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U.S. Citizenship
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FILE: EAC 02 203 51805 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

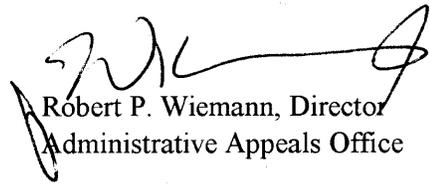
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


Robert P. Wiemann, Director
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 dismiss the appeal.

The petitioner is a Florida corporation engaged in the acquisition of a gas station and convenience store. The petitioner, a new office, currently employs the beneficiary as its president, and seeks to extend her temporary employment for two additional years. The petitioner filed a petition requesting an extension of the beneficiary's L-1A status. The director denied the petition noting that there is insufficient evidence that the beneficiary will be employed in an executive capacity.

On appeal, counsel for the petitioner stated that the director erred in concluding that the beneficiary would not be employed in an executive capacity. Counsel asserted that the petitioner has proven that the proposed job duties of the beneficiary are executive in nature.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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) 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 (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.

In addition, pursuant to the regulation at 8 C.F.R. § 214.2 (l)(14)(ii), a visa petition involving the opening of a new office may be extended by filing a new Form I-129 and submitting the following evidence:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the beneficiary will be employed in the United States in a primarily executive capacity.

In the petition, the petitioner claimed that the beneficiary would be responsible for the overall development and major decision making for the corporation. The petitioner further explained in an accompanying letter that the beneficiary's executive job duties would consist of the following:

- Sourcing and reviewing available business purchases,
- Preparing feasibility reports and financial planning,
- Research into location and area demographics,
- Reviewing sellers details and financial status of business being sold,
- Preparation of financial forecasts, budgets and cash flows,
- Signing of all documents on behalf of the corporation,
- Issuance of checks for purchase on behalf of the corporation,
- Signing of legal documents for [the petitioning organization] to trade in Delaware,
- Establishment of the new management,
- Overall control of the business,
- Interviewing of existing staff to offer continued employment,
- Preparing new staff training manual,
- Training Manager on new corporation's policies, procedures and expectations,
- Review of current services,
- Introduction of new services, such as lottery ticket sales, deli products,
- Feasibility of new development plans including capital required,
- Long range development planning,
- Setting budgets and cash flows,
- Setting sales goals,
- Setting staff remuneration and vacations,
- Monitoring weekly sales figures and profit margins and advising Manager.

The director subsequently issued a request for additional evidence in which she explained that the petitioner had not sufficiently established that the beneficiary is employed in an executive capacity. The director asked that the petitioner submit the following supplemental evidence: (1) a description of the duties performed by the beneficiary in the past year and the duties she will perform if the petition is extended; (2) a copy of the U.S. company's business plan, giving specific dates for each proposed action for one year, starting with the

date of the company's incorporation; and, (3) photographs of the interior and exterior of all of the premises that have been secured for the U.S. entity.

In its response, the petitioner submitted a list of the beneficiary's job duties during the past year, similar to those already provided above. In addition, the petitioner claimed that over the next two months, the beneficiary would be involved in the following:

- Attending an interview with Sunoco to finalize details of a dealership
- Attending a training seminar on gas station operations
- Issuing checks for purchase on behalf of the corporation
- Attending attorney's meetings to sign all legal documents on behalf of the corporation pertaining to the purchase of the business
- Establishing the new management
- Overall control of the business
- Interviewing existing staff to offer continued employment

The petitioner also provided a list of the proposed duties that the beneficiary will perform following the purchase of the gas station and convenience store.

In the business plan submitted by the petitioner, the petitioner noted that it anticipated settlement for the purchase of the gas station and convenience store to take place on or about August 1, 2002. Prior to this, the beneficiary will attend a seminar, sponsored by Sunoco, in which new dealers are informed of gas station operations. The petitioner expects that the gas station will be operating by the beginning of August, and that the beneficiary will begin to review the layout of the store, remodel where necessary for improvement of sales, meet with architects and builders, and determine different avenues for advertising.

