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U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

File: WAC 06 125 51628 Office: CALIFORNIA SERVICE CENTER Date: DEC 04 2007

IN RE: Petitioner: [redacted]
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:

[redacted]

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, California 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 Delaware limited liability company, intends to operate as an electronic payment services provider. It states that it is a subsidiary of WorldClearing Holding, Inc., located in Bratislava, Slovakia. The petitioner seeks to employ the beneficiary as the operating manager of its new office in the United States for a five-year period.[1]

The director denied the petition, determining that the petitioner did not establish: (1) that the beneficiary would be employed in the United States in a primarily managerial or executive capacity; or (2) that the U.S. company has been doing business as defined in the regulations. The director determined that the petitioner, which was established on June 10, 2004, did not qualify as a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) and therefore did not apply the regulations at 8 C.F.R. § 214.2(l)(3)(v) in adjudicating the petition.

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 erred in determining that the petitioner does not qualify as a "new office." Counsel emphasizes that although the petitioner was formed in 2004, it had not commenced business operations in the United States as of the date the petition was filed. Counsel asserts that, as a start-up company, the petitioner was not required to establish that the beneficiary would immediately undertake full management responsibilities. 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.

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[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.

(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 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 nonimmigrant petition was filed on March 10, 2006. The petitioner indicated on the L Classification Supplement that the beneficiary is coming to the United States in order to open a new office. The petitioner submitted a Certificate of Formation showing that the U.S. company was established as a Delaware limited liability company on June 10, 2004.

Although the petitioner stated on Form I-129 that the company was established in 2003, employed 15 people, and had gross annual income of $982,700, the foreign entity's letter of support dated March 1, 2006 clarified that this information pertains to the foreign entity. The foreign entity stated that the beneficiary would be responsible for overseeing the start up of the U.S. subsidiary company. The petitioner also provided a business plan for the U.S. company.

The director issued a request for evidence on April 21, 2006, in which he requested evidence that the U.S. company is doing business, including corporate tax returns for the last two years. The director also requested quarterly wage reports and Federal quarterly tax returns for the previous four quarters.

In a response dated July 10, 2006, the petitioner provided a projected organizational chart for the U.S. company, and noted that much of the evidence requested by the director was unavailable:

> [A]s a startup business in the U.S., [the petitioner] has not yet incurred payroll costs or tax liabilities in the U.S. and therefore it does not have any quarterly wage reports, payroll summary, Federal (Form 941) quarterly wage reports and federal income tax returns.

The director denied the petition on September 22, 2006 on the grounds that the petitioner did not establish: (1) that the beneficiary would be employed in a primarily managerial or executive position; and (2) that the U.S. company was doing business as defined in the regulations. The director acknowledged the petitioner's statements that the U.S. company is a start-up business, but noted that as the company was established in June 2004, more than one year before the petition was filed, its statements were unpersuasive. The petition was denied in part based on the petitioner's failure to document the employment of prospective workers.

On appeal, counsel for the petitioner asserts that the petitioner has not commenced doing business in the United States and therefore qualifies as a new office for L-1 purposes, pursuant to the definition at 8 C.F.R. § 214.2(l)(1)(ii)(F). Counsel submits additional documentary evidence in support of this claim, including the petitioner's 2005 IRS Form 1120, U.S. Corporation Income Tax Return, showing that the petitioner had no assets, income or tax obligations in 2005. The petitioner also submits an opinion letter from Bruce W. McClain, a professor of accounting and business law at Cleveland State University, who opines that the petitioning company did not undertake any business activities prior to 2006, and notes that it is not uncommon for a company to delay business operations following formation or incorporation.

Upon review, the AAO concurs with counsel's assertions and will withdraw the director's September 22, 2006 decision. The director had insufficient basis to determine that the petitioner did not qualify as a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). Contrary to the director's determination, the fact that the U.S. company was formally established on June 10, 2004, without more, does not serve as *prima facie* evidence that a petitioner is doing business as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(G). Furthermore, the director's finding that the U.S. company does not qualify as a "new office" implies that the

director has determined that the U.S. company has in fact been doing business in the United States for at least one year. The director in fact made a separate determination that the U.S. company has not been doing business, thus making the decision, as a whole, internally inconsistent.

