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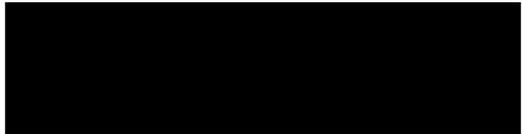
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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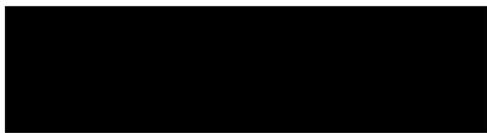


FILE: WAC 05 119 52504 Office: CALIFORNIA SERVICE CENTER Date: NOV 01 2007

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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 The decision of the director will be withdrawn and the case will be remanded for further consideration and a new decision.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as its general 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 corporation organized under the laws of the State of Delaware and is allegedly engaged in the helicopter business.

The director, treating the petitioner as a "new office," denied the petition, concluding that the petitioner failed to establish that it has secured sufficient physical premises to house the "new office."

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 asserts that the petitioner is not a "new office" and, thus, was not obligated to establish that it had secured sufficient physical premises to house its second United States location planned for San Francisco, California.

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." Rather, the petitioner asserts in the letter dated August 5, 2005 that the beneficiary is coming to the United States to be employed as a general manager "to expand [the petitioner's] existing operations in the United States, including opening a second office in San Francisco, California." The petitioner also asserts that the

petitioner was established in the United States in 1996 and that it has been maintaining a sales office in New Holland, Pennsylvania. In support of its petition, the petitioner submits a variety of organizational and business documents including a copy of its 2004 tax return.

Nevertheless, the director requested additional evidence on May 19, 2005. The director requested, *inter alia*, a lease agreement for the proposed second office in San Francisco, California. In response, counsel submitted a letter dated August 9, 2005 in which he asserts that the petitioner is *not* a "new office" and, thus, is not obligated to establish that it has already leased space in San Francisco for the petitioner's second United States location.

On August 26, 2005, the director denied the petition. The director, treating the petitioner as a "new office," denied the petition. The director determined that the petitioner's proposed second location in San Francisco is an "organization" that has been in operation for less than a year. 8 C.F.R. § 214.2(l)(1)(ii)(F). Consequently, the director reasoned that the petition must be denied because the petitioner failed to establish that it has secured sufficient physical premises to house the San Francisco office, a criterion only specifically applicable to organizations meeting the definition of a "new office."

Upon review, the AAO agrees with counsel and concludes that the petitioner does not meet the definition of a "new office" in 8 C.F.R. § 214.2(l)(1)(ii)(F). First, the petitioner does not request to be treated as a "new office" in the Form I-129. Second, the record sufficiently establishes that the petitioning organization has been in operation in the United States through a parent, branch, affiliate, or subsidiary for more than one year. *See id.* The fact that the petitioner may be opening a new location, moving its place of business, or even entering an entirely new line of business is of no consequence.

Therefore, the director's application of the "new office" criterion in 8 C.F.R. § 214.2(l)(3)(v)(A) was in error, and, because this was the director's only basis for denying the petition, the decision is hereby withdrawn.¹

However, upon review, the petitioner has not submitted sufficient evidence to establish eligibility for the L-1A classification as an established entity. While not addressed by the director, the petitioner provided insufficient evidence to establish whether the beneficiary will be employed primarily in a managerial or executive capacity in the United States. 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 failed to establish that the beneficiary will be relieved of the need to perform non-qualifying administrative or operational tasks by a subordinate staff or that he will manage supervisory, managerial, or professional employees, or will manage an essential function of the organization. The record indicates that the petitioner has not yet hired a subordinate staff

¹It is noted that, even though the director's decision will be withdrawn, the director's request for a copy of the petitioner's San Francisco lease was an appropriate request under the circumstances. The petitioner specifically avers that the beneficiary will be employed in San Francisco. It was entirely appropriate for the director to question where the beneficiary will work immediately upon his arrival in the United States. The existence, or non-existence, of a lease in San Francisco could, for example, be relevant to whether the beneficiary will primarily perform qualifying duties immediately upon his arrival in the United States or whether he will be primarily engaged in performing non-qualifying tasks related to setting up the San Francisco office. However, as it was inappropriate to deny the petition for failing to meet a "new office" criterion where the petitioner is not a "new office," the decision must be withdrawn.

in San Francisco or that it has an organizational complexity requiring the employment of a truly managerial or executive employee. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the director is directed to review the record, request pertinent evidence addressing the beneficiary's duties and subordinate staff at the time the petition was filed, and render a decision after reviewing this evidence.

Second, the petitioner has provided insufficient evidence to establish that it has a qualifying relationship with the foreign entity. In fact, the record contains at least one serious inconsistency undermining the petitioner's claim. While the petitioner asserts in the Form I-129 that it is 100% owned by [REDACTED] in Hong Kong, the petitioner's 2004 Form 1120, U.S. Corporation Income Tax Return, indicates that the petitioner does not have any foreign owners owning at least 25% of its stock and that no entity owns 50% or more of the petitioner's stock. The record does not resolve this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the 2004 Form 1120 indicates that the petitioner generated no revenue other than "management fees" in 2004. As this does not establish that the petitioner was engaged in the regular, systematic, and continuous provision of goods and/or services at the time the petition was filed, the record is not persuasive in establishing that the petitioner is a qualifying organization.

Finally, while the petitioner claims to maintain a sales office in New Holland, Pennsylvania, the corporate records of the Commonwealth of Pennsylvania do not indicate that the petitioner is or was registered to do business in Pennsylvania as a foreign (Delaware) corporation.

Therefore, the director is directed to review the record, request pertinent evidence, 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 which, if adverse, shall be certified to the AAO for review.