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

The petitioner filed this nonimmigrant petition seeking to employ 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, an Ohio limited liability company, operates as a distributor of solid industrial tires and wheels manufactured overseas by its corporate group. The petitioner states that it is a subsidiary of Watts of Lydney Group, Ltd., located in Gloucestershire, United Kingdom. The petitioner seeks to employ the beneficiary as its managing director/chief executive officer for a period of three years.

The director denied the petition concluding that the petitioner did not establish 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 asserts that the director erroneously denied the petition without seeking specific additional information, and failed to give appropriate weight and consideration to the petitioner's evidence. 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 sole issue addressed by the director is whether the petitioner 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 October 19, 2006. In a letter dated October 10, 2006, the petitioner provided the following description of the beneficiary's proposed duties as managing director and chief executive officer of the U.S. company:

In this position [the beneficiary] will have the direct responsibility over the management of all aspects of the business and will report directly to the parent company. These responsibilities will include formulating a detailed strategy for growth in conjunction with the parent company. He will allocate, oversee, and approve annual budget and its expenditures. The company's initial goal is to increase sales 100% by the end of 2007 and to add two additional distribution centers in the U.S. by the end of 2008. The beneficiary will have full responsibility for locating, hiring and agreeing on employment terms for appropriate sales and support staff to achieve this growth. He will have the authority to negotiate and to approve sales contracts up to \$15m within our industry sector. His responsibility will also include identifying potential acquisitions in our business sector.

[The beneficiary] will be responsible for business development, marketing of our services, and providing market models for implementation of market demands. He will lead and coordinate all regional marketing campaigns. Moreover, [the beneficiary] will be involved in the development of long-range plans to achieve the company's objectives for overall growth and profitability.

The petitioner indicated on Form I-129 that the U.S. company currently has five employees, but did not provide additional information regarding its organizational structure as of the date of filing. The petitioner submitted a proposed organizational chart for "2007-2008" which shows the beneficiary supervising two regional sales managers and a director. The chart shows that each area sales manager will supervise an area sales manager, while the director will supervise the Cleveland office administration manager, sales administration clerks, and warehouse operations.

On December 5, 2006, the director issued a request for additional evidence. The director instructed the petitioner to submit: (1) complete position descriptions for the beneficiary's proposed subordinates, including a breakdown of the number of hours devoted to each of the subordinates' job duties on a weekly basis; (2) copies of educational credentials for the beneficiary's subordinates; and (3) copies of IRS Forms W-2 and payroll rosters for 2005. The director advised the petitioner that the evidence submitted did not establish that the beneficiary would function at a senior level in an organizational hierarchy, or that he would be involved in the supervision and control of supervisory, professional or managerial employees.

In a response dated January 31, 2007, counsel for the petitioner referenced the statutory definitions of managerial and executive capacity, and provided the following description of the beneficiary's proposed duties:¹

¹ Portions of the initial position description, already recited above, were repeated in counsel's letter and have been omitted here.

[The beneficiary] will direct the management of [the petitioner] and will have direct responsibility over all aspects of the business and will report directly only to the Director of the parent company.

* * *

As described in the original filing, [the beneficiary] will be functioning in an executive and managerial capacity. As an executive, he [will] manage and plan a detailed strategy for growth in conjunction with the parent Company and Board of Directors. He will function to provide vision and direction to the entire profit and sales of the US entity, to prepare a five year business plan, and to determine the distribution needs. He will allocate, oversee, and approve annual budget and its expenditures, with little or no supervision.

* * *

[The beneficiary] will also function as a functionary manager for a temporary time period so that he may analyze, develop, and initiate marketing objectives with direct review and supervision over all sales professionals. He will direct the activities of sales personnel, determine hiring requirements and will have the authority to take personnel actions, such as the authority to hire/terminate employees, promote, approve leave authorizations, and recommend salary and organizational changes.

[The beneficiary] will be responsible for overseeing the Sales Managers and determine the effectiveness of the business development plan, marketing of company's services, and provision of market models for implementation of market demands. Moreover, he will establish goals, lead and coordinate all regional marketing campaigns, and will direct a team of sales representative[s] to achieve the company's objectives for overall growth and profitability.

Counsel also referenced the beneficiary's previous positions within the petitioner's group, noting that he was stepping down as managing director of the international group in order to concentrate his responsibilities on the U.S. company following the unexpected death of the petitioner's director and business manager in September 2006.

Counsel stated that the petitioner currently employs six individuals "and five of them deal directly with sales." Counsel indicated that their primary duties are "to interest buyers in company's merchandise and to address potential and current clients' questions and concerns." Counsel noted that the petitioner markets its products to manufacturers, wholesalers, construction contractors and other institutions. The following is a summary of information provided by counsel regarding the beneficiary's proposed subordinates:

Bob Snyder – National Sales Manager (hired February 2004)
Responsible for overseeing and evaluating assigned accounts and managing company's sales activities throughout the U.S. territory consisting of 20 states; develops sales and marketing

strategy and provides ongoing training to marketing personnel. Devotes 60% of his time to guiding the growth and direction of company sales and 40% of his time traveling to and visiting with prospective buyers.

- Area Sales Manager (hired January 8, 2007)

Responsible for monitoring sales activities in 15 U.S. states. Devotes 75% of his time performing telephone sales work with potential customers and 25% of his time on traveling and face to face meetings and closing on these transactions.

██████████ - Warehouse Manager (hired July 2005)

Responsible for planning and coordinating warehouse operations. He receives shipping and inventory and shipping orders (10%), liaises with clients (30%), plans deliveries (35%), monitors and allocates storage space (20%), and makes sure supplies are stored correctly and in line with any relevant regulations (5%)

██████████ - Accounting Manager (hired September 2005)

Responsible for monitoring daily accounting activities such as compiling sales reports and reviewing purchase orders (30%), computing credit terms and shipment charges (20%), recording invoices (20%), and verifying accuracy of billing data (30%).

