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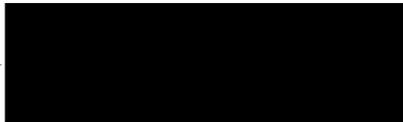
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FILE: SRC 06 022 52281 Office: TEXAS SERVICE CENTER Date: MAR 06 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the case will be remanded for further consideration and action.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as its executive 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 limited liability company organized under the laws of the State of Texas and claims to be engaged in the business of dairy consulting and equipment sales and distribution. The petitioner also claims a qualifying relationship with Sleurink Beteiligungs GmbH of Germany as a subsidiary.

The director, treating the petitioner as a "new office," denied the petition concluding that the petitioner failed to establish 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.

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, because the petitioner has established that it has assets and is financially self-sufficient due to its ongoing business operation in the United States, it has sufficiently established that it has the financial ability to commence doing business in the United States. The petitioner also argues that it is due a refund of its premium processing fee because the director did not render her decision until 25 days after the Texas Service Center's receipt of the petitioner's response to the second Request for Evidence. In support of these assertions, the petitioner submits a brief.

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.
- (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) 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 regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as:

[A]n organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

Moreover, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

[T]he 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.

A threshold issue in this matter is whether the director correctly treated the petitioner as a "new office" in adjudicating the petition.

In the initial petition, the petitioner does not assert that the beneficiary is coming to the United States to open a "new office." In a letter dated October 28, 2005 appended to the initial petition, counsel asserts that the petitioner was originally formed on July 23, 2002. According to an Assignment and Resignation also appended to the petition, the foreign entity became the sole member of the petitioner, a limited liability company, on March 1, 2003. Beginning in 2003, the petitioner asserts that it began selling feed management systems and weighing equipment to overseas clients on a regular, systematic, and continuous basis. In support of this assertion, the petitioner provided copies of advertising and promotional materials; invoices dated as early as May 1, 2004; bank statements; and a 2004 tax return indicating that the petitioner had over \$100,000.00 in gross receipts in 2004.

In response to the director's request for evidence, counsel asserts in a letter dated November 14, 2005 that the petitioner "has some of the characteristics of a new office" in that the petitioner currently has no employees, and that the petitioner is, in the alternative, coming to the United States to open a "new office."

On December 30, 2005, the director denied the petition after apparently concluding that the petitioner met the definition of a "new office" in 8 C.F.R. § 214.2(l)(1)(ii)(F). The director applied the "new office" criterion in 8 C.F.R. § 214.2(l)(3)(v)(C)(2) and determined that the petitioner failed to establish 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.

Upon review, the AAO concludes that the petitioner does not meet the definition of a "new office" in 8 C.F.R. § 214.2(l)(1)(ii)(F) because the record establishes that it has been "doing business" in a regular, systematic, and continuous fashion for over one year before the filing of the instant petition. Therefore, the director's application of the "new office" criterion in 8 C.F.R. § 214.2(l)(3)(v)(C)(2) was in error, and, because this was the director's only basis for denying the petition, the decision is hereby withdrawn. However, the case will be remanded for further consideration and action because the petitioner has not submitted sufficient evidence to establish eligibility for the visa as explained below.

It is not a choice of the petitioner whether or not it is treated as a "new office." Whether a petitioner will be, or will not be, treated as a "new office" for purposes of 8 C.F.R. § 214.2(l)(3)(v) depends on whether the petitioner meets, or does not meet, the definition of a "new office" contained in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F).

In this matter, the record sufficiently establishes that the petitioner has been "doing business" in the United States for at least one year prior to the filing of the instant petition. The petitioner provided invoices dated more than one year before the filing of the instant petition on October 28, 2005 and provided evidence of over \$100,000.00 in gross receipts in 2004. Although the petitioner does not have any employees, a petitioner need not have employees to be engaged in the regular, systematic, and continuous provision of goods or services. Therefore, because the petitioner has been "doing business" for over one year, it is not a "new office" and the director's denial of the petition for failure to establish an adequate investment in the United States entity pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C)(2) was in error.

However, upon review, the petitioner has not submitted sufficient evidence to establish eligibility for the L-1A visa as an established entity. While not addressed by the director, the petitioner provided insufficient evidence to establish whether the beneficiary has been or will be employed primarily in a managerial or executive capacity.

