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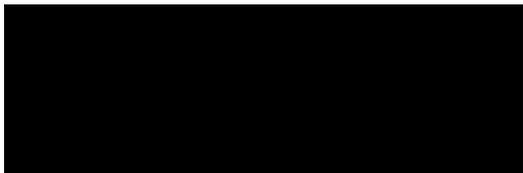
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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Services

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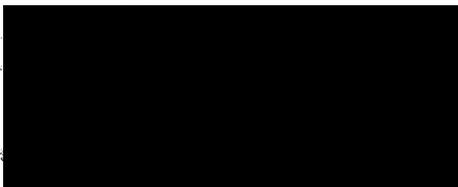


FILE: WAC 03 206 52256 Office: CALIFORNIA SERVICE CENTER Date: JUN 10 2005

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

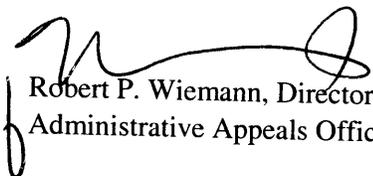
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was incorporated April 28, 2003, and claims to be an alternative medicine, holistic center. The petitioner claims to be a subsidiary of SunPloot Pharmaceuticals, located in Maradana, Sri Lanka. It seeks to employ the beneficiary temporarily in the United States as the president of its new office for twelve months, at a monthly salary of \$3,000.00. The director determined that the petitioner failed to establish that the financial status of the United States entity was adequate to commence doing business and to remunerate the beneficiary for his services as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2).

On appeal, counsel disagrees with the director's decision and asserts that the evidence submitted is sufficient to establish 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.

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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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(1)(3)(v) states 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.

In a letter of support, dated June 10, 2003, the petitioner stated that the U.S. entity was established in 2003, and its purpose is to own and operate an alternative medicine center (holistic center). The petitioner further stated that the entity planned to operate its facilities to the exact specifications of the foreign entity. As evidence, the petitioner submitted copies of the U.S. entity's Articles of Incorporation, by-laws, meeting minutes, stock share certificate number 1, stock ledger, and state notice of stock transaction. The petitioner also submitted copies of the foreign entity's Certificate of Registration, balance sheet and income statement as of March 31, 2003, monetary conversion table, import and export licenses, invoices, stock valuation report, lease agreement, patent medicine lists, and a patient information kit.

The director submitted a request for evidence, dated July 10, 2003, in which he requested that the petitioner submit proof of stock purchase, showing that the foreign entity paid for the recorded 10,000 shares of the U.S. entity's stock.

In response to the request for evidence, the petitioner submitted copies of Bank of America confirmation letters confirming two wire transfers sent from the foreign entity's bank account, totaling \$10,000.00, and notification of wire transaction from Watton National Bank Limited, located in Sri Lanka.

The director submitted a second request for evidence, dated August 18, 2003, in which he specifically requested, in part:

What is the projected **total investment** in the U.S. within 12 months of opening a new office in the U.S.? (Emphasis in original.) Submit a timetable to transfer the proposed total investment in the U.S.

What is the cost of the newly created business? (Emphasis in original.) - The cost of a newly created business is the actual cost needed to establish such a business to the point of being operational. (Emphasis in original.) The petitioner should have already purchased at least some of the necessary assets and be able to provide cost figures for additional assets needed to run the business. This is best accomplished by submitting a detailed description of all start-up costs to open a new office in the U.S. – The evidence should include: Payments for leases or rents; Purchase of equipment and for inventory on hand (as evidence by invoices or contracts for substantial purchases of equipment and inventory); The value of goods or equipment transferred to the United States; Appraisals of the market value of land, buildings, equipment, and machinery; accounting audits; Records required by various governmental authorities, etc.

