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File: EAC 06 098 52568 Office: VERMONT SERVICE CENTER Date: SEP 06 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:

SELF-REPRESENTED

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 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 New York that operates as an importer and wholesaler of martial arts supplies, sporting goods and garments. It claims to be a subsidiary of Exportman, located in Sialkot, Pakistan. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for a three-year period.¹

The director denied the petition, determining that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Although the petitioner submitted evidence to establish that it qualifies as a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), the director did not apply the regulations at 8 C.F.R. § 214.2(l)(3)(v) in adjudicating the petition. The director based the decision primarily on the petitioner's staffing levels at the time of filing and concluded that the beneficiary would be required to perform routine duties associated with operating the business.

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, the petitioner objects to the director's reliance on the petitioner's current staffing levels, noting that the company was only established in January 2006, has already hired two employees, and has laid out its plans to hire additional staff within the first year of operations. The petitioner asserts that the director's presumption that the beneficiary would perform primarily non-managerial duties is incorrect.

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.

¹ Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (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.

As a preliminary matter, the AAO will address whether the petitioner qualifies as a "new office." The term "new office" is defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) as an organization which has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one year.

The term "doing business" is defined at 8 C.F.R. § 214.2(l)(ii)(H) as 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 petitioner indicated on Form I-129 that the beneficiary is coming to the United States in order to open a new office. The petitioner submitted evidence that the U.S. company was incorporated in the State of New

York on January 26, 2006, less than one month prior to the filing of the petition. There is no evidence to suggest that the petitioner has a parent, subsidiary or affiliate already doing business in the United States.

The petitioner clearly qualifies as a "new office," and therefore the instant petition should have been adjudicated under the regulations pertaining to new office petitions at 8 C.F.R. § 214.2(l)(3)(v). The director's failure to adjudicate this matter as a new office petition led to a flawed analysis of the beneficiary's proposed employment in a managerial or executive capacity. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services regulation, that allows for a more lenient approach to petitions filed on behalf of managers or executives that are entering the United States to open a new office. 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. *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.*

Although the director's decision will be withdrawn, the AAO finds insufficient evidence to establish the petitioner's and beneficiary's eligibility for this visa classification under the "new office" regulations at 8 C.F.R. § 214.2(l)(3)(v). Accordingly, the petition will be remanded to the director for further action and entry of a new decision.

Upon review of the record, the AAO finds that additional evidence may be needed to satisfy the requirements of 8 C.F.R. § 214.2(l)(3)(v)(C), and to establish that the company would realistically grow to sufficient size to employ the beneficiary in a primarily managerial or executive capacity within one year of the approval of the petition. The petitioner has not provided any evidence of the financial situation of the U.S. entity or shown that an investment has been made in the U.S. company. The petitioner's business plan only mentions that the petitioner intends to borrow \$100,000 from its parent company to meet its capital requirements, but the immediate availability of these funds has not been established, and there is no evidence that any monies have been transferred from the foreign entity as an initial investment, or as payment for the issued stock. As the petitioner claims that it has already commenced business operations in the United States and hired two employees, it should be able to document that the U.S. company has been adequately financed. Without clear evidence of how and when the company will be financed, it is difficult to make a determination regarding the feasibility of the petitioner's business plan.

The petitioner has also outlined its proposed organizational structure for the first year of operations, and indicated that it has already hired a manager and secretary. The petitioner states that it intends to hire a sales manager, an "office staff," and commissioned sales agents/representatives within one year. Although the petitioner indicates that two individuals were hired, no documentary evidence was submitted in support of this claim. The petitioner also failed to provide position descriptions for its proposed sales manager, office staff, and sales agent positions, nor did it identify the number of sales agents to be hired. Since the petitioner intends to engage primarily in the import, marketing and sales activities, additional evidence is required to

establish that the beneficiary will be relieved from routine duties associated with these functions within one year.

Accordingly, the petitioner should provide evidence documenting the employment of the two individuals hired at the time of filing, as well as a more detailed hiring plan outlining when it intends to staff each of its open positions. The petitioner should also provide job duties and educational requirements for each position, and indicate whether the beneficiary's subordinates will be employed on a full-time, part-time or commissioned basis. The evidence submitted should establish who will be responsible for performing the petitioner's administrative, clerical and operational functions, including, if applicable, market research, marketing, advertising, purchasing, sales, customer service, administrative, distribution and clerical tasks and any other functions inherent to the type of business to be operated by the petitioner.

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, April 18, 2006.

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 deemed necessary.

ORDER: The decision of the director dated April 18, 2006 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.