

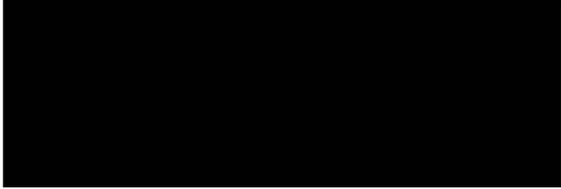
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U.S. Citizenship
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Services

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File: WAC 09 026 51319 Office: CALIFORNIA SERVICE CENTER Date: **JUL 28 2009**

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:

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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will remand the petition to the director for further action and entry of a new decision.

The petitioner seeks to employ the beneficiary temporarily in the United States 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, intends to operate as a manufacturing and import/export company. It claims to be a subsidiary of Dong Yang CMI, Inc., located in Seoul, Korea. The petitioner seeks to employ the beneficiary as president of its new office in the United States for a period of one year.

The director denied the petition, determining that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Although the petitioner indicated that it qualifies as a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), the director did not apply the applicable regulations at 8 C.F.R. § 214.2(l)(3)(v) in adjudicating 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 the director failed to consider the petitioner's status as a new office, and thus erred by requiring the petitioner to demonstrate that the beneficiary would immediately carry out primarily managerial or executive duties upon approval of the petition. Counsel submits a brief and additional evidence 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) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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 involves 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.

As a threshold issue, the AAO will address whether the petitioner qualifies as a "new office." The term "new office" is defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) as an organization which has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one year.

The term "doing business" is defined at 8 C.F.R. § 214.2(l)(ii)(H) as the 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 6, 2008, and indicated on the petition that the beneficiary is coming to the United States in order to open a new office. The petitioner submitted evidence that the U.S. company was incorporated in the State of California on May 24, 2007. In a letter submitted in support of the petition, the foreign entity's chairman and chief executive officer stated:

[The petitioning company] in USA was established originally in 2007 by Dong Yang CMI, Inc. in South Korea but there was no significant operation except for maintaining the status of U.S. corporation until we recently decided to initiate the operations. . . .

The petitioner submitted a copy of its commercial lease agreement, which has a commencement date of September 8, 2008, and submitted evidence in the form of wire transfer receipts for funds transferred from the foreign entity beginning in July 2008. The petitioner also submitted a business plan indicating that 2008 will be the company's first year of operation.

On appeal, the petitioner also submits a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, which indicates that the petitioner reported no assets, receipts or expenses for the 2007 fiscal year.

Based on the evidence of record, the petitioner has established that the instant petition should have been adjudicated under the regulations pertaining to new office petitions at 8 C.F.R. § 214.2(l)(3)(v). There is no evidence to suggest that the petitioner had been doing business for more than one year at the time the petition was filed.

The director's failure to adjudicate this matter as a new office petition led to a flawed analysis of the beneficiary's proposed employment in a managerial or executive capacity. 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 approach to petitions filed on behalf of managers or executives that are entering the United States to open a new office. Accordingly, 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.* Accordingly, the director's decision will be withdrawn.

Although the director's decision will be withdrawn, the AAO finds insufficient evidence to establish the petitioner's and beneficiary's eligibility for this visa classification under the "new office" regulations at 8 C.F.R. § 214.2(l)(3)(v). Accordingly, the petition will be remanded to the director for further action and entry of a new decision.

Upon review of the record, the AAO finds that additional evidence will be needed to satisfy the requirements of 8 C.F.R. § 214.2(l)(3)(v)(C), and to establish that the company would realistically grow to sufficient size to employ the beneficiary in a primarily managerial or executive capacity within one year of the approval of the petition.

The record as presently constituted contains no detailed description of the beneficiary's proposed duties as president of the U.S. company, and no indication of what duties he would be expected to perform at the end

of the first year of operations. The petitioner merely indicated that the beneficiary will "assure that the U.S. company undergoes a successful commencement of operation and gets established in a sound financial footing with an adequate client base." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's proposed activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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). Accordingly, the director is instructed to request a comprehensive description of the beneficiary's specific proposed duties and the approximate percentage of time the beneficiary will allocate to each of these duties.

The petitioner has also failed to outline its proposed organizational structure for the first year of operations. Rather, the petitioner has simply stated that the petitioner has hired one manager and is "expecting to employ more workers" within one year. The petitioner should be instructed to: identify all positions it has filled or intends to fill during the first year of operations and provide a timeline for hiring any additional workers; provide job duties, educational requirements and salaries/wages for each proposed position; and indicate whether the beneficiary's subordinates will be employed on a full-time, part-time or commissioned basis. The evidence submitted should establish who will be responsible for performing the petitioner's administrative, clerical and operational functions, including, if applicable, market research, marketing, advertising, purchasing, sales, customer service, administrative, distribution and clerical tasks and any other functions inherent to the type of business to be operated by the petitioner.

It is emphasized that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, November 6, 2008.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for this nonimmigrant visa classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence deemed necessary.

ORDER: The decision of the director dated November 19, 2008 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.