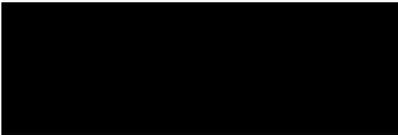


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File: EAC 07 007 51107 Office: VERMONT SERVICE CENTER Date: NOV 06 2007

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, Vermont 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 action and entry of a new decision.

The petitioner seeks to employ the beneficiary temporarily in the United States 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 in the State of Florida that intends to import and distribute leather goods. It claims to be a subsidiary of Leather Mode International, located in New Delhi, India. The petitioner seeks to employ the beneficiary as president/marketing director of its new office in the United States for a one-year period.

The director denied the petition, determining that the petitioner had failed to establish that the U.S. entity would employ the beneficiary in a primarily managerial or executive capacity within one 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 contends that the director erroneously required that the petitioner establish that it can currently support a managerial or executive position. Counsel further asserts that the director erred by determining that the beneficiary would not be supervising managerial, supervisory or professional employees and that the petitioning company would not require such workers as a "modest-sized import/export outfit." Counsel contends that the decision was largely based on "mere conjecture regarding the needs of a new business." Finally, counsel objects to the director's finding that the beneficiary's offered salary of \$30,000 is "incongruous" with a managerial or executive position, noting that the beneficiary's salary should be irrelevant to the adjudication of the petition. Counsel submits a brief 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 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 established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the 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 nonimmigrant petition was filed on October 10, 2006. The petitioner stated on Form I-129 that the beneficiary would serve as its president/marketing director with responsibility to "oversee and establish initial operations and activities, hire staff and implement company goals and policies, and oversee market research." The petitioner indicated that it anticipates hiring a staff of three to five employees initially, and expects gross annual income of \$100,000 or more.

In a letter dated September 24, 2006, the foreign entity indicated that the U.S. company will initially import leather goods for sale in the United States and research potential distribution outlets in Latin American markets. The foreign entity noted the beneficiary's responsibility to "start up our operations, hire staff, and oversee market research to target optimal market potential for our exports."

The petitioner did not submit a business plan or any information or evidence regarding its proposed business operations, hiring plans, or organizational structure for the first year of operations. The petitioner provided a copy of its lease agreement, but it did not identify the size or purpose of the leased premises. The petitioner did not provide evidence of the size of the investment in the United States entity and its ability to commence

operations, or evidence of the organizational structure of the foreign entity. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

Nevertheless, the only additional evidence requested by the director in his request for evidence issued on November 29, 2006 was a proposed organizational chart for the U.S. entity, position descriptions for subordinate positions to be supervised by the beneficiary, and photographs of the leased premises.

The petitioner provided a complete response to the director's request on February 15, 2007. The petitioner provided an organizational chart indicating that the beneficiary's direct subordinates would include an administrative/general manager, a marketing/sales manager, an import/warehouse manager, and an accountant/budget analyst. The organizational chart indicates that the marketing/sales manager will supervise a market research analyst and sales representatives, the import/warehouse manager will supervise warehouse/shipping workers, and the administrative/general manager will supervise all employees, including a receptionist/clerical/filing assistant.

The petitioner also provided "proposed job descriptions for 2007-2008" which included detailed position descriptions for each proposed employee. As these descriptions are part of the record, they will not be repeated here. The beneficiary's position description was as follows:

Direct commencement of leather import/distribution business operations in new U.S. subsidiary, making executive decision regarding location of business premises based on market research [50% initially, until location secured]. Hire professional, managerial and support staff, and continue to direct additional hiring, firing, and promotion of employees [50% initially, then 15%]. Direct managerial staff including Administrator/General Manager, Marketing/Sales Manager, and Import/Warehouse Manager, as well as professional staff such as Accountant/Budget Analyst, setting company goals, policies, and procedures to be implemented by middle management [30%]. Direct and oversee market research and development of marketing strategies, based on reports by Marketing/Sales team; making executive decisions regarding expansion of market activities to Latin America [25%]. Relying on Marketing/Sales team's analysis of potential national and international distribution outlets and research strategies and direct implementation of such [15%]. Direct Import/Export Manager to ensure efficiency and compliance with import/export laws [10%]. Supervise and direct Accountant/Budget Analyst, making executive investment and financial decisions based on cost-benefit analysis and financial reports prepared by Accountant/Budget Analyst [5%].

In a letter dated January 29, 2007, the petitioner emphasized that the beneficiary would be removed from performing the non-managerial functions of the business within one year of operation and will not be performing tasks such as performing marketing research, conducting sales calls, or performing bookkeeping and accounting tasks.