When examining the managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing the organization, or managing a department, subdivision, function, or component of the company. Since a petitioner is generally relieved from establishing that a beneficiary will be immediately employed in a managerial or executive capacity when coming to the United States to open a new office, both the petitioner's failure to present evidence on this issue, and the director's failure to request additional evidence concerning the beneficiary's job duties immediately upon his arrival in the United States, is understandable. However, given that the petitioner has been determined to not be a "new office," the petitioner must now establish that the beneficiary will be primarily employed in an executive or managerial capacity, and the director is directed to review the record, request pertinent additional evidence, and render a decision after reviewing this evidence.

In addition, the petitioner has provided insufficient evidence to demonstrate that the beneficiary was employed abroad in a managerial or executive capacity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Likewise, the director is directed to review the record, request pertinent additional evidence, and render a decision after reviewing this evidence.

Finally, the petitioner has also provided insufficient evidence to establish that it has a qualifying relationship with the foreign entity. While limited liability companies do not issue share certificates like corporations, the petitioner has failed to provide sufficient evidence demonstrating the ownership of the United States entity. Texas limited liability companies formed in 2002 are regulated by the Texas Limited Liability Company Act. Tex. Rev. Civ. Stat. Ann. Art. 1528n.¹ This law provides guidance on how to interpret the articles of organization of a Texas limited liability company as these relate to ownership interests, and how a Texas limited liability company can evidence ownership interests by members.

Sections 3.02 and 4.01 permit a person to become a member of a limited liability company upon formation and to be identified as an "initial member" in the articles of organization. Tex. Rev. Civ. Stat. Ann. Art. 1528n, §§ 3.02 and 4.01. Section 4.01 also permits new members to be added after formation of the limited liability company. *Id.* Furthermore, section 2.22 requires Texas limited liability companies to maintain records including, but not limited to, a list identifying each member by name, address, and percentage of ownership; a written statement of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the date on which each member became a member; and copies of the regulations of the limited liability company, if any. Tex. Rev. Civ. Stat. Ann. Art. 1528n, § 2.22.

In the current matter, the only evidence provided by the petitioner to prove that the foreign entity "owns" the

¹While the Texas Limited Liability Company Act was substantially amended in 2005, and was made effective in 2006, these revisions do not generally affect limited liability companies formed in 2002, such as the petitioner. The petitioner, therefore, is still regulated by the Act as it appeared in 2002. Tex. Bus. Org. Code Ann. Chapter 101.

petitioner is a copy of an Assignment and Resignation dated March 1, 2003 purporting to assign the sole membership interest to the foreign entity and an unsigned and undated "stock certificate" purporting to issue 1,000 shares of "stock" to the foreign entity. As indicated above, limited liability companies do not issue stock. The petitioner did not provide a copy of the list, which it is compelled to maintain by Texas law, identifying the members of the limited liability company or any other company records which could have proven who, as of the date of the petition, are the members of the limited liability company. The petitioner also did not provide a "certificate of membership interest" which Texas law recognizes as a means to establish an ownership interest in a limited liability company. *See* Tex. Rev. Civ. Stat. Ann. Art. 1528n, §§ 4.05(B).

Therefore, the director is directed to review the record, request pertinent additional evidence regarding the purported qualifying relationship, and render a decision after reviewing this evidence.

For these additional reasons, the appeal may not be sustained, and the matter must be remanded to the director for further action.

ORDER: The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.²

²Finally, the AAO notes that the petitioner has requested that it be refunded the \$1,000.00 premium processing fee because "there was a lapse of 25 days between the Services' receipt of the [the petitioner's] Response to Second [Request for Evidence] and the Services' decision." Without addressing whether or not the AAO has jurisdiction to provide the requested relief, it will be observed that the petitioner is not entitled to a refund of the premium processing fee. Requests for premium processing are governed by the regulations at 8 C.F.R. § 103.2(f). These regulations state in pertinent part:

Premium Processing Service guarantees 15 calendar day processing of certain employment-based petitions and applications. The 15 calendar day processing period begins when the Service receives Form I-907, with fee, at the designated address contained in the instructions to the form. The Service will refund the fee for Premium Processing Service, but continue to process the case, unless within 15 calendar days of receiving the application or petition and Form I-907, issues and serves on the petitioner or applicant an approval notice, a notice of intent to deny, a request for evidence, or open an investigation relating to the application or petition for fraud or misrepresentation.

Because the Texas Service Center issued and served a Request for Evidence within 15 calendar days of the filing of the petition, the petitioner is not owed a refund. The petition was filed on October 28, 2005, and the first Request for Evidence was mailed on November 3, 2005. The premium processing regulations do not entitle the petitioner with an expedited review of the evidence submitted in response to this, or any subsequent, Request for Evidence.