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U.S. Citizenship
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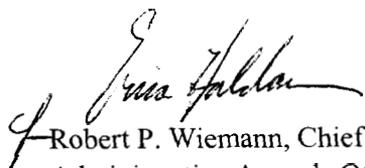
IN RE: Petitioner:
Beneficiary:

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, Chief
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 employ the beneficiary in the position of general manager 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, a Florida corporation, states that it is a “service provider.” The petitioner claims to be a subsidiary of the parent company, Waffel’s Holland Ltda., located in Brazil. The petitioner seeks to employ the beneficiary for a period of one year to open a new office in the United States.

The director denied the petition, concluding that the record contains insufficient evidence to demonstrate: (1) that the beneficiary has at least one year of continuous employment abroad in a managerial or executive capacity within the three years immediately preceding the filing of the petition; and, (2) that sufficient funding or capitalization was provided to the U.S. entity from the foreign entity.

On appeal, the petitioner asserts that the beneficiary commenced his employment with the foreign company on December 1, 2002 rather than December 1, 2003, as stated on the Form I-129 and supporting documentation. Counsel for the petitioner asserts that “the person in charge of typing the petition mistyped the year which by itself explains the confusion.” In addition, counsel states that the funding of the U.S. entity was provided by the foreign company and was deposited into the U.S. entity’s company account. The petitioner submits a brief, new evidence, and copies of previously submitted documents in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(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 (l)(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.

The first issue in this proceeding is whether the beneficiary has at least one year of continuous employment abroad in a managerial or executive capacity within the three years immediately preceding the filing of the petition.

The petitioner submitted the Form I-129 on December 10, 2004. On the Form I-129, the petitioner indicated that the beneficiary's dates of employment with the foreign employer were "December 2003 to the present." In addition, in a support letter dated December 14, 2004, the petitioner states that "From December 1, 2003 to now, [the beneficiary] had been working for [the foreign company] in Brazil, as an Executive Manager." Moreover, the petitioner submitted pay stubs from the foreign company issued to the beneficiary from December 2003 through March 2004, and from May 2004 through December 2004.

On February 4, 2005, the director requested additional information in order to proceed with the processing of the petition. In the request, the director stated "the beneficiary commenced employment on December 1, 2003, then entered the United States as a B-2 visitor on June 13, 2004 and has remained here." The director specifically requested that the petitioner submit evidence to demonstrate that the beneficiary has been performing in a managerial or executive capacity for one year with the foreign company prior to filing the petition.

In the petitioner's response dated April 26, 2005, the petitioner stated the following:

[The beneficiary] has been working for [the foreign company] since December of 2002 (not December 2003, as first informed) after his retirement from his work of many years as a Pilot for VARIG.

[The beneficiary] has maintained his managerial capacity throughout his stay in the United States by maintaining frequent communication with [the foreign company's] employees and directors, and by having access to all of information [sic] and reports from the Brazilian company, needed to carry out with job responsibilities [sic].

Before coming to the United States, [the beneficiary] left specific orders to be followed by employees to ease their communication once he entered the U.S.A.

In addition, the petitioner submitted pay stubs from the foreign company issued to the beneficiary from July 2003 through March 2004 and from May 2004 through February 2005.

The director denied the petition on May 25, 2005, concluding that the petitioner failed to establish that the beneficiary had been employed by the foreign entity for one year in the three years preceding his admission to the United States as a B-2 nonimmigrant on June 13, 2004.

In the denial, the director indicated that the petitioner submitted pay stubs for the period beginning July 2003 through 2005 as evidence of the beneficiary's one year of continuous employment with the foreign company. The director stated that the "petitioner responded with a statement proclaiming that the beneficiary started work with them in December 2002 instead of 2003. However, this is merely a statement with no evidence or supporting documentation."

On appeal, counsel for the petitioner asserts that the beneficiary has worked one year abroad in the last three years. Counsel asserts the following:

The beneficiary started working for [the foreign company] on December 1, 2002 and not 2003. Unfortunately, by the time the initial petition was filed, there was a mistake regarding the date in which [the beneficiary] was hired as a Sales Manager. The person in charge of typing the petition mistyped the year which by itself explains the confusion. Hence, it would not be fair to punish [the beneficiary] for a mistake which was not made by himself.

On appeal, the petitioner submits pay stubs indicating that the beneficiary received a salary from the foreign company from December 2002 to December 2003. In addition, the petitioner submitted a summarized translation of a labor agreement between the beneficiary and the foreign company signed on December 1, 2002 indicating that the beneficiary will commence employment with the foreign company as a Sales Manager on December 1, 2002.

Upon review, counsel's assertions are not persuasive. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. In its response to the director's request for evidence, the petitioner did not submit documentation evidencing that the beneficiary has been employed by the foreign company since December 2002. Instead, the petitioner submitted pay stubs indicating that the beneficiary had been employed by the foreign company since July 2003. The petitioner now submits evidence to document the beneficiary's employment with the foreign company since December 2002 on appeal and does not explain why the petitioner did not submit this documentation with the response to the director's request for evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The petitioner failed to submit evidence of the beneficiary's employment with the foreign company for one continuous year prior to filing the petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As noted by the director, 8 C.F.R. § 214.2(l)(ii)(A) states that "Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement..." Thus, the petitioner failed to submit evidence that the beneficiary was employed abroad for one continuous year since he entered the United States pursuant to a B-2 classification on June 13, 2004. For the foregoing reasons, the appeal will be dismissed.