In her decision, the director denied the petition stating that the petitioner had failed to clearly demonstrate that the beneficiary's proposed employment would involve executive authority over any U.S. operation. In concluding such, the director focused on the fact that the business in the U.S., specifically the gas station and convenience store, had not yet been purchased, and therefore could not support an executive position.

On appeal, counsel made the following assertions: (1) that the director erred in concluding that the beneficiary did not establish that she will be working in an executive capacity; (2) that the petitioner satisfied the requirement of proving future executive duties of the beneficiary because the beneficiary is in the process of purchasing the gas station and convenience store and will attend a training program sponsored by Sunoco; and, (3) that the beneficiary performed her executive duties when she located and entered into a contract to purchase the business in Delaware.

On review, the record does not demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive position. Pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C), within one year of the approval of a petition for an individual employed in a new office, the U.S. operation must be able to support an executive or managerial position. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

In the present matter, the petitioner's original petition was approved on June 25, 2001. Therefore, pursuant to the regulations, the U.S. operation must be sufficiently operating and able to support a managerial or

executive position one year later. As of June 25, 2002, the petitioner had not yet purchased the gas station and convenience store. The petitioner claimed in various documents in the record that the gas station and convenience store would be purchased in August 2002. Following the purchase of this business, the petitioner claims that the beneficiary will be functioning in an executive role, including controlling the overall business, establishing new management, and performing long-range development planning. As the petitioner does not presently own the gas station, there is no place of business in which the beneficiary can function as an executive. The petitioner must establish eligibility as a manager or executive 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).

In addition, pursuant to 8 C.F.R. § 214.2(l)(14)(ii), when filing a petition for a visa extension, the petitioner must provide a statement of duties performed by the beneficiary for the previous year and under the extended petition, as well as a statement describing the staffing of the new operation when the beneficiary will be employed in a managerial or executive capacity. The description must be sufficient to determine that the duties to be performed are primarily managerial or executive in nature.

The job descriptions provided by the petitioner do not establish how the beneficiary is relieved from performing the non-executive duties of the petitioning company. Although allowing for a start-up phase, the regulations require that an organization be established with a staff who will relieve the beneficiary from performing non-qualifying duties within one year of the approval of the petition. From the evidence provided, the beneficiary is performing all of the steps necessary to acquire the gas station and convenience store, including both the executive and non-executive job duties. The petitioner has not accounted for any subordinate individuals who are employed by the petitioning organization. Rather, the petitioner has asserted that any proposed employees will be hired following the purchase of the new business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Therefore, the evidence is insufficient to establish that the beneficiary is working in a primarily executive capacity.

An issue not addressed by the director is whether the petitioner has satisfied the requirement that the United States entity has been doing business for the previous year. In the regulation at 8 C.F.R. § 214.2(l)(14)(ii), a visa petition involving a new office may be extended by providing, among other documentation, evidence that the U.S. company has been doing business, as defined in paragraph (l)(1)(ii)(H) in the regulations, for the previous year. The phrase "doing business" is defined as the regular, systematic, and continuous provision of goods and/or services by a qualifying organization. 8 C.F.R. § 214.2(l)(1)(ii)(H). The petitioner has failed to demonstrate that it has been doing business in the United States for the past year. The beneficiary has essentially spent the last year searching for a business to acquire. As the petition will be dismissed on other grounds, this issue need not be addressed further.

An additional issue not addressed by the director is the financial status of the U.S. operation. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(E) requires that a petitioner seeking a visa extension for a new office provide evidence of the U.S. company's financial status. The petitioner in the present case has submitted bank records to demonstrate that the petitioner has sufficient funds to purchase the gas station and convenience store. However, there is no evidence of additional cash available to pay salaries and expenses once the

business is purchased and operating. Again, as the petition will be dismissed, this issue need not be considered further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.