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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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DATE: JAN 03 2012

Office: CALIFORNIA SERVICE CENTER

FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

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, a California corporation established in March 2009, states that it operates a management consultancy firm. The petitioner claims to be a subsidiary of [REDACTED]. The petitioner seeks to employ the beneficiary as the chief executive officer of its new office in the United States for a period of three years.¹

The director denied the petition on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that it has secured sufficient physical premises to house the new operation; and (2) that the beneficiary will be employed in a bona fide manager or executive position within one year of the beginning of operations for the United States business entity.

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 states that the director misapplied the preponderance of the evidence standard for immigration petitions in his decision. Counsel submits a brief and duplicate copies of the documents submitted with the initial petition and request for evidence.

I. The Law

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 The petition may not be approved for a period of three years. The regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3) provides that, 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) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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 involved 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.

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.

II. Physical Premises

The first issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new operation.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker. The petitioner indicated on the Form I-129 that it operates a management consultancy firm with zero current employees and it did not indicate any gross annual income (actual or projected). In support of the petition, the petitioner submitted an executed Office Share Agreement with [REDACTED] that states:

2. **Shared Premises**

The parties desire to share, on the terms and conditions set forth herein, a portion of the premises on the sixth floor of the building located at [REDACTED]. The shared premises are further described as follows:

One desk situated in the main office, furnished with a telephone (local landline), Internet access and power points.

4. **Rent**

In consideration for the sharing by [REDACTED] of part of its Premises to [the petitioner], [the petitioner] shall pay a monthly rent charged per seat at the following rates:

1 seat: \$600

2 seats: \$1100

3 seats: \$1500

The petitioner also submitted photographs of the workspace.

The director issued a request for additional evidence ("RFE") on June 25, 2009, instructing the petitioner to submit, *inter alia*, the following: (1) information on the worksite in the United States; (2) an explanation as to why the location for the business in the United States was chosen; (3) a copy of the floor plan for all spaces including office, warehouse, and production spaces; and (4) information on the U.S. business' office hours.

In response to the RFE, the petitioner provided an explanation of its acquired physical premises, stating that the worksite is intended to be a location for work on projects for clients in the United States and, predominantly, for meetings with clients and with contractors. The petitioner submitted a floor plan which identifies the work area. The petitioner noted that the floor was designed for offices and there are no warehousing or manufacturing areas. The petitioner also described the reasoning for the location and the business hours that the beneficiary expects to keep.

The director denied the petition on July 21, 2009, concluding that the petitioner failed to establish that it has secured sufficient physical premises to house the new operation. In denying the petition, the director found that the "petitioner has only shown that it has sufficient premises for a single person to work at a desk in its client's office for the first year."

On appeal, counsel submits a brief and addresses the director's concerns about the petitioner's physical premises as follows:

Under paragraph 2, "Shared Premises," is the specific reference to "One desk situated in the main office."

However, the same office share agreement continues, in paragraph 4, "Rent," to provide for additional occupants or "seats," with the second seat requiring an additional \$500 to the rent and the third requiring an additional \$400 to the rent. What is denoted clearly, here, is the consideration of additional personnel who would use the desk and ancillary facilities of the premises. What can be further established from this particular provision in the contract is that the \$500 and \$400 per user increases in the graduated rent scale reasonably implies more than [sic] just a chair at a shared desk. For it to be so, the contract price would not be merely exorbitant but vastly out of proportion of such limited use. So much so that it would make the clause, on its face, unconscionable. What can be reasonably inferred from the complete terms of the contract is that additional staff was contemplated at the time of the negotiations

and time of signing and that the rent corresponding to each additional employee suggests use of more than an allotment of a corner of a desk.

Discussion

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.*

Upon review, counsel's assertions are persuasive. The AAO finds sufficient evidence to establish that the petitioner has acquired physical premises as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The director's focus on the singular statement in the office share agreement that the petitioner was to be provided one desk, was misplaced. The office share agreement clearly demonstrates that there were provisions made for additional employees of the petitioner under paragraph four where the rental agreement stipulates increases for each additional employee.

