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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **MAR 07 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 appeal will be dismissed.

The petitioner, a Texas corporation, claims that it is engaged in the “manufacture and wholesale of a broad range of plastic bags, packaging supplies and poly tubing.” The petitioner states that it is a wholly-owned subsidiary of [REDACTED] located in China. Accordingly, the United States entity petitioned United States Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 seeks to employ the beneficiary to fill the position of vice president.

The director denied the petition on October 30, 2009, concluding that the petitioner does not qualify “under the special provisions governing ‘new office’ L-1s at 8 C.F.R. 214.2(l)(1)(ii)(F).” The director noted that the petitioner submitted documentation evidencing that it has been doing business in the United States for more than one year.

On November 30, 2009, the petitioner’s counsel timely filed the instant appeal. On appeal, counsel for the petitioner asserts that the petitioner has met the requirements for a “new office” petition. In particular, counsel asserts that the beneficiary is “coming to the United States to open and be employed in a new production facility of petitioner.” Counsel also states that “without the new production facility, petitioner is not going to hire 8 production facility employees who would be under the beneficiary’s management and direction.” Counsel further explains that it is filing the current petition as a new office. Counsel states that the “petitioner further pointed out that it is the petitioner, not its proposed production facility, [that] is the ‘new office’ as defined by the regulations.” Thus, counsel contends that the “Director clearly erred as a matter of law when she found that the ‘proposed facility’ is the new office and the petitioner is required to submit evidence of sufficient premises to house the ‘proposed facility.’”

The preliminary issue in this proceeding is whether the director should have applied the regulations at 8 C.F.R. § 214.2(l)(3)(v) to the facts of the instant case. As presently constituted, the record does not demonstrate that the petitioner is a new office under the regulations at 8 C.F.R. § 214.2(l)(3)(v).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F) provides:

New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means 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 submitted the U.S. company’s Form 1120, U.S. Corporation Income Tax Return, for 2008 that stated that the U.S. company made \$1,598,138.00 in gross sales. The petitioner also submitted the petitioner’s quarterly wage reports for 2008 that indicated the petitioner employed six individuals. The

petitioner also provided several invoices of the U.S. entity indicating that it is doing business. In the letter of support, the petitioner stated that "since its incorporation in 2005, [the petitioner] has been engaged in the business of selling and supporting [the foreign company's] full product line in the United States market." The petitioner acknowledges that it is doing business but it also states that it wishes to open a new production facility.

For purposes of the L-1 nonimmigrant visa category, the AAO considers the term "organization" to include the whole organization and not the individually incorporated petitioner. Critical to the use is the term "organization." The term "organization" is used frequently in the statute, regulations, and legislative history relating to the L-1 nonimmigrant visa. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (defining the terms "managerial capacity" and "executive capacity" in terms of the duties that an alien performs "within an organization."); *see also* 8 C.F.R. § 214.2(l)(1)(i) ("the organization which seeks classification of an alien as an intracompany transferee is referred to as the petitioner").

Congress has provided a statutory definition for the term "organization." Specifically, section 101(a)(28) of the Act, 8 U.S.C. § 1101(a)(28), provides:

The term "organization" means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

Given the broad statutory definition of "organization," it includes a company or corporation which in this case would be the petitioner including the new production facility. The new production facility would be a part of the structure of the petitioner and will have the same employer identification number as the petitioner. The one year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers, executives, and specialized knowledge employees that are entering the United States to open an entirely new office, as opposed to an office that is related to an existing U.S. entity. *See* 52 Fed. Reg. at 5740. Since the proposed production facility is part of a larger corporate organization that has been doing business in the United States for more than one year, that petitioner will not qualify to file as a "new office" petitioner.

Beyond the decision of the director, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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.

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.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

When examining the executive or 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's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states vague duties such as the beneficiary will be responsible for "directing and managing the establishment of a new bag production facility;" "budgeting;" and, "directing and supervising the work of Production Department." The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the production department and the duties to be performed by the subordinates in the department that the beneficiary will supervise. 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 activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will "prepare initial production plans and associated budgets," "hiring," "establish and direct training programs," and "prepare recommendations to develop new product lines." It appears that the beneficiary will need to establish the production facility from the beginning such as finding a location and developing all the policies and procedures and operations of a new production facility rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. at 604.

Although the petitioner claims that the U.S. entity will hire additional employees, the petitioner did not submit the job descriptions for the prospective employees, or a timeline for hiring all of the additional personnel listed in the proposed organizational chart. Based on the vague job description submitted with the petition, the director reasonably concluded that the petitioner has failed to demonstrate that the beneficiary would be primarily performing managerial or executive duties in his proposed position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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, that burden has not been met.

ORDER: The appeal is dismissed.