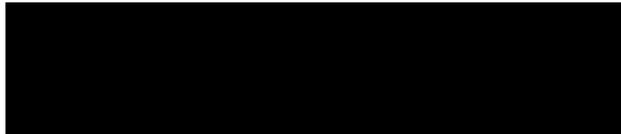


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FILE: WAC 02 161 52437 Office: CALIFORNIA SERVICE CENTER Date: JUN 20 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

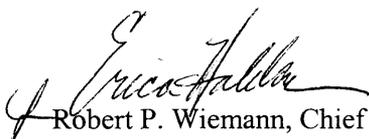
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision is withdrawn. The AAO will remand the matter to the director for additional review and consideration, and the entry of a new decision.

The petitioner filed the instant petition to classify 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 under the laws of the State of California that is engaged as an importer and distributor of Japanese cutlery and claims to be the subsidiary of the beneficiary's foreign employer. The petitioner seeks to temporarily employ the beneficiary as the president of its new United States office for a term of one year.

The director denied the petition finding that the petitioner had not established that it would be doing business in the United States, and concluding that the petitioner was merely an agent or office of the foreign Japanese company.

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel for the petitioner challenges the director's finding, stating that as a new office, the petitioner is not obligated to demonstrate that it has been doing business in the United States. Counsel claims that the petitioner submitted evidence in the form of a lease agreement, bank statements, and a business plan sufficient to demonstrate that the petitioner would be able to support the beneficiary in a primarily managerial or executive capacity within one year of the petition's approval. Counsel submits a letter in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 states that if the beneficiary is coming to the United States as a manager or executive to open or to be employed in a "new office," the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The issue in this proceeding is whether the petitioner demonstrated that it would be doing business in the United States and would not merely act as an agent or office of the foreign company.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner filed the Form I-129 on April 15, 2002, identifying itself as a distributor of Japanese cutlery. In an attached April 11, 2002 letter, the petitioner outlined its business purposes in the United States as:

- To provide a direct communication channel between [the foreign company] and its U.S. customers;
- To increase export of fine Japanese cutlery products in the U.S. wholesale and retail markets;

- To be closer to U.S. trading partners and to develop profitable relationships with new customers;
- To maintain [the foreign entity's] competitiveness in the growing cutlery market with first-hand knowledge of price and the American market; and
- To explore new markets for the expansion of [the foreign entity's] businesses.

In an attached business plan, the petitioner was identified as the importer and wholesaler of three specific brands of Japanese knives. As evidence of its business premises, the petitioner submitted a month-to-month lease agreement for office space, which commenced on March 1, 2002, as well as photographs of the leased office.

On April 17, 2002, the director issued a request for evidence, requesting that the petitioner submit a letter from the foreign company explaining its need for the United States office. The director further requested that the petitioner provide: a detailed business plan of its specific one, three, and five-year goals; photographs of the premises leased by the petitioner; a description of the building in which the petitioner's office is located; clarification of whether the petitioner would be operating "as a sales office, representative agency, distributorship, etc."; specification of the petitioner's daily hours of operation; an explanation of whether the petitioner is still operating from the address identified on its bank statements; and a copy of its 2001 federal income tax returns.

The petitioner responded in a May 30, 2002 letter, referencing its previously submitted lease as evidence that it had secured sufficient physical premises to house the new United States office. The petitioner submitted a copy of a receipt for its rent payment for the month of May, and again provided photographs of the leased office space. The petitioner explained that its office is located in a commercial building, and would be "used to coordinate [its] activities related to sales, marketing, logistics, and distribution." The petitioner further explained that any imported products would be shipped directly to its United States wholesalers and dealers.

In an attached May 15, 2002 letter, the foreign company's president explained the purpose of establishing the United States entity, stating that it "needs to sell directly to U.S. wholesalers and dealers to make our prices competitive [with Taiwanese and Chinese companies]." The foreign company's president stated: "Since the wholesalers and dealers do not themselves import products, we have a need to establish a subsidiary in the U.S. to import and distribute to these wholesaler and dealers." He further noted that the petitioner would "deal directly" with its 15 United States customers and would establish new customer relationships through the use of "marketing, trade shows, and other business development efforts."

In its appended business plan, the petitioner identified its function as an importer and distributor of Japanese knives. The petitioner noted its sales and marketing strategies of developing advertising and promotional campaigns in order to sell to existing customers, as well as its plans to attend trade shows in order to attain new customer contacts. The petitioner indicated its expectation of covering all operating costs by the second half of its start-up year.

