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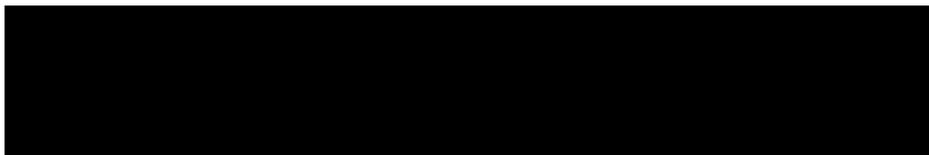
FILE: SRC 05 103 51746 Office: TEXAS SERVICE CENTER Date: FEB 01 2007

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, Texas 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 chief executive officer 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 sole proprietorship organized in the State of Texas, claims to be the affiliate of Gabay Jewelry, located in Haifa, Israel. The petitioner identifies itself as a real estate management and investment company. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous, and particularly focuses on the director's failure to consider that the beneficiary had less than one year in the United States to establish the U.S. organization. Specifically, counsel asserts that the director erred by not considering the petitioner as being in the start-up phase of operations. In support of these contentions, counsel submits a brief and additional evidence.

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) provides 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The issue in this matter is whether 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.

In a letter dated February 25, 2005, counsel for the petitioner stated that the petitioner had grown within the past year and now employs two individuals. Counsel explained that, although the beneficiary's initial L-1 petition was approved in March of 2004, processing delays hindered the issuance of his visa until June 23, 2004, nearly four months after the approval date. With regard to the beneficiary's role in the United States, counsel stated:

[The beneficiary] will be responsible for many areas of the business including continuing to establish the presence in the U.S. market, making sure profitability levels meets expectations, hiring, firing and training employees. He will continue to provide overall management and CEO services to the Israeli organization, but will be primarily responsible for the U.S. office. He will determine and formulate policy and plan and develop in accordance with the company charter and by-laws. He will determine business strategies and business objectives.

The foreign entity also submitted a letter dated February 15, 2004, which provided the following proposed duties for the beneficiary:

[The beneficiary's] job description in the U.S. as CEO of the organization will be as follows:

Determine and formulate policies and provide the overall direction of the company; Plan, develop and establish policies and objectives of the company in accordance with directives and corporation charter and by-laws; Plan, direct, and coordinate the operational activities at the highest level of management with the help of subordinate executives, managers, and employees; Determine and formulate policies, business strategies and business objectives, and to develop organizational policies to coordinate functions and operations; Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions; Direct and coordinate formulation of financial programs to provide funding for new or continuing operations to

maximize return on investments, and to increase productivity; Supervise and train subordinates, including executives, managers and employees; Evaluate performance of executives and subordinates for compliance with established policies and objectives of the firm.

On March 30, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit an organizational chart for the petitioner; a more detailed description of the beneficiary's duties, including the percentage of time devoted to each duty; a list of all subordinates of the beneficiary, with a description of each person's position title and their duties; and copies of its quarterly tax returns for the past year.

Counsel for the petitioner submitted a response dated June 28, 2005. In a somewhat confusing manner, counsel indicated that there were no employees on the payroll at the current time, yet submitted a list of three employees of the petitioner, namely, [REDACTED] Secretary; [REDACTED], Project Manager; and [REDACTED] Assistant. Counsel further submitted a list of eight contractors providing various services for the petitioner. Despite the director's request for employment verification of these persons, no quarterly returns, 1099s, W-2s or payroll summaries were submitted.

With regard to the beneficiary's duties, the following updated description was submitted:

[The beneficiary's] specific duties day to day include:

- Continuing to establish presence in the U.S. market.
- Making sure profitability levels meet[] expectations.
- Hiring, Firing, and Training employees.
- Overall management and CEO services to the Israeli company.
- Determine and formulate policies and provide the overall direction of the organization.
- Plan, develop and establish policies and objectives of the company in accordance with the directives and corporation charter and by-laws.
- Determine business strategies and business objectives.

On July 16, 2005, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would function at a senior level within the organization or that the beneficiary had sufficient subordinate staff to relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner reasserts the claim that the petitioner should still be considered in the start-up phase and that the beneficiary should not be unfairly penalized for his less than one-year in L-1 status in the United States. Counsel further clarifies that at the time the I-129 petition was filed, the petitioner's sole employee was the beneficiary, but that additional employees were hired in the second quarter of 2005. Counsel refers to the use of staffing levels by the director in the denial and attempts to refute the director's basis for the denial by providing documentation verifying the current staffing of the organization. Finally,

counsel restates the beneficiary's duties and claims that the petitioner has in fact satisfied the regulatory requirements. Additional documentation regarding the positions of the petitioner's five alleged staff members are submitted in support of this contention. The AAO, however, disagrees with counsel's assertions.

Counsel suggests that the present petition should be adjudicated under the regulations governing new offices, provided in 8 C.F.R. § 214.2(l)(3)(v), as the beneficiary did not receive a full year in L-1A status. Counsel takes issue with the director's application of the regulatory requirements for new office extensions as provided in 8 C.F.R. § 214.2(l)(14)(ii). The initial new office petition (SRC-04-069-50270) was approved for a period from March 1, 2004 to March 1, 2005, or 365 days. If a beneficiary is coming to the United States to open a new office, the petition may be approved for a period "not to exceed one year." 8 C.F.R. § 214.2(l)(7)(i)(3). Although counsel indicates that due to delays in the processing of the visa, the beneficiary did not arrive in the United States until late 2005, the fact remains that any request for an extension of a petition that was originally approved as a new office must be evaluated under the criteria set forth at 8 C.F.R. § 214.2(l)(14)(ii). The regulations do not provide for any exception or discretionary authority to extend this one-year period.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (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, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS 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 size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, confusion arose as to whether the petitioner employed a subordinate staff to relieve the beneficiary from performing non-qualifying duties. While the response to the request for evidence indicated that the petitioner currently had no employees other than the petitioner, it also included a list of three employees and eight independent contractors. This inconsistency was clarified on appeal by counsel, who confirmed that at the time the extension request was filed in March 2005, the petitioner employed no other persons besides the beneficiary. However, counsel asserts on appeal that the staffing of the organization has since grown, and that the beneficiary is now supported by a subordinate staff sufficient in size to relieve him from performing the tasks necessary to generate the services of the petitioner.

This evidence, however, is not acceptable to establish eligibility in this matter. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an

extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, it is clear via counsel's own admission and the lack of payroll records that at the time of filing, the beneficiary was the sole employee of the petitioner, and thus was responsible for all aspects of the business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Moreover, 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).

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was overseeing a small company with six employees. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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.

Based on the evidence presented, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the decision of the director, the beneficiary as a matter of law is ineligible for the classification sought. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. See 8 C.F.R. 214.2(l)(1)(ii)(G)(2). The petition includes evidence, including a certificate of operation under an assumed name and confirmation of the filing of an application for an IRS ITIN (Individual Taxpayer Identification Number), that indicates the beneficiary is doing business as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). As in the present matter, if the petitioner is actually the individual beneficiary doing business as a sole proprietorship, with no authorized branch office of the foreign employer or separate legal entity in the United States, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization.¹

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

¹ According to the Texas Comptroller of Public Accounts, it appears the beneficiary did incorporate an entity in Texas under the name [REDACTED]. However, the petitioner in this matter has not demonstrated that it has any connection with this Texas corporation. Moreover, [REDACTED] is not currently in good standing in Texas due to its failure to satisfy all state tax requirements, thereby raising the issue of this company's continued existence as a legal entity in the United States.

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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.