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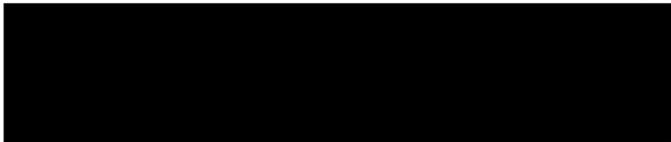
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File: SRC 05 199 50134 Office: TEXAS SERVICE CENTER Date: FEB 01 2007

IN RE: Petitioner:
Beneficiary:



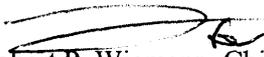
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF BENEFICIARY:



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 seeks to employ the beneficiary as its president/chief executive officer to open a new office in the United States 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 U.S. petitioner, a corporation organized in the State of Texas, is engaged in software development and claims to be the subsidiary of Sinapsis Technologies Mexico, S.A. de C.V., located in Cuajimalpa, Mexico. The director denied the petition concluding that the petitioner had failed to establish that it had secured sufficient physical premises to house the new office, and that it had failed to show the size of the U.S. investment as required by the regulations governing the opening of new offices.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision was erroneous and that the petitioner submitted ample information to establish eligibility for the benefit sought. In support of this assertion, counsel submits a brief and additional evidence.

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.

(v) 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 matter is whether the petitioner has established the size of the United States investment. Pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C)(2), the petitioner must establish that the petitioner will be able to support the beneficiary in a primarily managerial or executive capacity by the end of the first year of operations by establishing the nature and extent of the foreign entity's role in the financial welfare of the petitioner, including its ability to remunerate the beneficiary.

The petitioner submitted a letter of support with the petition dated June 28, 2005. Although the letter provided an overview of the proposed nature of the U.S. entity, it failed to discuss the financial situation of the petitioner or the extent of the foreign entity's investment therein. Consequently, the director issued a request for evidence on July 14, 2005. The request specifically asked the petitioner to submit documentation which demonstrated the funding and/or capitalization of the United States entity. The director advised that copies of documents including but not limited to wire transfers, bank statements, and evidence of financial resources committed by the foreign entity were the preferred types of evidence.

In a response dated July 25, 2005, the petitioner responded to the director's request. The response included a copy of the petitioner's checking account statement for the period from June 1, 2005 through June 30, 2005. The bank statement indicated that during this period, two transactions occurred. The first was a deposit,

identified as "Ft Incoming Tran Straight," in the amount of \$9,000. The second was a withdrawal, identified as an "Analysis Fee For The Month of May," in the amount of \$14.97. Combined with the beginning balance of \$25.03, the final balance for the petitioner at the end of the statement period was \$9010.06.

The director denied the petition, noting that one bank statement, without making reference to the foreign entity, the nature and scope of the U.S. investment, or the manner in which the foreign entity invested in the petitioner, was insufficient to satisfy the regulatory requirements. On appeal, counsel for the petitioner asserts that by submitting a bank statement, it fully complied with the director's request in the request for evidence, since one of the items listed by the director as acceptable evidence was a checking or savings account statement. In support of its position, counsel on appeal submits documentation alleging the connection between the foreign entity and the \$9,000 deposit of June 8, 2006.

Upon review, the AAO concurs with the director's findings. Specifically, based on the documentation submitted, it does not appear that the petitioner would be able to support the petitioner in its start-up phase and allow it to employ the beneficiary in a qualifying capacity at the end of the first year of operations.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2) provides that, when a 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 of 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. In this matter, the only documentation referring to the financial status of the petitioner is the June 2005 bank statement. This documentation, which shows a balance of only \$9010.06, is insufficient to establish that the petitioner is a fledgling organization that will grow to support a managerial or executive position at the end of the first year of operations.

The petitioner, through counsel, argues on appeal that by virtue of submitting one of the documents identified by the director as acceptable evidence, it has sustained its burden. The AAO disagrees. While the petitioner correctly asserts that bank statements were identified by the director as acceptable forms of financial documentation, one statement, covering a one-month period and identifying only two transactions, is insufficient to definitively establish the extent of the United States investment.

In this matter, the regulations governing the evidence necessary to support a new office petition clearly stated the requirements and established the burden of proof to be met by the petitioner. Despite the general language used by the director in the request for evidence, the regulation at 8 C.F.R. 214.2(l)(3)(v)(C)(2) clearly requires the petitioner to submit evidence of 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.

Clearly, the regulations outlined the requirements for establishing a new office in the United States. The petitioner, however, continues to claim on appeal that its one bank statement, showing a balance of approximately \$9,000, is sufficient to demonstrate that the U.S. entity is ready to commence doing business and sufficiently outlines the nature of the foreign entity's investment. This is not the case. The bank statement makes no reference to the source or origination of the \$9,000 deposit. In addition, the AAO notes that the petition was filed on July 7, 2005, one week after the closing date of the statement. It appears, therefore, without evidence to the contrary, the sole extent of the petitioner's finances at the time of filing was limited to its closing balance for the month of June.

Although counsel on appeal submits documentation in support of the foreign entity's connection to the \$9,000 deposit, this information will not be considered. Counsel notes in the appeal brief that this evidence was not available at the time of the request for evidence; however, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). More importantly, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The evidence of record is insufficient to establish a significant financial investment by the foreign entity in the United States petitioner, such that it can commence doing business in the United States as outlined in the petition. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has secured sufficient physical premises to house the new entity, as required by the regulation at 8 C.F.R. 214.2(l)(3)(v)(A). In the request for evidence, the director requested a copy of a valid commercial lease for the petitioner's business. In its response dated July 25, 2005, the petitioner submitted an agreement with a company identified as "Regus," in which the petitioner paid [REDACTED] a \$225 monthly fee for "virtual office" services, including call forwarding. According to the Terms and Conditions attached to the agreement, the petitioner contracted for the right to (1) use [REDACTED]'s address, (2) have phones answered in the petitioner's name, and (3) have 50 hours of workstation usage a month. The director denied the petition, noting that a "virtual office" does not constitute sufficient physical premises, and thus does not satisfy the regulatory requirements.

On appeal, counsel challenges the director's finding, noting that the minimum needs of the petitioner's business are satisfied by the services provided for in the virtual office agreement. In addition, counsel challenges the definition of "sufficient physical premises," arguing that since the petitioner's needs are fully met by the services provided by [REDACTED] it has satisfied this provision in the regulations.

The AAO disagrees. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. Although the petitioner has submitted evidence of its incorporation in the United States, the fact that it does not have its own offices or commercial space available suggests that the petitioner is "shell company" that will not conduct business in a regular and continuous manner. According to the agreement, the petitioner is contracting merely for the use of [REDACTED]'s address and a specific amount of workspace hours per month. This factor, coupled with the bank account balance of \$9,000, suggests that the U.S. petitioner is not ready to commence business operations in the United States. As a virtual office is not the equivalent of physical premises secured by and for the exclusive use of the petitioner, this requirement is not satisfied. For this additional reason, the petition may not be approved.

Although not explicitly addressed in the decision, the record contains insufficient documentation to persuade the AAO that the beneficiary would be employed in a managerial or executive capacity as defined at section

101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), or that the petitioner would support such a position within one year of approval of the petition.

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.