Projected Income Statement: A minimum of 4 quarters projections should be made for the first year of operations. (Emphasis in original.) The projections should include at a minimum the following:

- ⇒ Sales (including costs of sales)
- ⇒ Purchases (including costs of purchases)
- ⇒ Gross Profit (Loss)
- ⇒ Operating Expenses: Amortization, Auto, Bank Charges, Depreciation, Janitor, Legal & Professional, Licenses & Fees, Meal & Entertainment, Office Expense, Outside Services, Printing, Rent, Supplies, Telephone, Travel, Utilities...
- ⇒ Income From Operations
- ⇒ Federal Income Tax
- ⇒ Franchise Tax
- ⇒ Net Income

In response to the director's request for evidence, the petitioner submitted the following estimates:

TOTAL INVESTMENT IN THE FIRST 12 MONTHS OF OPERATIONS

\$10,000 Sent as initial capital, for payment of shares.

\$20,000 Valued Ayurvedic medicine sent 07/15/2003.

\$14,000 Valued equipment and medical furnishings sent on 8/12/2003.

\$30,000 Additional capital to be sent upon successful transfer of [the beneficiary]. Date to be determined.

TOTAL INVESTMENT UNTIL FURTHER BOARD MEETING AND FINANCIAL ASSESSMENT \$74,000.

COST OF NEWLY CREATED BUSINESS

1. First and last months lease	\$4,000
2. Medicine inventory (Paid by foreign entity and shipped on 07/15/2003 by Dr. Sunethra Dasanayaka)	\$20,000
3. Equipment/Furnishings (Paid by foreign entity and shipped on 08/12/2003 by Denny Bros.)	\$14,000
4. Electricity, phone installation/equipment, health permits, misc.	\$2,000
 Total	 \$40,000

The petitioner submitted copies of proforma invoices from Denny Brothers, dated August 12, 2003, and [REDACTED] the petitioner also submitted a copy of a projected income statement for the first four quarters of the U.S. entity's business year.

The director subsequently denied the petition after determining that the evidence was insufficient to establish that the size of the United States investment was adequate and that the foreign entity possessed the financial ability to remunerate the beneficiary and to commence doing business in the United States. The director noted the U.S. entity's initial investment was \$10,000.00, office rent was \$2,000.00 per month, and the beneficiary's salary would be \$36,000.00 per year. The director also noted the U.S. entity's total investment in the first twelve months as provided by the petitioner in response to the director's request for evidence. The director stated that although the petitioner responded to his request for evidence on August 20, 2003, it failed to provide evidence of the shipment of the Ayurvedic medicine, equipment, and medical furnishings as claimed. The director further stated that the record only contained evidence of the initial \$10,000 investment and that such an investment did not appear sufficient to cover the cost of starting a new business, inclusive of the beneficiary's salary.

On appeal, counsel disagrees with the director's decision and asserts the total financial investment in the U.S. entity totals approximately \$74,000.00. Counsel further asserts the initial capitalization includes \$10,000 cash from the sale of 10,000 shares of the U.S. entity's stock and that approximately \$34,000 had been paid to procure inventory and office furniture. Counsel contends that upon approval of the instant petition, the petitioner will arrange for shipment of materials and relevant stock to the United States. Counsel further contends that in response to the director's request for evidence the petitioner erroneously stated that the materials were to be shipped upon payment, where as in fact, the petitioner will make final shipping arrangements upon a favorable adjudication of the petition. Counsel also contends that the materials, office furniture, and stock will be considered assets rather than liabilities because they have been paid for in full. As evidence on appeal, the petitioner submitted copies of an amended proforma invoice number 0001, dated July 15, 2003, from [REDACTED] a receipt, dated September 2, 2003, acknowledging the cash receipt of \$20,974.87 US from the U.S. entity as payment in full for the supplies described in the July 15, 2003 invoice, and a monetary conversion table showing rupee amounts and their U.S. currency equivalents. The petitioner also submitted copies of a purchase order and an amended proforma invoice number 9876 from [REDACTED] dated August 12, 2003, a receipt, dated September 2, 2003, acknowledging the cash receipt of \$14,650.79 US from the U.S. entity as payment in full for the supplies and equipment described in the August 12, 2003 invoice, and a monetary conversion table showing rupee amounts and their U.S. currency equivalents. The petitioner submitted a letter, dated October 3, 2003, from MIT cargo acknowledging that [REDACTED] have booked space for a 2x20' container to be shipped to the U.S.