In a decision dated June 12, 2002, the director concluded that the petitioner would be acting as a United States agent or office of the foreign entity, and would not be doing business in the United States, as that term is defined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H). The director pointed out that the foreign entity would be shipping products directly to United States purchasers, as evidenced in invoices submitted for the record, and that the petitioner did not appear to be involved in these transactions. The director stated that "[i]t

appears that the petitioner would merely take orders from the U.S. organizations . . . , " a task that the director determined did not qualify as "the regular, systematic and continuous provision of goods and/or services." The director ultimately concluded that the petitioner would be acting as a distributor. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on July 10, 2002, claiming that "[t]o deny the petition on the basis that the petitioner cannot show the newly established entity will engage in a pattern of trade is premature." Counsel explains that the petitioner will "handle" the foreign entity's importing and distributions, respond to customers' needs and coordinate the distribution logistics, while also cultivating relationships with other United States contacts. Counsel states:

With a new office or start-up company situation, [CIS'] regulations provide that the petitioner only need to show that the new office/company will be able to sustain a manager/executive transferee within one year of the approval of the petition. In the original petition, we have submitted evidence to establish a realistic expectation that the U.S. company will be able to support the Beneficiary's position. Our documentations were in the form of statements from the U.S. entity and foreign entity, bank statements, wire transfers, and business plan along with proforma financial statements. As demonstrated in the petition, the U.S. entity was established on February 11, 2002. Therefore, the petitioner has no tax return nor has the petition[er] been engaged in regular, systematic, and continuous provision of goods and services.

Upon review, the director's decision with respect to the petitioner's business operations in the United States will be withdrawn. While it may appear that the petitioner would act only as a facilitator of the foreign entity's imports into the United States, the evidence submitted by the petitioner, particularly its two business plans and the May 15, 2002 letter from the foreign entity, demonstrates the petitioner's expectation to distribute and sell the products procured by the foreign entity. Considering the petitioner is a new office, it is reasonable to rely on its business plans as evidence of its future business operations, and not realistic to expect the petitioner to present income tax return as evidence of doing business in the United States. Accordingly, the director's decision will be withdrawn.

Although the petitioner has overcome the specific deficiency found by the director, the AAO notes that the director did not address the issues of whether the beneficiary was employed abroad in a primarily managerial or executive capacity or would be employed by the United States entity in a qualifying capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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), provides:

The term "executive capacity" means 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.

Pursuant to the regulation at 8 C.F.R § 214.2(l)(3)(v)(C), the petitioner must demonstrate that within one year of the petition's approval, the beneficiary would be employed in a primarily managerial or executive capacity, as these terms are defined in §§ 101(a)(44)(A) and (B) of the Act.

Here, the record does not establish that the beneficiary would occupy a primarily managerial or executive capacity within one year of the approval of the instant petition. The AAO recognizes the claims made by the petitioner in its April 11, 2002 letter as to the beneficiary's proposed employment as both a manager and an executive. The information provided in the petitioner's business plan, however, does not corroborate the petitioner's claims of employing the beneficiary in a primarily managerial and executive capacity. Based on its business plan, at the end of its first year of operation, the petitioner's personnel would consist of a managing director, who is presumably the beneficiary, and an office manager. In 2004, the petitioner anticipated hiring a sales manager. Considering the employment of the beneficiary and an office manager, it does not appear that within one year of the petition's approval, the petitioner would maintain a staff sufficient to relieve the beneficiary from performing the non-managerial and non-executive tasks related to its importing, distribution, and sales functions, which are the main operations of the petitioning entity, as well as any related administrative or operational functions. 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).

Additionally, the information contained in the petitioner's business plan severely undermines the petitioner's expectation of hiring an additional four to six workers during its first year of operations, as claimed by the petitioner in its May 30, 2002 response to the director's request for evidence. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

With respect to the beneficiary's foreign employment, the director did not consider whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

In its April 11, 2002 letter, the petitioner identified the beneficiary's former position in the foreign entity as managing director, claiming that he oversaw the company's day-to-day operations, and managed, directed, and coordinated its marketing, business, development, logistics, and customer service functions. In a separate March 25, 2002 letter from the president of the foreign corporation, the beneficiary was identified as occupying the position of logistics manager prior to his transfer to the United States in September 2001 on an F-1 student visa. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. The AAO notes that in each position, the beneficiary was identified as performing such non-managerial and non-executive tasks as ensuring the delivery of goods and supplies, analyzing and negotiating contracts, compiling logistical data, and determining customer requirements. Additionally, as the managing director, the beneficiary developed manuals and bulletins. While the beneficiary was identified as managing three subordinate managers, the provided job descriptions do not demonstrate that as either the managing director or the logistics manager, the beneficiary was performing *primarily* managerial or executive job duties.

The record as presently constituted does not establish the beneficiary's eligibility for the requested immigrant visa classification, and the petition will therefore be remanded to the director for further action and consideration. The director is instructed to consider the issues of whether the beneficiary was employed abroad and would be employed in the United States in a primarily managerial or executive capacity, and, if necessary, request additional evidence related to the beneficiary's former and proposed employment capacities. The director should enter a new decision based on her review of the record and any additional documentary evidence.

ORDER: The decision of the director dated June 12, 2002 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.