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File: SRC 03 077 51350 Office: TEXAS SERVICE CENTER Date: APR 28 2005

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

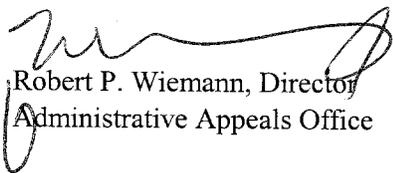
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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 appeal will be summarily dismissed.

The petitioner seeks to extend the employment of its chief executive officer 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 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. The director determined that the petitioner had failed to demonstrate that the beneficiary had been and would continue to be employed in the United States in a primarily managerial or executive capacity.

The regulation at 8 C.F.R. § 214.2(l)(3)(ii) states that an individual petition filed on Form I-129 shall be accompanied by 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. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(c)-(d) 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 a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition, as well as 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.

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.

The director concluded that based on the evidence submitted, the beneficiary had not been and would not be performing primarily managerial or executive tasks. In addition, upon examining the nature of the staffing of the U.S. enterprise after its first year of operation, the director determined that it was unrealistic to presume that the petitioner could employ the beneficiary in a bonafide managerial or executive position when the beneficiary was its only employee. The director found that the petitioner had failed to demonstrate that the beneficiary would manage or direct a department, subdivision, function, or component of the U.S. organization, and further concluded that the petitioner had not shown that the beneficiary would be supervising other managerial, professional, or supervisory employees. Since the record indicated that after one year of operations, the beneficiary remained the petitioner's sole employee, the director determined that the U.S. business had not expanded to the extent where it could employ the beneficiary in a full-time managerial or executive position. Consequently, the director found that in order to ensure the continued operation of the business, the beneficiary would be required to perform the day-to-day administrative functions of the organization, and thus could not be employed in a capacity that was *primarily* managerial or executive.

On appeal, counsel filed a Form 1-290B and stated the following:

The Center Director erred in failing to approve the L-1A extension petition for the following reasons:

The position of the Company President in the instant case is clearly an executive and managerial position;
The Company has made sufficient progress since its inception in the United States;
The Company's business and employees have grown and continues to grow;
For such other and further reasons as shall be set forth in the Brief of Petitioner to be filed hereinafter.

Counsel further stated that he would be submitting a brief and/or additional evidence to the Administrative Appeals Office within 60 days of the filing of the appeal.

Counsel dated the appeal October 2, 2003. More than one year has passed since the filing of the appeal, yet as of the date of this decision, the AAO has received nothing further.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

Counsel here has not addressed the reasons stated for the denial and has not provided any additional evidence. Although counsel alleges that the director erred in failing to approve the petition, he fails to address the director's specific reasons for the denial. In this case, counsel merely provides brief sentences asserting that the beneficiary

and the petitioner are qualified for the benefit sought. Without documentary evidence to support these claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The filing by an attorney of an appeal that is summarily dismissed under this section may constitute frivolous behavior as defined in 8 C.F.R. §292.3(a)(15). Inasmuch as counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the appeal must therefore be summarily dismissed.

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. The petitioner has not met this burden.

ORDER: The appeal is summarily dismissed.