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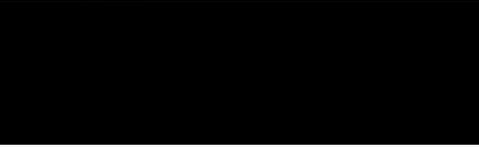
FEB 15 2008

FILE: EAC 03 093 51195 OFFICE: VERMONT SERVICE CENTER Date:

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, Director
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 dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its sales manager 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 Jersey and claims to be a subsidiary of Orient Marketing, located in Pakistan. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and states that the director was inconsistent in deeming the petitioner a new office but failing to accord it new office treatment.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(3) state 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 (I)(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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed in a managerial or executive capacity under an extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 support of the petition, the petitioner provided the following description of the beneficiary's job duties:

Manages sales activities, directs staffing [sic], training and performance evaluations to develop and control sales program. Coordinates sales distribution by establishing sales territories, and goals and advises dealers, distributors, and clients concerning sales. Analyzes sales statistics to formulate policy and to assist dealers in promoting sales. Previews market analyses to determine customer needs, price schedules, and discount rates, and develops sales campaigns [sic] to accommodate goals of company. Prepares periodic sales report showing sales volume and potential sales. May direct sales for manufacturer, retail store, wholesale house, or other establishment. May recommend or approve budget, expenditures, and appropriations for research and development work.

The petitioner also submitted a copy of Form I-797A, indicating that the petitioner's request to change the beneficiary's status to that of an L-1A intracompany transferee was granted on July 19, 2002 and that such change was effective as of February 1, 2002 through February 1, 2003.

On February 11, 2003, the director issued a request for additional evidence. The petitioner was asked to supplement the record with additional information regarding the petitioner's business, as well as the beneficiary's specific duties, and the petitioner's organizational hierarchy. The director also noted that the description of the beneficiary's duties was directly obtained from the Department of Labor's Dictionary of Occupational Titles and that the director is, therefore, not persuaded that the description is an accurate representation of the beneficiary's job duties.

The petitioner's response included a letter dated April 5 stating that the petitioner was initially incorporated in New York in 2001, but was subsequently moved to New Jersey. Counsel also pointed out that the beneficiary was initially granted L-1A status in July of 2002 and was not able to fully get the business going until the fourth quarter of 2002. In regard to the petitioner's organizational hierarchy counsel stated that the beneficiary is currently the petitioner's only employee. Counsel claimed that the beneficiary is "aggressively recruiting" additional employees and that he would eventually be responsible for acquiring new businesses, staffing and operating the chain stores, and negotiating new contracts. Despite the director's comment regarding the insufficiency of the beneficiary's job description, the petitioner did not provide any information describing the beneficiary's actual job duties in greater detail.

On May 21, 2003, the director denied the petition again noting that the job description initially provided was copied, verbatim, from the Department of Labor's Dictionary of Occupational Titles, and is an unlikely

reflection of the beneficiary's actual daily activity. The director noted that the petitioner's claim to having submitted a percentage breakdown of the beneficiary's duties is unsubstantiated by the evidence of record and ultimately concluded that the petitioner failed to establish that the beneficiary would primarily perform managerial or executive duties.

The director also noted that the initial petition requesting L-1A status to open a new office was actually granted in July of 2002 and that the beneficiary, therefore, did not actually have one full year as an L-1A intracompany transferee. Counsel also points out this fact in the appellate brief. However, according to Citizenship and Immigration Service's (CIS) records, the beneficiary initially entered the United States on July 30, 2001 as a B-2 visitor for pleasure and that such status expired on January 30, 2002. The records further indicate that the petitioner filed the initial L-1A petition on April 16, 2002, after the beneficiary's B-2 status had already expired, and that without the retroactive effect of the L-1A status the beneficiary would have commenced accruing unlawful status as of February 1, 2002. Therefore, while the director erred in backdating the beneficiary's L-1A status to February 1, 2002, such retroactivity was apparently requested by the petitioner and benefited the beneficiary by preventing him from accruing unlawful status in the United States. Since it was the petitioner's wish to have the beneficiary's L-1A status take effect retroactively as of February 1, 2002, the petitioner will now be treated as a new office of which the beneficiary took charge on the date his status became effective. Consequently, the petitioner must be considered a new office, which has been operating for one year and now seeks to extend the beneficiary's stay.

On appeal, counsel asserts that the beneficiary did not have one full year as an L-1A nonimmigrant in which to get the petitioner's business sufficiently off the ground. He further claims that the petitioner is a new business and should be considered in light of this classification. However, as discussed above, due to the retroactivity of the beneficiary's L-1A status, the petitioning business will be considered as having functioned since February 1, 2002. Consequently, the petitioner cannot be deemed a new office, which has operated for less than one year. Rather, the instant petition must be considered pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii), which specifically applies to a visa petition under section 101(a)(15)(L) which involved the opening of a new office and where the petitioner subsequently seeks to extend the beneficiary's period of employment. Therefore, while the petitioner submits evidence on appeal to show that it conducted business in April and May of 2003, the petitioner's description of the beneficiary's job duties is key to determining whether the beneficiary would be employed in a managerial or executive capacity. See 8 C.F.R. § 214.2(l)(3)(ii). In the instant case, the petitioner was informed several times that the petitioner's description of the beneficiary's job duties was copied, verbatim, from the Department of Labor's Dictionary of Occupational Titles, and is, therefore, an unlikely reflection of the beneficiary's actual daily activity. The petitioner was also asked to submit a percentage breakdown of the beneficiary's proposed duties. While the petitioner claimed that this information was submitted, the record does not support this claim. It is noted that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner made several statements regarding its plans to hire more employees and acquire additional stores to make part of its chain, which would be run by the beneficiary. However, 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity. The petitioner did not provide a comprehensive description of the beneficiary's routine duties. Therefore, the AAO cannot affirmatively conclude that the beneficiary would primarily perform qualifying duties on a daily basis. The record indicates that at the present time a preponderance of the beneficiary's duties would be directly providing the services of the business. However, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not demonstrated that the beneficiary would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he would otherwise be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States and abroad pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). The evidence in the record consists of a number of documents that show business activity having taken place in April and May of 2003. However, the beneficiary's L-1A status was granted as of February 1, 2002. Therefore, the petitioner must show that business activity was taking place as of that date. The record does not contain this crucial evidence. Therefore, the AAO cannot conclude that the petitioner had been doing business for the requisite one-year period prior to filing the petition to extend the beneficiary's employment.

It is noted that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). As such, due to the additional grounds discussed in the above paragraph, this petition cannot be approved.

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, that burden has not been met.

ORDER: The appeal is dismissed.