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File: EAC 05 228 51234 Office: VERMONT SERVICE CENTER

Date: FEB 01 2007

IN RE: Petitioner:
Beneficiary



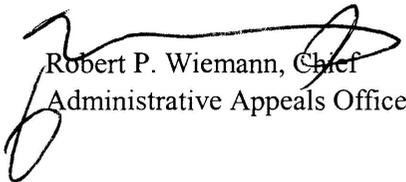
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


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 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 limited liability company organized in the State of Michigan that claims to be engaged in the provision of engineering and design services, primarily for the automobile industry. The petitioner states that it is an affiliate of [REDACTED] located in Germany. The petitioner seeks to open a new office in the United States and has requested that the beneficiary be granted a one-year period in L-1A classification to serve as its manager of product design.

The director denied the petition concluding that the petitioner did not establish that the United States company has secured sufficient physical premises to house the new office.

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 director's conclusion that the physical premises secured by the U.S. company is not supported by evidence or relevant decisions. Counsel cites to numerous unpublished AAO decisions in which home offices were found to be sufficient physical premises for the purpose of opening a new office, and asserts that the regulations do not permit a determination as a matter of law that a residential office is never sufficient physical premises to house a petitioner's business. Counsel contends that the space secured is sufficient for the type of business to be operated by the petitioner. 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 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 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 sole issue addressed by the director is whether the petitioner had secured sufficient physical premises to house the new office as of the date the petition was filed.

The nonimmigrant petition was filed on August 16, 2005. In a letter dated August 2, 2005, the petitioner indicated that the U.S. company has leased a "combination apartment/office space" and "is actively looking to purchase a commercial office building from which to conduct its business in the United States." The petitioner stated that the company was established in order to provide engineering and design services for the U.S. automotive and transportation industries.

The petitioner submitted a copy of a document entitled "Move-In Information and Notification under Sec. 3, Act 348, Public Acts of 1972, State of Michigan," and a lease application for a two-bedroom Auburn Hills, Michigan apartment, which identify the petitioner's president and his spouse as the only intended occupants of the premises. The "Move-In Information" document indicates a date of occupancy of April 1, 2005, while the lease application indicates that the petitioner's president intended to lease the premises through September 30, 2005.

The director requested additional evidence on August 25, 2005, advising the petitioner as follows:

You have stated that you are actively looking to purchase a commercial office building from which to conduct your business. It must be established that the petitioner has secured physical premises of sufficient size to conduct business. Submit photographs of the interior and exterior of all of the premises that you have secured for the United States entity. These should include photographs that clearly depict the organization and operations of the entity.

In a response dated September 13, 2005, the petitioner submitted four photographs. One photograph depicts the outside of an apartment building with the street number "2809." A second-story window has a small sign bearing the petitioner's name. The petitioner also provided two photographs of a directory for the apartment building, which includes an entry bearing the petitioner's name and the beneficiary's surname. Finally, the petitioner provided one photograph of an interior room containing one desk and desk chair, two computers, a printer, a scanner and a small file cabinet. In a letter accompanying the petitioner's response, the petitioner indicated its intention to hire a team of approximately ten project directors who would carry out engineering projects under the beneficiary's supervision.

On October 11, 2005, the director issued a notice of intent to deny the petition. The director acknowledged receipt of the photographs of the Auburn Hills, Michigan apartment. The director requested photographs of the foreign entity's operations, including photographs that clearly depict the organization and operation of the entity. The director requested that the petitioner explain if it intends for the U.S. operation to grow to be "of the same caliber as the foreign operation." The director also instructed the petitioner to submit a business plan for commencing the U.S. start-up company, including specific dates for each proposed action for the next two years.

In a response dated November 4, 2005, counsel for the petitioner stated that the company anticipates that the U.S. company will obtain technical assistance and expertise from its parent company, which is expected to "at all times remain the dominant and larger entity as far as worldwide operations are concerned." Counsel further asserted that by April 2006, the petitioner intends to locate and purchase "suitable premises which will support a team of up to 15 employees in the Auburn Hills, Michigan area." Counsel, referencing the petitioner's attached business plan, noted that the company anticipates employing a staff of five employees in 2006, eight employees in 2007, and 12 employees in 2008.

Counsel stated that the petitioner has purchased an automobile to be used for business purposes, and signed a contract for high speed internet service required to conduct its business. Finally, counsel stated:

Petitioner has been working and continues to work with [REDACTED] a local realtor in Troy, Michigan, for the purpose of securing commercial property in the Auburn Hills, Michigan area. . . . The present location at [REDACTED] Auburn Hills, Michigan is however, suitable and adequate to carry on Petitioner's business at the present time.