entity in December of 2003. The petitioner also submitted copies of three transmittal of funds request made by the foreign entity to Hatton National Bank Limited of Sri Lanka. The requests are dated October 10, 2003, and are in the amount of \$5,200 US, \$5,600 US, and \$5,000 US respectively. The petitioner submitted a letter from the Hatton National Bank Limited, dated October 16, 2003, confirming the foreign entity's bank balance of RS 1,010,731.66.

There has been insufficient evidence submitted by the petitioner to establish that the size of the United States investment is adequate and that the foreign entity has the financial ability to remunerate the beneficiary and to commence doing business in the United States as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). After the director requested additional documentation on this issue, the petitioner failed to submit sufficient evidence. On appeal, counsel relies on evidence that was requested but not produced until after the initial decision to deny the petition was made by the director. The petitioner submitted amended copies of proforma invoices, a purchase order, cash payment receipts, a letter acknowledging cargo space for shipment of inventory and supplies, bank transmittal of funds request, and a bank balance statement. It is noted that the petition in the instant matter was filed July 7, 2003, the director's request for evidence is dated August 18, 2003, and the director's decision was issued September 18, 2003. 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). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981).

Although the petitioner infers that the regulations do not require that the business be fully funded at the time of the application, it is necessary for the petitioner to establish from the onset that the new office has been adequately funded to commence doing business in the United States. 8 C.F.R. § 214.2(l)(3)(v)(C)(2). Evidence of a \$10,000 wire transfer to the U.S. entity in payment for 10,000 shares of stock in the company is not sufficient to establish that the organization was adequately funded or had received sufficient capital to commence doing business at the time the petition was filed. Furthermore, based upon information contained in the U.S. entity's business plan and projected income statement, and in light of the nature of the proposed business, it is highly unlikely that the initial start-up capital in the amount of \$10,000 US would suffice to cover the entity's operating expenses, inventory purchases, and the beneficiary's salary of \$36,000 US. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, another issue in the proceeding is whether the petitioner has submitted sufficient evidence to establish that the U.S. entity will be able to support a managerial or executive position within one year of operation in compliance with the regulatory requirements for a "new office" pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C). Although the regulations do not require proof that the duties performed by the beneficiary in the first year were entirely managerial or executive, there must be some evidence of managerial or executive activity to substantiate the hierarchical position. The petitioner submitted a copy of the U.S. entity's proposed organizational chart that showed the company proposed to hire a president, operations manager, specialist, masseuse, and cashier/stockperson. The chart also indicates projected employee salaries. The record does not demonstrate that the U.S. entity will contain the organizational complexity to support the proposed managerial or executive staff position. In addition, the petitioner failed to submit evidence that shows in detail how the new business will be fully operational within one year, with employees in place and doing business by providing a product or service. Although the petitioner states that it intends to hire new employees it has not provided detailed position descriptions to show that they will be employed in other than non-professional positions.

Although specifically requested by the director, there has been no evidence presented that details the time frame in which new employees will be hired, what the new hires' duties will consist of, or how the beneficiary's duties will interrelate with that of the new hires. There is no evidence to show that the beneficiary will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. Furthermore, the petitioner's evidence is not sufficient in establishing that the beneficiary will be directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher level executives.

Rather than the beneficiary functioning at a senior level within the organizational hierarchy within one year of operation in the United States, it appears from the record that he will continue to perform the functions of the organization and carry out the day-to-day activities of the business. *See Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988)

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.2nd 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.