██████████ Administrative Manager (hired January 2006)

Responsible for analyzing sales statistics (10%), preparing reports (15%) and handling administrative duties (75%), such as filing expense account reports, scheduling appointments, and making travel plans and reservations.

██████████ (hired November 2006)

Part-time employee responsible for assisting the administrative manager with invoices, filings and accounts, and for answering phones and daily mail activity.

The petitioner indicated that its national sales manager and area sales manager each possess a bachelor's degree in business administration. The petitioner provided copies of its 2005 IRS Forms W-2. The petitioner did not provide evidence of wages paid to employees hired in 2006. In 2005, the petitioner paid \$13,138.61 to ██████████ \$2,062.50 to ██████████ and \$52,964.12 to ██████████, and paid total wages of \$176,677 to seven employees.

The director denied the petition on March 1, 2007, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director acknowledged the position descriptions submitted for the beneficiary's proposed subordinates, but determined that the petitioner's "small distribution outfit" would not require workers with professional-level expertise to perform the proposed job duties. The director further noted that the beneficiary's offered salary of \$50,000 is "incongruous with that of an employee who is actually managing other bona fide managers or professionals." The director concluded that the beneficiary would not supervise and control the work of other supervisory,

professional or managerial employees who would relieve him from performing the services of the corporation.

The director acknowledged that the petitioner "listed a number of duties that would normally be required of or associated with a manager or executive," but indicated that "this service is not convinced that the beneficiary will actually be carrying out these duties." The director concluded that the petitioning company does not require a bona fide manager or executive to perform the listed duties on a full-time basis.

On appeal, counsel for the petitioner asserts that the director erroneously denied the petition without seeking additional specific information, particularly with respect to the beneficiary's salary. Counsel states that the beneficiary's total compensation package, including salary to be received from the foreign entity, would be approximately \$180,000 annually, with \$50,000 paid by the U.S. entity.

Counsel further contends that the director failed to give appropriate weight and consideration to the petitioner's evidence and instead relied on conjecture when determining whether the beneficiary's subordinates would be employed as bona fide professionals. Finally, counsel emphasizes that the beneficiary will be employed as both a function manager, and as an executive, with responsibility for identifying and determining potential acquisitions for the company. Counsel provides a press release dated January 25, 2007 announcing the purchase of a U.S. industrial tire business by the petitioner's group, and notes that the beneficiary was instrumental in the research, development of business objectives, and negotiations for the acquisition, reporting to only the Board of Directors of the parent company.

The petitioner also submits a letter from the foreign entity's chairman, who confirms that only a portion of the beneficiary's salary would be paid in the United States, and further discusses the beneficiary's authority to pursue negotiations for potential acquisitions and contractually bind the company to multi-million dollar purchases and investments.

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 director's decision was largely based on conjecture and speculation with no explanation as to why the director concluded that the beneficiary and his subordinates would not actually perform the stated job duties. Furthermore, 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, which neither require nor permit, a beneficiary's salary to be considered as a factor in determining the beneficiary's employment capacity.

The AAO finds that the evidence of record does not directly reflect that the beneficiary is ineligible for the benefit sought. However, although the director issued a request for evidence in this matter, the AAO finds that additional evidence will be required in order to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The petition will be remanded to the director, who is instructed to request additional evidence consistent with the discussion below.

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 position description provided for the beneficiary is vague and nonspecific and provides little understanding as to what duties the beneficiary would primarily perform on a day-to-day basis. For example, it is unclear what qualifying duties are included in the beneficiary's responsibility for "business development," marketing of services, providing market models, and leading and coordinating "regional marketing campaigns." Accordingly, the director is instructed to request that the petitioner provide 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 will perform on a "typical day," as of the date the petition was filed. If the petitioner indicates that the beneficiary "oversees," "supervises," "directs," "reviews" or "manages" an activity or function, the petitioner should clearly indicate who among its employees performs the routine duties associated with the particular activity or function.

When examining the managerial or executive capacity of a beneficiary, United States 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 number of hours worked by subordinate employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

The petitioner's staffing levels as of the date of filing cannot be determined based on the evidence submitted. As the petitioner's 2006 payroll records were never requested, the petitioner should be instructed to provide its IRS Forms 941, Employer's Quarterly Federal Tax Return, and state quarterly wage reports for the last two quarters of 2006. The AAO notes that two of the six employees identified in response to the request for evidence were not employed by the petitioner in October 2006 when the petition was filed, and it is unclear whether they were hired to replace other workers.

Moreover, although counsel for the petitioner indicated that five of its six employees "deal directly with sales," based on the evidence provided, the company only had one sales employee, the national sales manager, as of the date the petition was filed and this discrepancy should be clarified. The petitioner should also be instructed to provide more detailed position descriptions for its claimed professional sales employees. The AAO recognizes that the petitioner's industry is quite specialized, but it is unclear that the "telephone sales work" that occupies the majority of the area sales manager's time actually requires a bachelor's degree in business administration. In addition, the position description for the national sales manager referred to his responsibility for training "marketing personnel," but the petitioner does not appear to employ marketing employees.

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, October 19,

2006. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's and beneficiary's eligibility and will not be considered. The AAO notes that the beneficiary's proposed duties would include hiring additional employees in the future; however, the petitioner must establish that the beneficiary's actual duties as of the date the petition was filed were primarily managerial or executive in nature.

In this matter, the evidence of record is insufficient to establish the beneficiary's and petitioner's eligibility. Further evidence is required in order to establish that the beneficiary meets 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 he deems necessary.

ORDER: The decision of the director dated March 1, 2007 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.