The AAO therefore concludes that 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 recognize that the petitioner qualifies as a "new office" consequently 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 USCIS 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 in accordance with the following discussion.

The record as presently constituted does not contain sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition. 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner provided only a vague position description for the beneficiary that fails to specify the actual managerial or executive duties to be performed by him on a day-to-day basis as president of the petitioner's new office in the United States. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner should be instructed to submit a comprehensive description of the beneficiary's proposed duties, including the percentage of time he will devote to each duty on a weekly basis, and a description of the beneficiary's "typical day." If the petitioner states that the beneficiary will "direct," "manage," "oversee," or "supervise" an aspect of the petitioner's business, it should clarify who would perform non-qualifying duties associated with the activity or function.

Furthermore, in order to establish that the U.S. company will be capable of supporting the beneficiary in a managerial or executive position within one year of approval of the petition, the petitioner is required to submit evidence regarding the proposed nature of the office, describing the scope of the entity, its organizational structure, and its financial goals, and evidence regarding the size of the United States investment. *See* 8 C.F.R. §§ 214.2(l)(3)(v)(C)(2) and (3).

The record as presently constituted does not contain clear or consistent information regarding the petitioner's proposed organizational structure. The petitioner's business plan dated January 2006, submitted with the initial petition filing, includes a personnel plan which identifies the following positions to be filled during 2006: operating manager (the beneficiary), an administrative assistant, a marketing manager, a server and SMS center administrator, two programmers, an accounting employee, and a claims and call center employee. In response to the request for evidence, the petitioner indicated that the beneficiary's direct subordinates would include a manager of finance, a manager of operations management, and a manager of business development, none of which were identified in the business plan. The accompanying organizational chart included a total of six proposed departments working under these three managers. The differences between the business plan and the proposed organizational chart are significant. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

To resolve these apparent discrepancies, the petitioner should provide a 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, technical and operational functions.

Another issue to be addressed is whether the petitioner has acquired sufficient physical premises to house the proposed new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner has not provided a lease agreement for the address indicated on Form I-129. Although it appears that the company secured physical premises on July 1, 2006, the petitioner must establish eligibility as of the date of filing. Furthermore, the July 1, 2006 is a "services agreement" and does not clearly indicate the amount or type of space secured.

To correct the deficiencies in the record, the petitioner should describe its anticipated space requirements and submit evidence to establish that it was leasing commercial space at the address listed on Form I-129 as of the date of filing. If the petitioner is not able to provide additional evidence that it had secured sufficient office space as of the date of filing the petition, the petition cannot be approved.

Another issue not addressed by the director is whether the petitioner established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner indicated that the beneficiary has served as a director and operations manager of the foreign entity, which is described as a "repository and clearing house for electronic online transactions." The petitioner's description of the beneficiary's duties is vague and suggests that the beneficiary was directly involved in the day-to-day operations of the company. For example, the petitioner stated that the beneficiary "helped to run" the business, including "programming, marketing, business development, making arrangements with banks, signing on and working with customers," and entering into sales contracts. It is not clear based on this limited description whether the beneficiary managed these operational functions through subordinate personnel, or whether he directly performed non-managerial programming, sales and marketing duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves

will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The beneficiary's job description also included duties that seem implausible, considering the nature of the foreign entity as an electronic payment services provider. The petitioner indicated that the beneficiary "supervised the operations of the factory" and supervised a foreman. To correct these deficiencies, the petitioner should be instructed to submit a comprehensive description of the beneficiary's duties while employed by the foreign entity, including the percentage of time he devoted to specific duties on a weekly basis, and a description of the beneficiary's "typical day." If the petitioner states that the beneficiary "directed," "managed," or "supervised" an aspect of the foreign entity's business, it should clarify who performed non-qualifying duties associated with the activity or function.

Finally, the petitioner should be instructed to provide a detailed organizational chart for the foreign entity which reflects the staffing of the company during the beneficiary's period of employment abroad from February 2004 through March 2005. The chart should clearly identify the names, job titles and job duties of the beneficiary's subordinate 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, March 10, 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 she deems necessary.

ORDER: The decision of the director dated September 22, 2006 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.