The second issue in this proceeding is whether sufficient funding or capitalization was provided to the U.S. entity from the foreign entity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(2) requires the petitioner to submit evidence of the size of the United States investment and the ability to commence doing business in the United States.

As noted by the director, the petitioner did not submit with the initial petition any evidence to show that the foreign company provided any funding or capitalization for the U.S. entity. On February 4, 2005, the director requested that the petitioner submit evidence to show that a wire transfer occurred in order to start-up the U.S. company.

In the petitioner's response dated April 26, 2005, the petitioner stated the following:

When [the beneficiary] entered the United States, (with the purpose of analyzing the real possibilities for the business in the U.S. market) a sum of money was given to him with the purpose of the payment of expenses, along with the potential investment, including legal fees. A back account in the name of the company was non-existent at that time, until the creation of the U.S. company.

When the necessity for monetary support becomes evident, [the foreign company] will transfer what is needed promptly to their now established bank account.

In addition, the petitioner submitted a bank statement from the Bank of America in the name of the U.S. company for the period ending April 6, 2005. In addition, the petitioner submitted an affidavit dated April 11, 2005 from a [REDACTED] Financial Manager," asserting that the beneficiary "traveled to the United States, taking with him in current currency, US\$ 10,000 (ten thousand dollars), to pay for the financial necessities for the opening of the company in the U.S.A." The bank statement submitted by the petitioner indicated a "counter credit" of \$10,000 for April 6, 2005, nearly four months after the filing of the instant petition.

The director denied the petition concluding that the petitioner failed to provide sufficient evidence that the funding or capitalization of the United States company has been provided by the foreign company. The director stated that the petitioner did not submit sufficient evidence to demonstrate the funding came from the foreign company.

On appeal, counsel for the petitioner asserts that the funding was deposited in a bank account under the U.S. company's name rather than the beneficiary's name and thus the "petitioner has proven that the foreign company invested in the United States." In addition, the petitioner re-submitted the bank statement from the Bank of America dated April 6, 2005 and submitted a new bank statement dated June 20, 2005, also from the Bank of America, under the U.S. company's name.

In reviewing the two bank statements submitted by the petitioner, it is not evident that the \$10,000 deposited to the U.S. company's bank account originated from the foreign company. The bank statement dated April 6, 2005, indicates that a deposit was made in the amount of \$10,000 on April 6, 2005. The transaction was a "Counter Credit." The petitioner did not submit sufficient evidence to demonstrate that the credit was funding provided by the foreign company. The petitioner submitted an affidavit from a finance manager of the foreign company indicating that the foreign company provided the beneficiary \$10,000 to start up the U.S. entity, however, this documentation is not sufficient. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient funding or capitalization from

the foreign company. Furthermore, the petitioner has not submitted a business plan or other documentation to establish the U.S. company's anticipated start-up expenses and it is therefore not possible to determine what investment amount would be sufficient. Therefore, even assuming, *arguendo*, that the approximately \$10,000 in the U.S. entity's account as of April 2005 was intended to be used as capitalization for the new U.S. company, the AAO could not conclude that this amount is adequate for the U.S. company to commence doing business in the U.S. The petitioner has not disclosed the size of the U.S. investment, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, even assuming the \$10,000 in the U.S. entity's account was funding from the foreign company for the U.S. entity, the deposit was made on April 6, 2005, nearly four months after the filing of the instant petition. 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). For the foregoing reasons, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to demonstrate that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position. Specifically, the petitioner has not adequately defined the proposed nature of the office, and has not realistically described the scope of the entity, its organizational structure and its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, CIS will extend the validity of the new office petition only if the entity demonstrates that it had been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B).

Furthermore, as contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products

and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

The petitioner did not submit a business plan that outlines the intended scope of the U.S. entity, its funding requirements and financial objectives, and how the U.S. entity will reach the listed goals and plans and if it is financially feasible to do so. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In addition, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. The petitioner indicated that the beneficiary will be the general manager and that the minimal staffing level for the U.S. entity will be four additional employees including a supervisor, a secretary, and two sales representatives. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties will involve supervising employees, the petitioner must establish that the subordinate employees will be supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the secretarial and sales work of the secretary and the sales representatives, who will be among the beneficiary's subordinates.

The petitioner's minimal evidence regarding its proposed business, the vague job descriptions provided for the beneficiary and his proposed subordinates, and the lack of evidence to establish the funding of the new entity, collectively, fail to demonstrate a realistic expectation that the proposed enterprise will succeed and rapidly expand as it moves away from the development stage to full operations, where there would be an actual need for a manager or executive who will perform primarily qualifying duties. For this additional reason, the appeal will be dismissed.

Another issue not addressed by the director is whether, as of the date of filing, the petitioner had secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner's lease agreement was signed on January 1, 2005, subsequent to the filing of the petition. 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). Moreover, the petitioner has not described its anticipated space requirements for the new business, and the lease in question does not specify the amount or type of space secured. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner had secured sufficient space to house the new office. For this additional reason, the appeal is dismissed.

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).

The petitioner will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 appeal will be dismissed.

ORDER: The appeal is dismissed.