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U.S. Citizenship  
and Immigration  
Services

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File: EAC 08 079 51405 Office: VERMONT SERVICE CENTER Date: FEB 05 2009

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.

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal.

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 New York corporation, is engaged in the import and wholesale of fashion jewelry. It claims to be a subsidiary of [REDACTED], located in Seoul, Korea. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a one-year period.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval of 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, counsel for the petitioner asserts that sufficient evidence was submitted to establish that the beneficiary will be primarily performing executive and managerial duties within one year of obtaining classification as an L-1A nonimmigrant intracompany transferee. Counsel emphasizes that the petitioner is already staffed with six employees, and intends to hire additional staff during the first year of operations. Counsel further asserts that the director erred in determining that the beneficiary's proposed subordinates will not be employed in managerial, professional or supervisory positions. Counsel submits a brief in support of the appeal.

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) 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.

The issue in this matter is whether the petitioner has established that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity within one year.

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.

The nonimmigrant petition was filed on January 22, 2008. The petitioner stated on Form I-129 that the beneficiary would be employed as its president, and stated that the company had six employees as of that date. The petitioner indicated that the beneficiary would be responsible for formulating the new office's merchandising policies and coordinating merchandising activities in the United States, and be compensated at an annual salary of \$98,000. The petitioner submitted evidence that it is a subsidiary of [REDACTED] of Korea, a jewelry manufacturing company with annual sales of \$30 million, and provided evidence that its parent company wired \$500,000 to the U.S. company as an initial investment. The petitioner also provided a copy of its lease and photographs of its physical premises, which consists of offices and a showroom located on Fifth Avenue in New York City.

The petitioner provided a business plan which explained the purpose for the establishment of the U.S. subsidiary, noting that it would initially act as a design center capable of creating customized designs for U.S. clients and fostering closer relationships with customers in the United States. The petitioner submitted an organizational chart depicting its current structure, which includes the beneficiary as president, a vice president, a general manager, a senior designer, and three designers. The petitioner's business plan also included brief job descriptions for the general manager and design staff. The petitioner indicated that the general manager would be responsible for controlling the design teamwork, marketing, sales and providing exact design direction, as well as attending meetings with customers, while the beneficiary would "manage the company's overall work including development, marketing, and management analysis." The business

plan indicates that the company anticipates that its current staff of six employees would increase to 10-20 employees in the near future. The petitioner provided copies of IRS Forms W-4, Employee's Withholding and Allowance Certificate, for its general manager and design staff.

The director found the evidence submitted with the petition insufficient to establish that the petitioner would support a managerial or executive position within one year. Accordingly, the director issued a request for evidence (RFE) in which he requested, *inter alia*, complete position descriptions for the beneficiary's proposed subordinate employees, a detailed organizational chart depicting all proposed subordinates, and additional photographs of the petitioner's place of business.

In a response dated February 14, 2008, the petitioner submitted the requested detailed position descriptions for the beneficiary's proposed subordinates, as well as a more detailed description of the duties to be performed by the beneficiary as president. As these descriptions are part of the record, they will not be repeated here. The petitioner provided an expanded organizational chart which includes the current staff referenced above, as well as proposed employees that will include a sales/marketing manager, sales representatives, marketing assistants, an administrative assistant and a bookkeeper. According to the petitioner's business plan, it anticipates sales of \$6 million and payroll expenses in excess of \$700,000 by the end of 2008. The petitioner provided a copy of its New York Form NYS-45-MN, Employer's Combined Withholding, Wage Reporting and Unemployment Insurance Return, for the fourth quarter of 2007, which shows that the petitioner paid wages of \$65,386.72 to its general manager, lead designer and three design staff during the three-month period.

The director denied the petition on February 29, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year. The director's determination was primarily based on a determination that the petitioner would not employ "bona-fide professionals" and a conclusion that a "small-sized jewelry import/export company" does not appear to require a bona fide manager or executive who would perform qualifying tasks on a full-time basis. The director found that the beneficiary would likely be engaged in the non-managerial, day-to-day operations of the business.

On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity within one year. Counsel emphasizes that the beneficiary has already hired two managerial employees, three design staff, and intends to hire an additional managerial employee and support staff to perform the day-to-day functions of the company, including jewelry design, sales, marketing and administrative and financial tasks. Counsel emphasizes that the general manager, who has already been hired, will supervise all lower-level managerial, professional and support staff. Finally, counsel asserts that based on the evidence submitted, the director's determination that the beneficiary will be primarily engaged in the non-managerial, day-to-day operations of the company at the end of the first year of operations is an erroneous conclusion.

Upon review of the petition and evidence, the petitioner has established that the United States entity will support the beneficiary in a primarily managerial or executive capacity within one year. Accordingly, the director's decision will be withdrawn and the petition will be approved.

When a new business is 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 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 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.

When examining the managerial or executive capacity of a beneficiary, U. S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy.

Although the director based his decision primarily on the proposed size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, although the proposed organization will not be large, the totality of the record supports a conclusion that the beneficiary's direct subordinates will be supervisors or managers. *See* section 101(a)(44)(A)(ii) of the Act. Further, as proposed, the petitioner's staffing levels by the end of the first year of operations will be sufficient to relieve the beneficiary from performing non-qualifying day-to-day operational and administrative duties associated with the design, marketing and sale of the company's products. In addition, the petitioner has demonstrated a substantial investment from the foreign entity, and a commitment to staffing the U.S. company, as evidenced by its quarterly wage report for the quarter preceding the filing of the petition.

The evidence of record, considered as a whole, establishes a realistic expectation that the petitioner will be able to support a primarily managerial or executive position within one year.

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 appeal will be sustained and the decision of the director will be withdrawn.

**ORDER:** The appeal is sustained. The petition is approved.