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U.S. Citizenship
and Immigration
Services

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File: SRC 04 008 50601 Office: TEXAS SERVICE CENTER Date: APR 01 2005

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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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 filed this nonimmigrant petition seeking to extend the employment of its president 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 is a corporation organized in the State of Florida that is engaged in the wire transfer business. The petitioner claims that it is the subsidiary of [REDACTED], located in Maracaibo, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner had not established that: (1) it had been doing business as required by the regulations; (2) the petitioner had not established that it generated sufficient revenue to support a managerial or executive level position; and (3) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, the petitioner states that at the time of the filing of the petition, the petitioner was waiting for the issuance of its business license, and thus was prohibited from commencing business operations until the license was issued. The petitioner notes on appeal that since the denial of the petition, the license had in fact been issued and the petitioner had since commenced its business operations. In support of these contentions, the petitioner submits a brief and additional new evidence for consideration.

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)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The first issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" 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."

In this matter, the petitioner claims that it is engaged in the business of wire transfers. The petitioner repeatedly alleged prior to adjudication that the U.S. entity had not yet commenced its business operations because it had not yet received its Wire Transmitter License, which it had applied for on June 25, 2003. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business. Specifically, the director noted that the petitioner's revenue for the calendar period ending July 31, 2003 was zero, and that it paid no salaries to employees.

On appeal, counsel for the petitioner submits copies of its newly acquired license, and alleges that since the license was issued on October 22, 2003, two days prior to the denial, the petition should be reconsidered on this basis. In support of this contention, the petitioner submits a copy of said license along with a statement confirming that the petitioner had added the beneficiary and two new employees to the payroll. The petitioner

further stated that at the time of the filing of the appeal on November 11, 2003, the petitioner employed four employees.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. The record indicates that the beneficiary was granted a one-year period of stay from November 7, 2002 to November 6, 2003 to open a new office. The record further indicates that the beneficiary entered the United States shortly after the visa approval to begin her duties. On or about January 30, 2003, the petitioner retained the services of a local law firm to assist with the acquisition of a wire transmitter license. However, the license application was not filed until June 25, 2003. The AAO further notes that the applications for other important documents, such as a Certificate of Use and an Application for Occupational License, were not filed until June 2003. There is no explanation as to why there was such a significant delay in the filing of these applications. In addition, there is no documentation or information regarding the activities of the beneficiary and the petitioner during this time period. In fact, every attempt by the director to solicit further information from the petitioner was unsuccessful, with the petitioner always responding that it had not yet commenced business operations.

Based on this information, it is clear that the petitioner was not doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO understands that the petitioner was required to wait for the issuance of the Wire Transmitter License prior to engaging in business transactions. However, the record is devoid of an explanation as to why the petitioner waited so many months before filing the relevant applications, and further lacks any explanation or documentation regarding other activities engaged in by the petitioner to promote its business during this period. A letter submitted on appeal, from the law firm retained by the petitioner, clearly states that the average wait time for a Wire Transmitter License was six months. The fact that the petitioner did not request this license until June of 2003, five months prior to the visa expiration, does not excuse the petitioner from meeting the regulatory requirements.

The regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted at the time of filing confirmed that the petitioner had not been conducting business as required. The fact that the business license was obtained several days prior to the expiration of the beneficiary's stay does not automatically entitle the petitioner to an extension of the visa, for it fails to change the fact that the petitioner failed to conduct business during the previous year. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner generated sufficient revenue from which it could support a managerial or executive position. The regulations at 8 C.F.R. §§ 214.2(l)(14)(ii)(d)-(e) require the petitioner to submit evidence of the U.S. entity's financial status, as well as evidence of wages paid to its employees, in order to be eligible for an extension. In this case, although requested by the director, the petitioner was unable to provide evidence establishing that it paid wages to employees. In addition, a financial statement supplied indicated that the petitioner's net revenue was zero.

By its own admissions, the petitioner states that the foreign entity paid the beneficiary's salary, since the U.S. entity had yet to commence business. There were no available payroll tax records or W-2 forms which established that the petitioner had the ability to pay wages, although it was alleged that one person, [REDACTED] would eventually be compensated as an independent contractor although no records of this compensation were yet available. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Since the petitioner had no revenue and paid no wages to employees during its first year of operations, the AAO concurs with the director's finding that the petitioner was unable to financially support a managerial or an executive position by the end of its first year of operations as required by 8 C.F.R. § 214.2(l)(14)(ii)(D)-(E).

The third issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 initial petition, the petitioner submitted an addendum outlining the beneficiary's proposed duties. Specifically, the petitioner stated that the beneficiary will:

Plan, develop and establish policies & objectives of [the] corporation. In addition, she will plan business objectives, develop organizational policies to coordinate functions and operations. She will establish responsibilities and procedures. She will review activity reports and financial statements to determine progress and status in attaining objectives. She will direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity. She also will plan and develop public relation policies designed to improve [the] company's image and relations with customers, employees, and public.

Based on the evidence submitted with the initial petition, the director concluded that the record contained deficiencies. Thus, on October 15, 2003, the director requested additional evidence. Specifically, the director requested evidence establishing the need for the extension of the beneficiary's stay, and specifically requested further details of the beneficiary's duties, including who would be performing the routine, non-executive and non-managerial tasks of the company if the beneficiary was its sole employee.

The petitioner submitted a response on October 16, 2003. With regard to the director's question as to who would perform the routine tasks of the business, the petitioner stated that there were no routine tasks to be performed because the business was not yet operational. The petitioner continued by explaining the beneficiary's involvement in the retention of the local law firm to handle its license application in January of 2003, and concluded by stating that no further business dealings could be undertaken until the license was issued.

On October 24, 2003, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, concluded that the beneficiary was not acting in a primarily managerial or executive capacity since she was not supervising a staff of professional, supervisory, or managerial employees, and did not employ a sufficient number of subordinate employees to relieve her from performing the routine tasks necessary to maintain business operations. In addition, the director concluded that based on the petitioner's statements, it was impossible to conclude that there was sufficient work to allow the beneficiary to function in such a capacity.

On appeal, the petitioner reiterates that it is still in the start up phase, but since it had recently obtained its license, the beneficiary could now be employed by the U.S. entity along with two additional employees. This argument is unpersuasive for two reasons.

First, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that since the denial of the petition, it has hired two additional employees and that it plans to hire additional managers and employees in the future. However, 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. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Second, there is no indication that the beneficiary has actually been performing any duties during the past year. By the petitioner's own admission, the U.S. entity had not commenced business at the time of the petition's filing. The only notable action by the beneficiary was the retention of the local law firm to handle the application for the wire transmitter license in January 2003. The actual duties themselves 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 this case, since the beneficiary's duties appear to be few and far between, it is impossible to conclude that she has been acting in a primarily managerial or executive capacity. At best, the beneficiary could be found to have performed the necessary start up and administrative tasks necessary to begin business operations, since the petitioner provided no evidence that it employed a subordinate staff to relieve the beneficiary of mundane duties. This classification is also insufficient to warrant a favorable conclusion in this matter, since 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).

Finally, the AAO concurs with the director's conclusion that the beneficiary was primarily engaged in day-to-day tasks as opposed to managerial or executive duties based on the small staff employed by the U.S. petitioner. Counsel correctly asserts that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. It is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C); *see, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See id.*

The petitioner has failed to establish that the beneficiary has been and will continue to be employed in a managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(iv). The regulation at 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. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner, now in its second

year of business, has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition will be denied.

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. As the previous decision will be affirmed, this issue need not be examined further.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.