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U.S. Citizenship
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Services

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File: EAC 06 261 518777 Office: VERMONT SERVICE CENTER Date: **AUG 04 2008**

IN RE: Petitioner: 
Beneficiary: 

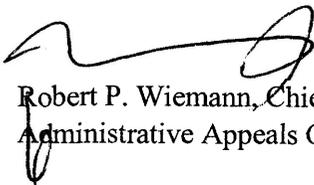
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 sustain the appeal.

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 California corporation, states that it is engaged in the import and export of agricultural products as well as the wholesale and retail sale of pet foods and pet supplies. The petitioner claims to be a subsidiary of Simar (Group) Co. Ltd. located in Myanmar. The petitioner has employed the beneficiary in L-1A status since January 2002 and now seeks to extend his employment for two additional years.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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 disputes the director's decision and asserts that the director misunderstood the nature of the petitioner's business and the beneficiary's role within the company. Counsel submits a brief and documentary 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 sole issue addressed by the director is whether the petitioner has established that the beneficiary will be employed in the United States 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.

The nonimmigrant petition was filed on September 21, 2006. In a letter dated September 19, 2006, the petitioner indicated that the beneficiary would continue to be employed by the petitioner in an executive capacity. The petitioner provided a detailed list of duties to be performed by the beneficiary:

Direct the management and overall administration of the U.S. subsidiary (40%), including:

- 1) Provide leadership and direction to ensure that the company mission and core values are put into practice.
- 2) Sign/execute major corporate documents on behalf of the company.
- 3) Evaluate the company's existing major customers and suppliers. Develop strategies to maintain effective long-term relationships with them.
- 4) Delegate assignments to departmental managers. Supervise the quality of major assignments.
- 5) Attend weekly meetings with all the departmental managers and key staff, listen to their reports/presentations on current matters, make decisions on key issues, in order to help increase the profitability of the company's business.
- 6) Review and manage the company's overall operating budget.
- 7) Evaluate employee's performance regularly, including the departmental managers. Ensure employees following the operation plan and company policies.
- 8) Review the employee's evaluation results to promote or reward accordingly.
- 9) Collaborate with the subordinating managers to develop and implement plans for the operational infrastructure of systems, processes and personnel designed to accommodate the growth objectives of the company.

Establish and execute the goals and policies of the U.S. Subsidiary (30%), including:

- 10) Set company's annual projections and operating goals for each year.
- 11) Drive the company to achieve and surpass business goals and objectives, including sales revenues, cash flow, and profitability.
- 12) Determine the company's expansion of business lines based on collected information of new technology and culture development.
- 13) Review company's financial statements of current year, figure percentages of sales, costs, expenses, etc. and set goals for the following year.
- 14) Develop and execute company's continued growth strategy and expansion to other business. Research and analyze feasibility of expansion and feasibility against company's operating position.
- 15) Formulate and modify company operating policies, and ensure employees are in compliance with the company policies for maintaining company's reputation in the market.
- 16) Plan and determine new marketing strategies based on current market research and business development environment, in order to support the existing business.
- 17) Develop and maintain relationships within the company, the customer community and industry to better understand the business requirement and international environment.

Exercise wide latitude in discretionary decision-making, and make important decisions for U.S. Subsidiary on strategic planning and major financial activity (25%), including:

- 18) Make decisions on major projects upon reviewing of the trading documents and correspondence with major customers.
- 19) Review and approval/disapprove key projects and major trading or financial documents. Make modifications if necessary.
- 20) Supervise and make decisions on the company's major financial activities.
- 21) Assume complete responsibility and accountability for all activities and performance of the company, and compliance with governing laws.
- 22) Provide effective oversight in the identification, evaluation, negotiation and integration of business in order to assure that expectations are fulfilled.
- 23) Review and execute major important corporate documents including company's financial statements and tax documents, department manager's evaluation reports, new investment proposals, and other business expansion plans.

Receive only general direction for the board of directors or the parent company (5%), including:

- 24) Authority to determine employee's salary and salary increase, hire/fire personnel of the whole company, including department managers, as necessary.
- 25) Represent the top authority of the U.S. subsidiary. Serve as a leader of the executive management team of the U.S. subsidiary.
- 26) Establish credibility throughout the organization in concern with the Board of Directors to effectively develop solutions to business opportunities and challenges.
- 27) Receive general direction from the board of directors in Myanmar via telephonic meeting.

In support of the petition, the petitioner provided a chart listing all ten subordinate employees of the U.S. company, including their names, job titles, level of education, monthly salary and job duties. The petitioner indicated that it employs a trading and market developing manager who: supervises the daily operation of the trading and market development department; negotiates with suppliers in Myanmar and China; negotiates with major customers in the United States; signs trading contracts; explores new markets for agricultural products; increases customer base through market development; and prepares quarterly and annual trading reports for review by the beneficiary.

The petitioner further indicated that the trading and market development manager supervises a logistics coordinator who is responsible for: implementing the company's logistics strategies; and coordinating with banks, suppliers, shipping companies and customers to ensure efficient transactions and delivery. The petitioner also stated that it employs a trading assistant who: tracks and maintains order levels, purchasing and shipping records; compiles data from contracts; purchase orders, invoices and accounting records; processes required trading documents as directed by the department manager; collects market information and customer feedback, and supports customer service and trading processing.

The petitioner stated that it employs a retail store manager who ensure that company policies and procedures are followed; implements advertising and sales promotions programs; is responsible for all aspects of sales, gross margin, expenses, inventory levels and shrink; and recruits trains and leads store staff, including a warehouse assistant and three sales staff.

