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U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 282 54098 Office: VERMONT SERVICE CENTER Date: JUL 26 200

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 2002 and claims to be in the pharmaceuticals business. The petitioner claims that the U.S. entity is a subsidiary of the foreign entity. The U.S. entity claims one employee. It seeks to employ the beneficiary in the United States as an executive director and vice president of its new office for a period of three years, at a yearly salary of \$50,000.

The director determined that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial capacity within one year of operation.

On appeal, counsel disagrees with the director's decision and states that sufficient evidence has been submitted to establish that the beneficiary will be employed primarily in a managerial or executive capacity within one year of operation.

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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 (1)(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 regulation at 8 C.F.R. § 214.2(1)(3)(v) states 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.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity within one year of operations as a “new office.”

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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner stated that the beneficiary's proposed duties are to set-up, direct, and develop the U.S. entity; plan marketing strategy; introduce the company's line of products and technology into the U.S. market; negotiate sales and cooperation agreements; organize the day-to-day operations; contract with U.S. companies; and hire new personnel as needed.

In response to the director's request for additional evidence, counsel submits a letter dated December 9, 2002, describing the beneficiary's duties performed in the United States as:

The beneficiary . . . directly performs the duties inherent to her position as director of this start-up company. She makes contact with potential business associates; forwards and receives product and other information and documentation, using the internet extensively; maintains communications with the company in China, . . . continues to monitor the Avathrom project with GL Synthesis, and performs other duties as needed. [The beneficiary] has the authority to hire personnel as needed in the U.S.

In a letter dated January 15, 2003, the petitioner stated that the beneficiary would be the executive and vice president of the new business and that she will have complete authority to manage the business activities, including hiring and firing additional employees, establishing goals and policies, making business decisions, etc.

The petitioner submitted as evidence a two-year business plan for the U.S. entity; a list of activity conducted by the beneficiary in the United States; a copy of the Patent Licensing Agreement entered into by the U.S. entity and [REDACTED]; and an outline of meetings held between the U.S. entity and [REDACTED] in the United States.

The director determined that the petitioner had failed to submit sufficient evidence to establish that within one year of operation the U.S. entity would be able to support a managerial or executive position. The director stated that the evidence demonstrated the beneficiary would be performing all the functions of the organization presently and into the future. The director noted that the petitioner demonstrated that the U.S. entity planned to hire a full-time assistant and possibly two business negotiators within a year. The director stated that even if the prospective employees were hired by the U.S. entity, the beneficiary would still have to perform non-qualifying duties including marketing, advertising, finance, and sales. The director concluded by stating that the petitioner had failed to establish that the beneficiary would be relieved from performing non-qualifying duties within one year of operation.

On appeal, counsel disagrees with the director's decision. Counsel contends that the conclusions made by the director were without merit and based upon speculation. Counsel also contends that the proposed employees will be in a position to relieve the beneficiary from performing non-qualifying duties. Counsel asserts that the assistant will perform the day-to-day office duties, and that the beneficiary will transfer the basic marketing, advertising, and sales functions to the business negotiators. Counsel further asserts that the beneficiary, having sole authority over all of the business operation, already functions in an executive capacity as defined by the statute.

The record does not support a finding that the U.S. entity will be able to support a managerial or executive position within one year of operation in compliance with the regulatory requirements for a "new office" pursuant to 8 C.F.R. § 214.2(1)(3)(v). The record does not demonstrate that the U.S. entity will contain the organizational complexity to support the proposed managerial or executive staff position. In addition, the petitioner failed to adequately respond to the director's specific request for a business plan that shows in detail how the new business will be fully operational within one year, with employees in place and doing business by providing a product or service. The business plan submitted by the petitioner fails to detail realistic projections to establish that the U.S. entity will realize growth within one year sufficient to support a managerial or executive position. Although the evidence demonstrates that the petitioner intends to hire new

employees it has not provided detailed position descriptions to show that they will be employed in other than non-professional positions. Furthermore, the business plan submitted does not demonstrate projected dates of hire.

The business plan is not supported by independent documentary evidence that would show that its projections and assertions are adequate. There has been no evidence presented that details the time frame in which each new employee will be hired, what the new hires duties will consist of, or how the beneficiary's duties will interrelate with that of the new hires. There is no evidence to show that the beneficiary will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties.

Furthermore, the petitioner's evidence is not sufficient in establishing that the beneficiary will be directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher level executives. Rather than the beneficiary functioning at a senior level within the organizational hierarchy within one year of operation in the United States, it appears from the record that she will continue to perform the functions of the organization and carry out the day-to-day services of the business. A vague and speculative business plan does not suffice to explain how the new office plans to support a managerial or executive position within one year of operation. Although the petitioner has submitted evidence to demonstrate that the U.S. entity has entered into contract agreements, that the beneficiary will continue to negotiate for additional business, and that it anticipates relocating to a larger office complex, there is no evidence to substantiate that the beneficiary will perform primarily in an executive or managerial capacity, or that employees will be hired to relieve the beneficiary from performing non-qualifying duties, within one year of operation.

On review of the complete record, it cannot be found that the U.S. entity will be able to support a managerial or executive position within one year of operation.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.