in the adjudication of the petitioner's first extension request. The beneficiary's most recent extension was granted in August 2004, and therefore he has had more than one full year to develop the business to the point where it would support a primarily managerial or executive position. Accordingly, the AAO will not take into consideration the petitioner's future hiring plans or business prospects in determining whether the beneficiary will be employed in an executive or managerial capacity under the extended petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. 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.* 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 show 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).

Although the petitioner indicates that the beneficiary establishes the U.S. company's goals and policies and manages the day-to-day operations of the company, the petitioner also states that the beneficiary's duties include "servicing customer accounts, developing new accounts, product procurement, shipping, inland

freight forwarding, and the development of market opportunities." The supporting documents submitted by the petitioner, including invoices, purchase orders and electronic mail correspondence, confirm that the beneficiary is solely responsible for taking orders from U.S. customers, locating overseas suppliers, and making all the necessary arrangements to ensure that the products are manufactured according to specification and timely delivered. Thus he is directly performing the company's sales, marketing, procurement, shipping, and distribution functions, rather than supervising the performance of these non-qualifying tasks through a subordinate staff of employees or contractors. These are the daily operational tasks inherent to operating as an import and wholesale distribution company, and do not fall under the statutory definitions of managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Therefore, while the beneficiary in this matter evidently exercises discretion over the U.S. business as its owner, manager, and sole employee, the petitioner must still establish that he is not primarily involved in performing the company's day-to-day operations. The petitioner has not met this burden.

Although requested by the director, the petitioner declined to provide a breakdown of how the beneficiary's time is allocated among his various responsibilities. The petitioner lists the beneficiary's duties as including both managerial and operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because the majority of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing managerial or executive duties. See, e.g., *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. An analysis of the totality of the record in this case leads to the reasonable conclusion that the beneficiary's non-managerial duties associated with the petitioner's sales, marketing, procurement, shipping, and distribution functions, along with routine administrative tasks, would require substantially more of his time than any managerial or executive duties he performs. Where an individual is primarily performing the tasks necessary to produce a product or

to provide a service or other non-managerial tasks, that individual cannot also primarily perform managerial or executive duties.

On appeal, counsel suggests that the director did not consider the current stage of development of the company in considering the beneficiary's position and current job duties. Counsel's assertion is not persuasive. 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, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. Here, the petitioner did provide an explanation as to why the petitioner had not been staffed during its first five years of operations. The director acknowledged the petitioner's arguments, and explained in great detail why the petitioner's arguments were not persuasive, and why the petitioner would no longer be considered a "start up" enterprise for the purposes of determining the beneficiary's employment capacity. As discussed above, the AAO concurs with the director's assessment with respect to the petitioner's current stage of development. Notwithstanding the beneficiary's period of "uncertain" immigration status between 2002 and 2004, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of primarily non-managerial or non-executive duties as of October 2005, when the instant petition was filed.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Counsel claims for the first time on appeal that the petitioner hired a sales representative within "the past six months." The petitioner has submitted no evidence to corroborate this statement. When replying to the director's request for evidence, the beneficiary unequivocally stated that he was the sole employee of the company as of December 23, 2005. Therefore, if the petitioner did in fact hire an employee, it did so subsequent to the director's decision. 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). For the same reason, the petitioner's stated intention to hire three employees during 2006 will not be considered.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

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, that burden has not been met.

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ORDER: The appeal is dismissed.