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D-7

FILE: SRC 04 203 51546 Office: TEXAS SERVICE CENTER Date: **APR 24 2006**

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, 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 states that it is engaged in information technology and international trade. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager. The director denied the petition based on the conclusion that the petitioner failed to establish that the beneficiary has been and will continue to be employed in a managerial or executive capacity. Specifically, the director noted that the beneficiary and one recently hired employee were the only persons in charge of operating the petitioner's business, which involved the generation of sales through direct contact with customers. The director noted that the evidence contained in the record indicated that the beneficiary engaged in numerous non-qualifying duties, and that the petitioner did not appear to be able to support the beneficiary in a primarily managerial or executive position after its first year of operations.

On appeal, counsel for the petitioner indicated on Form I-290B that it would submit a brief and/or additional evidence to address the director's denial within 30 days.<sup>1</sup> Although counsel submitted a brief statement on the Form I-290B, it failed to adequately address the director's conclusions. In this brief statement, counsel for the petitioner states that the director "summarily denied" the petition, and bases this conclusion on the fact that the decision was concise. Counsel further asserts that the director erred by not issuing a request for evidence in this matter, and claims that had the request for evidence been issued prior to adjudication of the petition, the petitioner could have presented additional evidence confirming the expansion of the petitioner's staff that had subsequently relieved the beneficiary from performing non-qualifying duties since the filing of the extension. Counsel further contends that the director erred because "to just casually deny the extension without a chance to respond is arbitrary and capricious, and has placed the petitioner and his family out of status in the U.S. after having invested so much money in this country's economy."

Counsel's assertions are not persuasive for two reasons. First, counsel contends on appeal that the director erred by failing to request further evidence before denying the petition. The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Second, counsel argues that had a request for evidence been issued, the petitioner would have submitted evidence showing that "after filing the extension and before the decision, the company hired two more employees" which, counsel asserts, would apparently have qualified the beneficiary for the benefit sought. This assertion is likewise erroneous.

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 this matter, counsel presumes

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<sup>1</sup> On March 22, 2006, the AAO sent a fax to counsel. The fax advised counsel that no evidence or brief had ever been received in this matter and requested that counsel submit a copy of the brief and/or additional evidence, if in fact such evidence had been submitted, within five business days. As of the date of this decision, the AAO has received no response from counsel or the petitioner.

that the petitioner's expansion of its staff prior to the denial of the extension satisfied the regulatory requirements. This is incorrect. 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 Citizenship and Immigration Services (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. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

On review, 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 evidence of record indicates that the beneficiary oversees one administrative employee, and no evidence has been presented to establish that this employee is supervisory, professional, or managerial such that the beneficiary's supervisory position over her would establish his managerial capacity. See § 101(a)(44)(A)(ii) of the Act.

The petitioner's general objections on the Form I-290B, without specifically identifying any errors on the part of the director with regard to the conclusions about the beneficiary's managerial and/or executive capacity, are simply insufficient to overcome the well-founded and logical conclusions the director reached based on the evidence submitted by the petitioner. 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).

On the Notice of Appeal received on October 18, 2004, the petitioner clearly indicates that it would send a brief with the necessary evidence to the AAO within thirty days. According to 8 C.F.R. § 103.3(a)(2)(i), the petitioner "shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision," which in the case at hand would be no later than November 17, 2004. While the petitioner may request that it be granted additional time to submit an appeal, no such request was made in this case. See 8 C.F.R. § 103.3(a)(2)(vii). Even if additional time to submit a brief in support of the appeal had been requested and approved, to date there is no indication or evidence that the petitioner ever submitted a brief and/or evidence in support of the appeal with the Service or with the AAO. As stated above, absent a clear statement, brief and/or evidence to the contrary, the petitioner does not identify, specifically, an erroneous conclusion of law or statement of fact. Hence, the appeal must be summarily dismissed. See 8 C.F.R. § 103.3(a)(1)(v).

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, 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.

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. Inasmuch as counsel has failed to identify specifically an

erroneous conclusion of law or a statement of fact in this proceeding, the petitioner has not sustained that burden. Therefore, the appeal will be summarily dismissed.

**ORDER:** The appeal is summarily dismissed.