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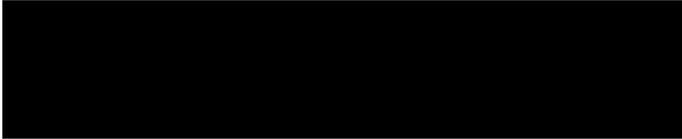
MAY 01 2007

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 AAO will withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president 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 Georgia limited liability company, states that it is engaged in sales, installation and service of electronics and satellite radio and television equipment and service. The petitioner claims that it is a subsidiary of Card Board Box Manufacturing Company, located in Calcutta, India. The beneficiary was granted a one-year period of stay in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his status for three additional years.

The director denied the petition concluding that the petitioner did not establish that the U.S. entity was doing business for the previous year.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred in his decision, and states that the petitioner is able to establish that it has been doing business since the beneficiary was granted L-1A status on February 2, 2005. 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)(14)(ii) also 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 the present matter is whether the petitioner established that the United States entity has been doing business for the previous year, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

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

*Doing business* means the 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 petition was filed on February 10, 2006. The beneficiary was initially granted L-1A status in order to open a new office on February 2, 2005. The petitioner indicated that it was engaged in the operation of a Dish Network retail business and provided the following evidence in support of its assertion that the company is doing business in the United States: (1) a lease for its current retail premises; (2) Forms 941, Employer's Quarterly Federal Tax Return, for the last quarter of 2005; (3) IRS Forms W-2 and Form 1099 for 2005, showing wages paid to five employees and one contractor; (4) bank statements for each month of 2005; (5) copies of occupational licenses; (6) an income statement for the 2005 year showing total sales of \$288,975.75; and (7) photographs of the petitioner's business premises.

The director issued a request for evidence on March 17, 2006, in part requesting that the petitioner submit evidence of the business conducted by the U.S. entity for the previous year, such as sales contracts, invoices, bills of lading, shipping records, orders or other documents.

In a response dated March 30, 2006, counsel for the petitioner noted that the company is engaged in the domestic sales of telecommunications equipment and therefore cannot submit bills of lading or shipping documents. Counsel emphasized the petitioner's gross sales of approximately \$288,000 in 2005, and noted that the petitioner began its retail operation to the public in April 2005. The petitioner submitted extensive documentation in support of its response to the request for evidence, including copies of purchase orders dated from March 2005 through December 2005, as well as copies of contract and installation agreements dated from April 2005 to December 2005. The petitioner also submitted its financial statement for the first two months of 2006, which shows total sales of \$114,303. The petitioner's response included receipts for electronics equipment purchases dated as early as February 9, 2005.

The director denied the petition on April 17, 2006, concluding that the petitioner had not established that the petitioner was doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The director noted that the earliest evidence of business submitted was a contract and installation agreement dated April 30, 2005, and thus the petitioner had failed to establish that the U.S. company was doing business since the beneficiary was granted L-1A status in February 2005.

On appeal, counsel for the petitioner asserts that the director erred in her decision. Counsel claims that the petitioner began operating as a satellite dish network business in January 2005, and not in April 2005, "as previously misstated." The petitioner submits voluminous documentary evidence in support of the appeal, including: copies of over 100 invoices for the sale and/or installation of satellite dish network systems between January and April 2005, along with copies of the petitioner's bank statements for the same time period, indicating deposits for services rendered; copies of three retailer agreements signed between [REDACTED] and the petitioner in March 2005; and copies of various previously submitted and new documents evidencing the petitioner's ongoing business operations from April 2005 through April 2006.

Upon review, counsel's assertions are persuasive. The AAO finds sufficient evidence in the record to establish that the petitioner has been engaged in the regular, systematic and continuous provision of goods and/or services since the beneficiary was initially granted L-1A status to open a new office on February 2, 2005. Although the petitioner previously stated that it began its retail operations to the public in April 2005, the evidence submitted on appeal establishes that the company was engaged in the provision of similar services prior to that date, apparently on a contract or commission basis. The director's decision dated April 17, 2006 will be withdrawn.

Although the director's decision will be withdrawn, the AAO finds that the evidence of record raises underlying questions regarding the beneficiary's eligibility for this visa classification, which, if unresolved, would prohibit approval of the petition. Specifically, the record as presently constituted does not establish that the beneficiary would be employed by the United States entity in a managerial or executive capacity under the extended petition.

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 petitioner indicated that it employed five individuals as of the date of filing and described the beneficiary's duties as its president as follows:

[The beneficiary] has been overseeing all financial, business, marketing and development aspects of the U.S. company's operations. . . .

While in the U.S., [the beneficiary] will continue planning business objectives and developing organization policies; reviewing activity reports and financial statements to determine progress; directing and coordinating the formulation of financial programs to

provide funding for new or continuing operations. [The beneficiary] has handled start-up of the new company and continues to direct that operation through marketing; developing and growing a customer base and maintaining existing customers. As President, [the beneficiary] will continue to enhance the development and marketing aspects of the U.S. operations. He will continue to service [sic] as CFO.

The record shows that the petitioner employs two sales employees and three technicians in addition to the beneficiary. Although the director requested additional evidence in support of the petition, she did not request clarification regarding the beneficiary's employment capacity in the United States.

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 provided description of the beneficiary's U.S. duties provides little insight into the true nature of the tasks he will perform under the extended petition. General statements such as the beneficiary will "oversee all financial, business, marketing and development" of the business, plan business objectives, and develop organizational policies are insufficient to establish that the beneficiary's day-to-day duties are primarily managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

The petition will be remanded and the director is instructed to request a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time he will devote to those duties on a weekly basis, and a description of the duties he performs on a "typical day." 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). The provided job description does not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature, nor does it adequately indicate what proportion of the beneficiary's time will be devoted to qualifying duties.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The record as presently constituted does not contain position descriptions for the beneficiary's subordinates, which makes it impossible to determine that the lower-level staff would relieve the beneficiary from performing the non-qualifying duties associated with operating a retail sales and service business.

Accordingly, the petitioner should provide job titles and job descriptions for all subordinate employees, as well as information regarding the number of hours they worked, and their educational background. If the petitioner utilized outside contractors to perform any functions as of the date of filing, it should submit documentary evidence to substantiate the employment of these individuals, and describe the scope and nature of services they provided. The petitioner should specifically explain how the subordinate employees relieve the beneficiary from primarily engaging in the day-to-day operations of the company. 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.

It is emphasized that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, February 10, 2005. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's eligibility and will not be considered.

Although the petitioner has overcome the specific objection of the director, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for L-1A classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence she deems necessary.

**ORDER:** The decision of the director dated April 17, 2006 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.