The director denied the petition on November 17, 2005, concluding that the petitioner has not secured sufficient physical premises for the petitioner's start-up business objectives. The director noted that the office space secured appears sufficient to accommodate the beneficiary only, and observed "the additional employees as well as the equipment needed to run the United States entity will require additional space." The

director acknowledged the petitioner's stated intention to acquire additional space during the first year of operation, but noted that the petitioner must establish eligibility as of the date of filing the petition.

On appeal, counsel for the petitioner states that the petitioning company is currently operating with fewer than the five employees anticipated by the end of the first year of operations. Counsel emphasizes that the company will be engaged in the provision of design and engineering services only and will not be engaged in any physical manufacturing or assembly at its current location, or at any new location secured by the company in the future. Counsel asserts that the director's determination that the physical premises depicted in the petitioner's photographs are not sufficient for conducting business "is not supported by evidence or relevant decisions."

Counsel cites several unpublished decisions in which the AAO has noted that the regulations do not specify the type of physical premises that must be secured for a new office, and states that the AAO has previously indicated that an office in residential space may be sufficient under the petitioner's particular circumstances. Counsel further states:

In the present case, the type of business in which [the petitioner] engages is a service and consulting enterprise. The Petitioner has no need for physical premises of a size that would be necessary for substantial physical activity, such as manufacturing or assembly. Moreover, the Petitioner currently has fewer than five employees engaged in its design and engineering services. Little more than desk space and basic office equipment are currently needed and used. Despite these circumstances, the Acting Center Director neither requested nor considered evidence of a floor plan of the Petitioner's office, the types of office equipment obtained and used by the Petitioner, and the allocation of office space between employees, records, and equipment. Without such information, it was not possible for the Acting Center Director to come to a reasoned conclusion regarding the sufficiency of the physical premises to house the Petitioner's new office. As discussed herein, the regulations do not permit a determination as a matter of law that a residential office is never sufficient physical premises to house a petitioner's business.

Counsel requests that the AAO reverse the director's decision or remand the case to the director "for appropriate supplementation of the record."

Upon review, counsel's assertions are not persuasive. The petitioner has not established that it has secured sufficient physical premises to house its new office. Contrary to the petitioner's assertions on appeal, the director did not deny the petition specifically because the petitioner intends to operate from a home office. The director's decision demonstrates that she reviewed the submitted lease application, photographs, and the petitioner's business plans and representations regarding its anticipated business operations, and reasonably concluded that the premises leased would not support the intended staffing levels or business activities.

First, the AAO notes that the documentation furnished regarding the petitioner's leased premises shows that it is a two-bedroom apartment of unknown square footage being rented to the petitioner's president and his spouse, the company's claimed shareholders, for a monthly fee of \$720.00. There is no evidence that the landlord is aware of or has authorized the use of the premises for any purpose other than as a residence, nor has the petitioner submitted evidence that it has established a separate telephone line, obtained a license to operate a business from a home office, or made other accommodations for the use of the premises by the U.S.

company, other than placing a single computer workstation in one room of the apartment. 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)).

Second, even if the physical premises were deemed to be adequate, it appears that the initial agreement was for the petitioner's president to lease the premises for a period of six months, until September 30, 2005. The petitioner states that it does not expect to secure additional premises until April 2006. As the petitioner initially indicated its intention to employ the beneficiary for a one-year period commencing on September 1, 2005, the record does not contain documentary evidence that the petitioner had secured any physical premises to house the company beyond the first month of the beneficiary's intended employment. The AAO acknowledges that secondary evidence in the record suggests that the petitioner's president continued to occupy the apartment beyond the initial six-month period, however, the lack of a lease agreement corroborating the continued rental of the premises cannot be excused. Again, 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. at 165.

The petitioner submitted copies of four purchase orders from a U.S. customer, all of which were dated October 2005, as evidence that the company is in fact doing business from the residential address, providing services associated with graphic and patent application support, design concepts and design labor. However, it is unclear who is providing these services on behalf of the petitioner, or how the petitioner's current office space, as depicted in its photographs, would support the addition of the beneficiary and other employees to be hired during the first year of operations, which the petitioner indicates will include "administrative, marketing and trainee engineers." As the petitioner has not specifically outlined its space requirements for the business, it is not possible to conclude that the office or bedroom depicted in the petitioner's photographs would support any additional employees.

The AAO acknowledges the petitioner's assertion that it requires only standard office equipment, computers and specialized software in order to operate its business. However, it appears from the evidence submitted that the company will operate the same type of business operated by its foreign affiliate, which, based on the photographs provided, has premises sufficient for the construction of prototypes and the simulation testing of the products it designs, as well as conference rooms for client meetings. Again, the petitioner neither explained nor documented how it will operate its business from a one-room office with a single workstation, and thus the AAO cannot find that the premises secured are sufficient for the petitioner's specific purposes.

