U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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File: WAC 08 244 51208 Office: CALIFORNIA SERVICE CENTER Date: JUL 28 2009

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:

SELF-REPRESENTED

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.

John F. Grissom
Acting 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 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 California corporation, intends to operate as an equipment supply and leasing company for the catering and wine industries. It claims to be a subsidiary of Vendology Ltd., located in Bristol, United Kingdom. The petitioner seeks to employ the beneficiary as the vice president of its new office in the United States for a period of three years.[1]

The director denied the petition, determining that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Although the petitioner submitted evidence to establish that it qualifies as a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), the director 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, the petitioner asserts that the director failed to consider the petitioner's status as a new office, and thus did not take into account the reasonable needs of the organization as required by section 101(a)(44)(C) of the Act. The petitioner re-submits the petitioner's business plan for the first three years of operation and emphasizes that it is the beneficiary's intention to recruit sufficient staff during the first year of operations to relieve him from performing operational and administrative tasks.

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.

[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.

(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 petitioner indicated on Form I-129 that the beneficiary is coming to the United States in order to open a new office. The petitioner submitted evidence that the U.S. company was incorporated in the State of

California in July 2008, two months prior to the filing of the petition. There is no evidence in the record to suggest that the petitioner has a parent, subsidiary or affiliate already doing business in the United States.

The AAO notes that the petitioner stated on Form I-129 at Part 5, questions #11-13 that it was established in 2006, and has six employees, with gross annual income of $162,332. According to the evidence of record, the foreign entity was established in the United Kingdom in 2006. It is unclear whether the employee and income figures provided were meant to represent the foreign entity's current information or the petitioner's anticipated staffing size and projected income. While the AAO grants that these statements made on Form I-129 may have caused some confusion, the record as a whole clearly establishes that the petitioner is a new office.

Therefore, 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 adjudicate this matter as a new office petition 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 U.S. Citizenship and Immigration Services 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.

Upon review of the record, the AAO finds that additional evidence will be needed to satisfy the requirements of 8 C.F.R. § 214.2(l)(3)(v)(C), and to establish that the company would realistically grow to a sufficient size to employ the beneficiary in a primarily managerial or executive capacity within one year of the approval of the petition. The petitioner has not provided any evidence of the financial situation of the U.S. entity or shown that an investment has been made in the U.S. company. The petitioner's business plan only mentions that the foreign parent company will financially support the U.S. operation during the first four months of operation and beyond, but the petitioner has not identified its capital requirements, start up costs, or the immediate availability of funds. There is also no evidence that any monies have been transferred from the foreign entity as an initial investment, or as payment for the issued stock. Without clear evidence of how and when the company will be financed, it is difficult to make a reasoned determination regarding the feasibility of the petitioner's business plan.

The petitioner has also briefly outlined its proposed organizational structure for the first year of operations, and indicated that it intends to hire a personal assistant/office manager, a marketing assistant, two administrative personnel and an unidentified number of commissioned sales agents. The petitioner should be instructed to provide job duties, educational requirements and salaries/wages for each proposed 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 and operational functions, including, if applicable, market research, marketing, advertising, purchasing, sales, customer service, administrative, distribution and clerical tasks and any other functions inherent to the type of business to be operated by the petitioner.

The record as presently constituted also contains no evidence that the petitioner has secured sufficient physical premises to house the new office in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner indicated on Form I-129 that the beneficiary will work at 2285 Palmer Drive, Helena, California 94574. The petitioner should submit evidence that it leases or owns this premises and that the premises are authorized for commercial use. The petitioner should also provide photographs and a floor plan for the premises to establish that the premises are sufficient meet its business requirements for the first year of operations.

In addition, the petitioner has not submitted sufficient evidence to establish that the foreign and U.S. entities have a qualifying relationship. 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 indicates that the beneficiary is the sole owner of the foreign entity, and the foreign entity wholly owns all of the petitioner's issued stock. However, the petitioner has not submitted any documentary evidence in support of the claimed parent-subsidiary relationship. The petitioner should be instructed to submit evidence which may include, but is not limited to, copies of all stock certificates issued by the petitioner to date; a copy of the U.S. company's stock ledger; a copy of the petitioner's Notice of Transaction Pursuant to Corporations Code Section 25102(f); and evidence that the foreign entity has in fact paid for its claimed stock ownership in the petitioning company.

Finally, the record as presently constituted does not contain sufficient evidence to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. Although requested by the director in a request for evidence issued on September 17, 2008, the petitioner declined to provide a detailed description of the beneficiary's duties with the foreign entity or the percentage of time spent on each duty; nor did the petitioner provide the requested position descriptions and educational level for the beneficiary's subordinates, which appear to include a marketing officer and an administrative manager. The director should instruct the petitioner to submit additional evidence pertaining to the beneficiary's duties and the staffing structure of the foreign entity in order to correct these deficiencies. If the foreign entity uses the services of contracted or commissioned staff to perform any duties, the petitioner should describe in detail the duties they perform and provided evidence of fees, wages or commissions paid to such staff.

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, September 12, 2008.

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 deemed necessary.

ORDER: The decision of the director dated November 4, 2008 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.