Furthermore, the AAO finds that counsel's explanations regarding the petitioner's office share agreement are credible. Counsel has adequately explained the terms of the agreement and the petitioner's expectations for the U.S. company. While the petitioner's office share arrangements may be characterized as unconventional, overall, the evidence submitted supports the petitioner's claim that it does in fact have physical premises from which to conduct its business.

The petitioner need only establish that sufficient physical premises to house the new office have been secured. The petitioner has met that burden.

III. Managerial or Executive Duties

The second issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a bona fide manager or executive position within one year of the beginning of operations for the United States business entity.

Facts and Procedural History

Accompanying the initial petition, the petitioner submitted a letter describing the duties of the beneficiary. The description discussed the beneficiary's initial role in laying the groundwork for the physical presence of the foreign entity in the United States. The description also stated that the beneficiary expects to hire administrative staff and a full-time marketing consultant early in the development. In the short term, the description noted that the beneficiary would work connecting its existing French clients with the U.S. market through U.S. professionals.

The petitioner also submitted an organizational chart for the U.S. company, depicting the beneficiary as CEO, a consultant to be hired in the first year, a second consultant to be hired in the second year, and one administrative and financial manager. The organizational chart also lists freelance employees that will be hired on an as needed basis for specific projects. The petitioner provided a business plan that describes the petitioner's staffing plan.

Related to its ability to commence doing business in a manner that will support a managerial or executive position, the petitioner submitted evidence of a significant United States investment and further established the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States. This evidence included financial statements, bank records, and evidence of wire transfers.

The director issued a request for additional evidence ("RFE") on June 25, 2009, instructing the petitioner to submit, *inter alia*, a more detailed description of the beneficiary's duties in the United States. In response to the RFE, the petitioner provided a lengthy description of the beneficiary's duties.

The director denied the petition on July 21, 2009, concluding that the petitioner failed to establish that the beneficiary will be employed in a bona fide manager or executive position within one year of the beginning of operations for the United States business entity. In denying the petition, the director found that the "petitioner has not provided evidence that the beneficiary would be primarily performing the duties of an executive or manger rather than primarily providing the services."

On appeal, counsel asserts that the beneficiary will have broad authority in the formation and staffing of the new company. Counsel clarifies that the duties described are more clearly executive than non-executive and that the submitted evidence establishes that the petitioner intends to hire additional staff, as it has for the continuing operations its location in France. Counsel emphasizes that the few non-executive tasks that remain will become the responsibility of the staff.

Discussion

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (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.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the

opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that "business entities just starting up seldom have a large staff." *Id.*

Despite the fact that an alien engaged in the startup of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

Upon review, counsel's assertions are persuasive. In order to qualify for L-1 nonimmigrant classification during the first year of operations, 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. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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.

The AAO finds sufficient evidence to establish that it is more likely than not that the beneficiary will be employed in a primarily managerial or executive position within one year of the beginning of operations. *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). The petitioner has submitted relevant, probative, and credible evidence of the United States investment and further established the financial ability of the foreign entity to remunerate the beneficiary and commence doing business. Furthermore, the petitioner submitted a detailed and credible business plan. The evidence submitted establishes that the beneficiary has the intent and financial ability to hire, supervise and control the work of subordinate professional consultants. *See* sections 101(a)(44)(A)(ii) and (iii) of the Act.

The AAO notes that upon approval of this new office petition, the petitioner must follow through on its business plan or the beneficiary will be ineligible for an extension. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. After one year, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner will be ineligible by regulation for an extension.

While the beneficiary will undoubtedly be required to apply her expertise to perform some higher-level sales while negotiating new business, marketing, and administrative tasks, the AAO is persuaded that the beneficiary's subordinates in the United States, when hired, and at the foreign entity will carry out the majority of the day-to-day non-managerial tasks required to operate the business. The petitioner need only

establish that the beneficiary will primarily perform executive or managerial duties within one year of commencing operations. The petitioner has met that burden.

IV. Conclusion

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, the petitioner has met that burden. Accordingly, the director's decision dated July 21, 2009 is withdrawn and the petition is approved.

ORDER: The appeal is sustained.