The director denied the petition on March 29, 2007, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity within a one-year period. The director acknowledged the detailed position descriptions submitted, and noted that the duties of the general

manager and accountant/budget analyst "would normally require the skills of bona-fide professionals." However the director concluded that the petitioner's "new modest-sized import/export outfit" would not require workers who have professional-level expertise. The director further acknowledged that a number of duties attributed to the beneficiary "would normally be required of or associated with a manager or executive," but noted that "this service is not convinced that the beneficiary will actually be carrying out these duties," or that the petitioner has a need for a bona fide manager or executive. Finally the director stated that the salary offered to the beneficiary "is incongruous with that of an employee who is actually managing other bona fide managers or professionals."

On appeal, counsel for the petitioner asserts that the petition was improperly denied based on a finding that the petitioner does not *currently* require and/or support a managerial or executive employee, or any subordinate managerial or professional employees. Counsel emphasizes that the director even acknowledged that the proposed duties for the beneficiary included qualifying managerial or executive duties, and that the proposed duties of his subordinates do require the services of professionals, but denied the petition based on a conjecture that a modest-sized import/export company cannot support managerial or professional positions.

Counsel asserts that "it is arbitrary and capricious for the USCIS to opine, at this very early stage in the company's growth and development, that it is a 'modest sized outfit' that will never require any managerial/executive and/or professionals workers." Counsel emphasizes that the petitioner must only show that it will support the beneficiary's managerial or professional position within one year.

Finally, counsel objects to the director's determination that the beneficiary's offered salary is incongruous with a managerial or executive position. Counsel asserts that neither the statute nor the regulation require or permit USCIS to consider the amount of the offered salary in determining whether an offered position is in a managerial or executive capacity.

Upon review, the AAO will withdraw the director's decision and remand the petition to the director for further action and entry of a new decision.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

Although the director issued a request for evidence in this matter, the director's request did not adequately address the missing initial evidence required by the regulations governing "new office" petitions. See 8 C.F.R. § 214.2(l)(3)(v).

Accordingly, as the evidence of record does not directly reflect that the petitioner or beneficiary is ineligible, the director should not have denied the petition based on a lack of evidence without first requesting all of the

evidence that must be considered when adjudicating a petition for a new office. *See* 8 C.F.R. § 103.2(b)(8); 8 C.F.R. § 214.2(l)(14)(i). The AAO concurs with counsel that the director's decision was largely based on conjecture and speculation, and also agrees that the director's determination that the beneficiary's salary is "incongruous" with an executive or managerial position is not supported by the statute and regulations.

However, because of a lack of required initial evidence, the AAO cannot determine that the beneficiary would be employed in a managerial or executive capacity within a one-year period. The petition will be remanded to the director, who is instructed to request additional evidence consistent with the discussion below.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS 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.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* The regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If

applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

The petitioner initially indicated that it anticipated hiring an initial staff of three to five employees, and expected gross annual income of \$100,000 or more during its first year of operations. In response to the director's request for evidence, the petitioner indicated a minimum of eight employees subordinate to the beneficiary and implied that these workers would be hired within the first year of operations. 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).

As the petitioner has provided no business plan, no hiring plan, and no financial projections indicating its anticipated income and salary costs, the AAO is not in a position to determine whether the petitioner would realistically support the proposed staff of eight employees, or even the staff of three to five employees initially indicated on Form I-129. While the petitioner's proposed organizational chart is impressive, the record as presently constituted is insufficient to establish that it would be financially feasible for the petitioner to hire eight or more employees within one year. The director should request a detailed business plan outlining the company's hiring plan and timeline for hiring each employee, start-up costs, funding requirements, sales, cost and income projections, for the first two years of operations, beginning in October 2006. The plan should document the anticipated volume of business, gross income predictions and staffing issues, and include the anticipated compensation levels for each of its proposed employees.

The record also does not identify the size of the financial investment in the United States entity or the company's financial ability to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(3). There is no mention in the record of the amount of funds committed by the foreign entity, nor is there any evidence that the U.S. company had received any funding at the time the petition was filed. The petitioner should provide a clear description of its start up costs and funding requirements and explain how these costs have been or will be met.

In addition, the record as presently constituted does not contain sufficient evidence to establish that the beneficiary has been employed by the foreign entity in a managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner indicates that the beneficiary served as the foreign entity's senior marketing manager, responsible for "directing our marketing operations, activities and staff." No additional description of the beneficiary's duties has been provided. The foreign entity appears to employ eight workers, but the petitioner has not provided evidence of the organizational structure of the foreign entity, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(3). The director is therefore instructed to request a detailed description of the

beneficiary's duties while employed by the foreign entity, including a breakdown of the number of hours he devoted to each duty on a weekly basis. The petitioner should also be requested to provide a complete organizational chart for the foreign entity, along with detailed position descriptions for all of its employees. The chart should clearly depict the beneficiary's place within the organizational hierarchy and indicate the job titles and duties of any and all of his subordinates, and indicate whether they are employed on a full-time or part-time basis.

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 date the petition was filed.

In this matter, 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 this nonimmigrant visa 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 he deems necessary.

ORDER: The decision of the director dated March 29, 2007, is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.

