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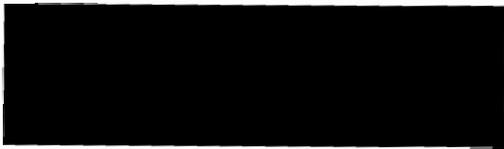
D-7

File: EAC 07 081 51760 Office: VERMONT SERVICE CENTER Date: **FEB 22 2006**

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, a New Jersey limited liability company, is described as an importer and wholesaler of women's and children's clothing. It claims to have a qualifying relationship with Pascal-Tex Co., located in Syria. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States.

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. The director did not apply the regulatory requirements pertaining to new offices pursuant to 8 C.F.R. § 214.2(l)(3)(v).

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 mischaracterized the nature of the petitioner's business and failed to take into account that the company is newly established in the United States. 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 petitioning company was established as a New Jersey limited liability company in October 2006 and filed the instant petition on January 26, 2007. Although the petitioner failed to indicate on Form I-129 that the beneficiary is coming to the United States to open a new office, the petitioner and counsel indicated throughout the record that the U.S. company is a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). The AAO concurs that it should be treated as such as it has clearly not been doing business in the United States for one year or longer.

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.

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.

In a letter dated January 16, 2007, the petitioner described the beneficiary's proposed position of general manager as follows:

[The beneficiary] will direct and guide the U.S. Company through its first stages of development by expansion-developing, directing and implementing [the petitioner's] long and short-term business plans and strategies. He will devised [sic] detailed business and financial plans to reduce costs, improved productivity and increase profitability. She [sic] will also create and implement innovative and aggressive marketing strategies and establish, negotiates, cultivate, and expand upon present relationship[s] with consumers nationwide.

[The beneficiary] will be responsible for all payments and collections, dealing with banks and all debtors and creditors. The beneficiary will also direct conversion of products from the Syrian to Domestic Standards, oversee shipping details such as export licenses, Custom declarations and packaging, shipping and routing of the products. He will be responsible for making contracts, directing the need materials such as fabrics, and dominate at line production. His other duties will also include expediting import/export arrangements and

maintaining current information with respect to import/export tariffs, quotas, licenses and restrictions, directing Foreign Sales and Service Outlets of the Business, negotiating Contracts with Foreign Distribution and Sales centers. [The beneficiary] will also continue to research and study on the Markets, choose appropriate designs for the good of our company, deal with Foreign Markets, secure licenses for exports, and follow-up with the Executives, Managers, and the 400 workers of the Syrian Parent Company.

The petitioner indicated that the U.S. company "currently employs 2 persons directly," but did not identify these employees. 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. Also, 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 February 7, 2007 was an organizational chart for the U.S. entity, position descriptions for the beneficiary's subordinates, and the petitioner's 2005 federal income tax return and IRS Forms W-2 for 2005. The director did not appear to observe that the petitioner was formed during the last quarter of 2006 and was therefore not doing business in 2005.

The petitioner submitted a response to the director's request on May 1, 2007. The petitioner provided an organizational chart indicating that the beneficiary's direct subordinates would include a bookkeeper, a sales representative and two salespersons. The petitioner provided position descriptions for each position.

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 director found insufficient evidence to establish that the beneficiary would supervise a subordinate staff of managerial, professional or supervisory employees, and further noted that the beneficiary's proffered salary of \$48,000 "is incongruous with that of an employee who is actually managing other bona fide professionals." 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 determined that the petitioner's "clothing manufacturing company" does not appear to require a bona fide manager to perform these duties on a full-time basis. As noted above, the director did not reference the regulations governing the adjudication of a "new office" L-1A petition at 8 C.F.R. § 214.2(l)(3)(v).

On appeal, counsel for the petitioner asserts that the director mischaracterized the nature of the U.S. business, noting that the foreign entity is a clothing manufacturer while the U.S. company is an importer and distributor of clothing. Counsel asserts that the misunderstanding "goes directly to the nature of the managerial responsibilities needed in the American distributor, which are significantly different from those of a clothing manufacturer." Counsel states that that the beneficiary's proposed duties are appropriately managerial and executive in nature in light of the nature of the petitioner's business. Counsel further contends that the U.S. company has already hired five employees who will report to the beneficiary and cannot operate without a manager.

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 positions 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 USCIS 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 had already hired two employees and on appeal, indicates that a total of five employees had been hired. As the petitioner has provided no business plan, no hiring plan, and no financial projections indicating its anticipated income and salary costs, the AAO has no basis to determine how many employees the company intends to hire by the end of the first year of operations, or whether the proposed staff would reasonably relieve the beneficiary from performing non-managerial and non-executive tasks. The record also contains some ambiguity regarding the nature of the petitioner's business, as there are references to both wholesale and retail sales activities in the record, but no clear evidence that the petitioner has leased a retail location. The director should request a detailed business plan that clearly outlines the proposed scope and nature of the business, the company's hiring plan and timeline for hiring each employee, position descriptions for each proposed employee, start-up costs, funding requirements, and sales, cost and income projections for the first two years of operations, beginning in January 2007. 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.

With respect to the beneficiary's proposed position, the AAO notes that several of his tasks, including responsibility for payments and collections, overseeing shipping details, making contracts, expediting import and export requirements, and researching and studying the market, are not clearly managerial in nature. If the petitioner will function as an importer, and the beneficiary will be solely responsible for duties related to this function, it appears that he will not be functioning in a primarily managerial or executive responsibility. 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.

The record also does not clearly 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). The record shows that there was a \$50,000 deposit in the petitioner's checking account in November 2006, but the source of these funds has not been clarified, nor has the petitioner identified its anticipated start up costs and capital requirements. 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 AAO notes several questions regarding the lease agreement submitted in support of the petition. The lease agreement is dated July 7, 2006, for a period commencing on September 1, 2006. Although the lease appears to have been signed by the beneficiary on July 8, 2006, the record suggests that the beneficiary was not in the United States on that date. Furthermore, the petitioning company was not established until October 26, 2006, so it is unclear how it was a party to a lease agreement in July of that year. In addition, the lease agreement has an inordinate number of handwritten corrections, and the petitioner's company name, although typewritten, is in a different typeface from the rest of the agreement. Finally, the AAO notes that the address identified as the beneficiary's worksite on Form I-129 is [REDACTED] Jersey. According to the lease agreement submitted, this is the petitioner's landlord's address and not the address of the claimed leased premises. Based on these observations, the AAO has serious doubts regarding the validity of the submitted lease agreement. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner should be instructed to provide additional evidence to establish that it was leasing the premises located at [REDACTED] Union City, New Jersey as of the date the petition was filed. Such evidence may include the original lease agreement, verification from the landlord of the petitioner's tenancy, evidence of monthly rental payments to the landlord in the amount of \$4,500 beginning on September 1, 2006, and photographs of the interior and exterior of the premises. Counsel states on appeal that the petitioner "has secured appropriate space in Manhattan's garment district." The petitioner is still required to establish the validity of the lease agreement submitted as of the date of filing in January 2007. 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).

Finally, the AAO notes that the record as presently constituted does not contain sufficient evidence of a qualifying relationship between the petitioner and the foreign entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The petitioner stated on Form I-129 that the petitioner is a wholly-owned subsidiary of Pascal-Tex Co., located in Syria. However, no documentary evidence was submitted in support of this claim. The petitioner should therefore be instructed to provide copies of its membership certificates, articles of association, operating agreement, and any other documentation that will corroborate its claim of a parent-subsidiary relationship between the foreign and U.S. companies.

Again, 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 May 11, 2007, is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.