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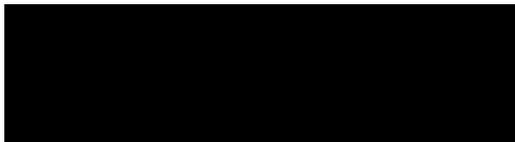


U.S. Citizenship
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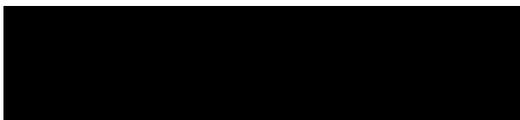
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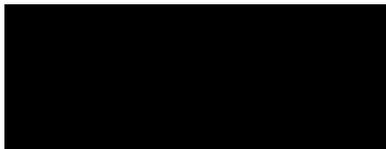
FILE: SRC 02 158 50050 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



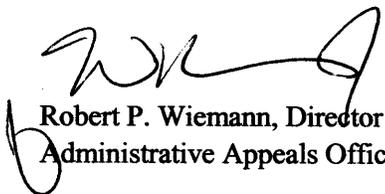
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 claims to be engaged in the business of exporting equipment and parts to facilitate the manufacturing of plastic goods. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and states that additional evidence and/or information will be submitted in 60 days. To date, however, more than one year since filing the appeal, the petitioner has not submitted any further information. Therefore, the record will be considered complete as currently constituted.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (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 U.S. petitioner claims to be a branch of Manufacturas Plasticas, located in Venezuela. However, the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state that a *branch* is an operation division or office of the same organization housed in a different location. In the instant case the petitioner has submitted a Certificate of Incorporation indicating that it was incorporated in the state of Florida in the year 2000. As such, the U.S. petitioner is not a part of the foreign organization. Rather, it has established itself as a separate legal entity and may fall under the definition of subsidiary or affiliate as defined by the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) and (L), respectively. The initial petition was approved and was valid from May 4, 2001

to May 3, 2002 in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$60,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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.

In the petition, the petitioner stated that the beneficiary would "open, run and operate the new company in Miami, Fl." No additional information about the proposed job duties was provided. Therefore, on August 14,

2002 CIS issued a request for additional evidence instructing the petitioner to submit additional information to establish that the beneficiary will be employed in a managerial or executive capacity. The petitioner responded with a statement containing the following description of the beneficiary's duties:

- Establish contact with providers of products and services
- Design sales and marketing strategies
- Direct and evaluate markets both at a national and international level.
- Evaluate and decide [sic] offers made by the various [sic] providers
- Control and evaluate the execution of the yearly budget
- Select and hire personnell [sic]

The petitioner also stated that it had hired its first employee, aside from the beneficiary, in June 2002 and claimed that a second employee was to commence employment on October 1, 2002. Thus, as of April of 2002, when the petition to extend the beneficiary's authorized stay was filed, the petitioner's sole employee was the beneficiary.

Furthermore, the petitioner claimed that there was no business activity until the original L-1 visa was approved in September of 2001. However, the record contains CIS documentation contradicting the petitioner's claim regarding the date of the visa approval. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, the CIS documentation indicates that the petition was approved and was valid from May 4, 2001, not from September 2001, as suggested by the petitioner.

On November 20, 2002 the director denied the petition noting that the beneficiary will primarily be performing the daily operational tasks of the petitioning organization.

On appeal the petitioner asserts that the beneficiary qualifies for classification as a manager or executive because he has executed the functions of a general manager. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Although the petitioner submits documentation indicating that it has hired additional personnel, none of the hiring took place as of the date the petition was filed. It is noted 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). In the instant case the record indicates that even though the initial petition to open a new office was approved on May 4, 2001, the beneficiary did not actually arrive to the United States until September of 2001. Regardless of the beneficiary's reasons for not coming to the United States when the initial visa petition was first approved, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position.

There is no provision in CIS regulations that allows for an extension of this one-year period or that allows for the one-year period to commence upon the beneficiary's arrival in the United States. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, at the time the petition was filed to extend the beneficiary's stay the petitioner did not have a support staff to relieve the beneficiary from having to perform non-qualifying duties. 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). The record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a managerial or executive capacity. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. For this reason the petition cannot be approved.

Beyond the decision of the director, the record lacks sufficient evidence that a qualifying relationship exists between the petitioner and the foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The record contains a signed statement from the foreign entity's president authorizing the beneficiary to open a checking account in the United States with an initial amount of \$20,000, which he says will be used as capital to fund the new company. However, this statement does not establish that the foreign company is the source of the funding or that the funding was actually used to purchase ownership of the U.S. entity. The petitioner has not established that it is a qualifying organization, as required by 8 C.F.R. 214.2(l)(14)(ii)(A). For this additional reason, this petition may not be approved.

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.