Counsel further refers to unpublished decisions in which the AAO acknowledged that a home office could be found to meet the standard of "sufficient physical premises" to house a new office. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel contends on appeal that the director erred by denying the petitioner without first requesting additional evidence, such as a floor plan, "evidence of the types of equipment obtained and used by the Petitioner, and the allocation of office space between employees, records and equipment." Counsel asserts that, without such evidence, the director could not come to a "reasoned conclusion regarding the sufficiency of the physical premises."

The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did issue a request for evidence and a notice of intent to deny the petition, both of which specifically expressed the director's doubts regarding the evidence submitted with respect to the petitioner's physical premises. If the petitioner had additional evidence to submit in support of its claim that the home office is adequate for the petitioner's purposes, it should have submitted the evidence in response to the request for evidence, in response to the notice of intent to deny, or in support of the appeal. While the AAO concedes that the director's requests were not ideal in their level of specificity, the petitioner had sufficient notice of the deficiencies of its petition, and the AAO declines to remand the matter to allow the petitioner a fourth opportunity to supplement the record.

Based on the foregoing discussion, the petitioner has not established that the U.S. company had sufficient physical premises to house the new office as of the date of filing. As noted by the director, the fact that the company intends to purchase a commercial office building by April 2006 is not relevant to this determination. 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). Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record is not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(1)(3)(v)(C). The petitioner intends to hire the beneficiary as its manager of product design, and stated in its supporting letter that the beneficiary "will be responsible for interacting with and designing products for Petitioner's clients." The petitioner further stated that the beneficiary's duties will include providing engineering/design services in the area of pre-development and development of automobile parts and components, being "in charge" of developing concepts, and compiling and illustrating technical issues for the company's clients, utilizing knowledge of proprietary engineering and design processes, strategies and information that is "unique" to the foreign entity. The petitioner further indicated that the beneficiary will be responsible for locating, hiring and training U.S. engineers, assigning them to specific projects, and supervising the progress of these projects.

The initial job description, therefore, included a mix of non-managerial engineering and design duties, and managerial duties, but failed to indicate how the beneficiary's time would be allocated among these tasks, or identify when additional staff would be hired to relieve the beneficiary from directly providing services to customers. 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); *see generally* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B) (defining "managerial capacity and "executive capacity.")

In her request for evidence, dated August 25, 2005, the director observed that the beneficiary's stated duties do not appear to be related primarily to policy and general operational oversight. Accordingly, the director instructed the petitioner to provide: a comprehensive description of the beneficiary's duties, the job titles and

duties of the positions to be supervised by the beneficiary; the percentage of time the beneficiary will devote to managerial duties and non-managerial duties; and, the degree of discretionary authority the beneficiary will exercise over the company's day-to-day operations.

In response, the petitioner stated that the beneficiary will assemble a team of design engineers to handle company accounts, supervise their work on individual projects and "develop design guidelines and standards." The petitioner stated that it intends to hire a team of ten project directors, and indicated that the beneficiary will spend approximately 80 percent of his time performing "managerial/executive functions," including hiring and firing personnel, assigning and supervising projects, and exercising authority to coordinate various project teams to ensure timely completion of client projects. The petitioner further indicated that the beneficiary will "work and interact with" clients to assess their design needs, and act as a mentor for the petitioner's design engineer professionals.

The petitioner subsequently submitted its business plan in response to the director's notice of intent to deny the petition. In a letter dated November 4, 2005, the petitioner indicated its intent to hire an administrative assistant and bookkeeper by the end of March 2006, a design engineer in April 2006, and an additional design engineer in October 2006. The petitioner's business plan indicates that the company intends to hire "up to 3 employees" by mid-2006 including "administrative, marketing and trainee engineers." The record does not persuasively demonstrate that the beneficiary will supervise more than one engineer or trainee engineer within one year of the date of filing the petition in August 2005. The petitioner has not specifically outlined the anticipated training period for its new hires, but it is reasonable to assume that a single design engineer, even if fully trained by the end of the first year of operations, will not fully relieve the beneficiary from performing the day-to-day tasks of the petitioner's product design department, particularly in light of the petitioner's anticipated income of \$620,000 from consulting services for the 2006 year. The record does not corroborate the petitioner's assertion that the beneficiary would devote 80 percent, or even 50 percent, of his time to managerial duties within one year.

Rather, based on the record of proceeding, particularly considering the petitioner's first year hiring plan, it is evident that the beneficiary's duties at the end of the first year of operations would be primarily duties required to provide the petitioner's services, as described in the petitioner's initial description of the beneficiary's duties. 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).

The AAO acknowledges that the U.S. company may eventually grow to a point where it would support the beneficiary in a primarily managerial capacity, wherein he would reasonably be required to devote the majority of his time to supervising the activities of professional employees performing the company's engineering and design functions. However, at the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it will support the beneficiary in a managerial or executive position within one year of approval. Here, the evidence submitted does not establish that the beneficiary will be employed in a primarily managerial or executive capacity within one year. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See*

Spencer Enterprises, Inc. v. United States, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.