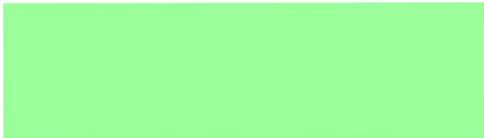




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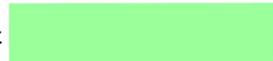
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OFFICE: CALIFORNIA SERVICE CENTER

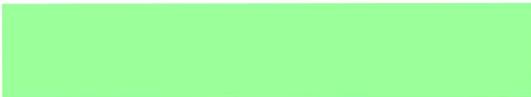
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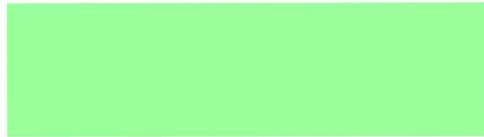
Petitioner:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. 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.

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. We will withdraw the director's decision and remand the matter to the service center for further review and issuance of a new decision.

The petitioner filed this nonimmigrant petition seeking to classify 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 California corporation established in [REDACTED] states that it is a logistics services firm. It claims to be a subsidiary of [REDACTED] located in Russia. The petitioner seeks initial approval so that the beneficiary may serve as its President for a period of five years.¹

The director denied the petition on July 7, 2014, finding that the petitioner would not be able to support an executive or managerial position by the end of the first year of operations. The director noted that the foreign entity did not appear to have the ability to pay the required start-up funds and that the company was not projected to show a positive net income until the third year of operations.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that the director misinterpreted the law by requiring the petitioner to be profitable in its first year of operations and misinterpreted evidence which demonstrates that the company had sufficient start-up capital. The petitioner states that the evidence submitted supports a finding that the petitioner will support a managerial position within the first year of operations.

I. The Law

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, Petition for a Nonimmigrant Worker, 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.

¹ The petitioner indicated, and the record reflects, that the beneficiary is coming to the United States to open a new office as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). Accordingly, if the petitioner establishes eligibility, the petition may be approved for a period not to exceed one year. See 8 C.F.R. § 214.2(l)(7)(i)(A)(3).

- (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(1)(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 (1)(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 pertinent regulations at 8 C.F.R. § 214.2(1)(1)(ii) define the term “qualifying organization” as follows:

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

II. The Issue on Appeal

The director denied the petition based on a finding that the petitioner failed to establish the size of the United States investment and the financial ability of the foreign entity to support the new office. The director also denied the petition, in part, based on information contained in the petitioner's business plan which indicated that the company did not expect to achieve a positive net income during the first two years in business.

On appeal, the petitioner has provided sufficient evidence to overcome the director's grounds for denial. The record supports a finding that the petitioner and parent organization have sufficient funds to cover the projected fixed costs and salaries for the first year of operations.

Moreover, the director's finding that the petitioner's business would not be profitable in its first two years of operation is beyond the scope of the regulatory requirements for a new office petition and cannot serve as the basis for denial of the petition. Accordingly, we will withdraw the director's decision dated July 7, 2014, as the petitioner has overcome the stated grounds for denial.

III. Additional Issues

Although the director's decision will be withdrawn, we find that there is insufficient evidence in the record to establish: (1) that the petitioner will be doing business as required; (2) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity within one year; and (3) that sufficient physical premises have been secured to house the new operations.

The first issue is whether the petitioner established that it will be doing business in the United States, as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(H):

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.

When a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. 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 commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business "for the previous year" through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

The business plan submitted in support of the initial petition calls into question whether the petitioner would begin doing business immediately upon approval. Specifically, the business plan states that the petitioner will "start offering its services to customers in [REDACTED] after the company establish strategic alliances and obtains commitments from the key partners involves in the logistics chain." Furthermore, the company milestones for "Year 1 [REDACTED]" state tasks such as open a bank account; select strategic partners and perform due diligence; create a web-site; develop logistics packages; develop a marketing strategy; and create a list of prospective clients. The second year of operations, according to the business plan, show that the petitioner will start active sales; rent a warehouse; hire a warehouse assistant/driver; rent/lease a delivery truck; and grow company business. Additionally, the petitioner's sales forecast, however, shows revenue of \$145,500 beginning in [REDACTED] with no projected income for [REDACTED]. Based on the plan as presented, it appears that the petitioner will not begin active sales and operations until the second year of business.

The second issue is whether the evidence supports a finding that the organization will support a managerial or executive position by the end of the first year of operations.

The position description submitted for the beneficiary in the business plan is vague, stating that the beneficiary will perform such duties as "manage and control the company's daily operations"; "lead the development of the company's strategy"; and "lead and oversee the implementation of the company's long and short term plans." 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 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).

In addition, it is not clear from the record who will be performing the day-to-day operations of the business, including conducting the sales function and administrative role of the business by the end of the first year of operations. The petitioner indicates that its services will include design of shipping routes, calculation of

expenses, various types of international shipping services, cargo handling and customs clearance services, product certification, insurance, and import/export consulting services. Therefore, the personnel plan calls into question whether the beneficiary will be directly performing the operations, sales, and administrative work of the organization. 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. 593, 604 (Comm'r 1988).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

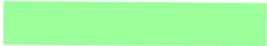
The business plan states that a "Logistics Manager" will be hired near the end of the first year of operations. The plan states that the Logistics Manager will be responsible for "management of logistics services, including warehouse operations and customer service." The petitioner does not state that any subordinate employees, other than the logistics manager, will be hired by the end of the first year of operations, and therefore the record as presently constituted does not indicate how its projected staffing would support the beneficiary's claimed managerial or executive position.

The third issue is whether the petitioner has shown that sufficient physical premises have been secured to house the new operations. The lease submitted with the initial petition shows a lease between the petitioner and [REDACTED] commencing on October 30, 2013 for a one year period. The lease is for [REDACTED]. The lease does not describe the amount or type of space available in the suite, and thus it is not clear whether the space will house anyone other than the beneficiary.

Additionally, the business plan states that "once the company starts generating sales, it will rent a warehouse and hire part-time employees." According to the business plan, the petitioner does not project rent expenses for any additional space until the second year of operations. If the petitioner is to operate a logistics and transportation firm, it is not clear how the office suite to be used for general office purposes will be sufficient to support their logistics operations by the end of the first year of operations.

Although the director's decision will be withdrawn, we find insufficient evidence in the record to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity, that the petitioner will be doing business as required, and that sufficient physical premises have been secured to house the new operations.

As these issues were not addressed in the director's decision, we will remand this matter to the director for entry of a new decision. The director should request any additional evidence deemed warranted and allow the



petitioner to submit such evidence within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse, shall be certified to the Administrative Appeals Office for review.