Finally, the chart depicts an accounting manager who oversees the activities of the accounting department, products monthly financial statements, annual audits and annual budgets and reports, and a bookkeeper, who reports to the accounting manager. The petitioner indicated that six of the ten employees subordinate to the beneficiary have bachelor's degrees.

The petitioner provided a copy of its California Form DE-6, Employer's Quarterly Report, for the first quarter of 2006, which confirmed the employment of the company's 11 workers.

The director issued a request for additional evidence on December 8, 2006, instructing the petitioner to submit, in part, the following: (1) a comprehensive description of the beneficiary duties; (2) a list of all U.S. employees which identifies each employee by name and job title, along with complete position descriptions for each employee and a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis; (3) copies of payroll records for the months of September and October 2006; (4) copies of all IRS Forms W-2 and Forms 1099 issued in 2005; and (5) copies of IRS Form 941, Employer's Quarterly Tax Return for the first three quarters of 2006.

In a response dated February 20, 2007, the petitioner reiterated the lengthy position description submitted with the initial petition. The petitioner also submitted an organizational chart depicting the employees including on its earlier employee list. The chart shows three departments under the beneficiary's supervision, including the retail store, the trading and marketing development department, and an accounting department. The petitioner also provided slightly revised position descriptions for the beneficiary's subordinates, which were amended to include the number of hours each employee devotes to his or her duties on a weekly basis. The petitioner submitted all requested payroll and wage records. In the third quarter of 2006, the quarter in which the petition was filed, the petitioner employed 11 workers and paid total wages of \$58,541.92.

The director denied the petition on May 7, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director acknowledged that the duties performed by the beneficiary's subordinates "would normally require the skills of bona fide professionals," but noted that the petitioner had not established that the employees would carry out such duties "on a full-time basis." The director noted that none of the petitioner's titular managers "appear to have been compensated at a rate commensurate with a bona fide manager or executive in a major metropolitan business market." The director further found that the beneficiary's offered salary "is incongruous with an employee who is actually managing other bona fide managers or professionals." The director also questioned whether the employees of a pet food and supply store would occupy professional positions.

The director further acknowledged that the petitioner's description of the beneficiary's duties would normally be associated with a managerial or executive position, but that the petitioner had not established that the

beneficiary "will actually be carrying out these duties." The director concluded that the petitioner's business does not appear to require a bona fide manager or executive on a full-time basis.

On appeal, counsel for the petitioner, counsel asserts that the denial was based on an erroneous perception of the nature of the petitioner's business and organizational structure, and misinterpretation of the beneficiary's job duties and salary. Counsel emphasizes that the petitioner is not merely a retail store, but an importer, exporter, wholesaler and retailer, with its primary purpose to engage in international trade. Counsel notes that the petitioner submitted a complete organizational chart for the U.S. company which clearly shows that the petitioner's retail store is only one of the three departments that contribute to the petitioner's business operation. Counsel therefore submits that the beneficiary is not "just a head of a retail store," but rather manages and oversees department managers, including a store manager, who supervises the store and reports to the beneficiary.

With respect to the director's findings that the beneficiary does not supervise bona fide professionals, counsel asserts that this finding was based solely on the director's assumption that the petitioner is only operating a pet supply store. Counsel asserts that the director provided no support for his conclusion that an accounting manager or trading manager position would not require the services of a professional. Finally, with respect to the beneficiary's salary, counsel asserts that the regulations contain no minimum salary requirements or otherwise address a beneficiary's wage or compensation. Counsel objects to the director's conclusion that the offered salary is "incongruous" with his executive position, emphasizing that "the salary of the beneficiary and the subordinating employees do not mean that the beneficiary and his employees did not fulfill their required duties." Finally, counsel asserts that the petitioner provided a very detailed list of job duties for the beneficiary, which was comprised primarily of executive and decision-making tasks. Counsel emphasizes that none of the job duties indicated that the beneficiary "would perform any specific day-to-day sales or delivery functions."

Upon review, counsel's assertions are persuasive. The director's decision dated May 7, 2007 will be withdrawn and the petition will be approved.

The petitioner has established that the beneficiary will be employed in a primarily managerial capacity. The petitioner has provided thorough explanations and sufficient documentary evidence to demonstrate that the beneficiary does in fact manage the entire organization, supervise and control the work of subordinate supervisory employees, has the authority to hire and fire all personnel within the company, and exercises discretion over the day-to-day operations of the company. The AAO concurs with counsel that the director provided inadequate explanation for his determination that the beneficiary would not perform qualifying supervisory duties, and for his finding that the beneficiary would primarily perform the day-to-day non-managerial operations of the company. The petitioner need only establish by a preponderance of the evidence that the beneficiary's duties are primarily managerial in nature. The AAO is satisfied that the beneficiary performs the high-level duties associated with the statutory definition of managerial capacity and that he would reasonably be required to devote more than half of his time to such duties.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. The AAO has also consistently required the petitioner to establish that the beneficiary's

position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. As noted above, the petitioner has established that it has a reasonable need for the beneficiary to perform primarily managerial duties within the context of its current staffing levels, overall purpose, and current stage of development. The petitioner has adequately demonstrated that that the majority of the day-to-day, non-managerial functions of the company are performed by the petitioner's subordinate supervisors and employees.

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, the petitioner has sustained that burden. Accordingly, the director's decision dated February 10, 2006 is withdrawn.

ORDER: The appeal is sustained. The petition is approved.