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File: SRC 06 086 51476 Office: TEXAS SERVICE CENTER Date: JUN 05 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 PETITIONER:

SELF-REPRESENTED

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 vice president 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 petitioner, a limited liability company organized under the laws of the State of Florida, claims to be engaged in the business of "retail, hospitality, restaurant and property development," and alleges that it is the subsidiary of [REDACTED]

The director denied the petition concluding that the petitioner failed to establish that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition.

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, the petitioner asserts the definition of "intracompany transferee" only requires the petitioner to establish that the beneficiary had at least one year of continuous employment by a qualifying relationship within three years preceding the time of her application for admission into the United States. The petitioner asserts that, since the beneficiary first applied for, and was granted, admission into the United States on June 7, 2002 in H-4 visa status, the beneficiary only needs to demonstrate that the beneficiary had been employed abroad for one continuous year within three years preceding June 7, 2002. As the beneficiary was allegedly employed in a managerial or executive capacity for a qualifying organization from February 1, 2001 until April 30, 2002, the petitioner asserts that it meets this criterion. In support of the appeal, counsel submitted 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.

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, 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.

Finally, "intracompany transferee" is defined in 8 C.F.R. § 214.2(l)(1)(ii)(A) as follows:

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. 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 towards fulfillment of that requirement.

The primary issue in this proceeding is whether the petitioner has established that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition.

The instant petition was filed on January 23, 2006. As indicated above, the petitioner asserts that the beneficiary was employed in a managerial or executive capacity for a qualifying organization from February 1, 2001 until April 30, 2002. The petitioner also asserts that, since the beneficiary first applied for admission into the United States on June 7, 2002 as an H-4 nonimmigrant, she only needs to establish that she had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding this date and not the date of the filing of the instant petition.¹

On February 14, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition.

On appeal, the petitioner reiterates its argument that the definition of "intracompany transferee" only requires the petitioner to establish that the beneficiary had at least one year of continuous employment by a qualifying relationship within three years preceding either June 7, 2002 or December 3, 2003, the two dates on which she applied for admission into the United States.

Upon review, the petitioner's assertions are not persuasive and the appeal will be dismissed.

As indicated above, the regulation at 8 C.F.R. § 214.2(l)(3)(iii) clearly requires that an individual petition filed on Form I-129 be accompanied by evidence that the beneficiary "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.*" (emphasis added). This requirement is repeated in the "new office" regulations at 8 C.F.R. § 214.2(l)(3)(v)(B). While the petitioner correctly quotes the definition of "intracompany transferee" in the regulations, its interpretation of this definition is inconsistent with the clear and unambiguous requirements set forth in 8 C.F.R. § 214.2(l)(3).

¹It is further noted that the record indicates that the beneficiary was in the United States in H-4 visa status from June 7, 2002 until October 23, 2003. She was then readmitted to the United States as an H-4 nonimmigrant on December 3, 2003, and, pursuant to an extension of stay, remained in H-4 visa status until August 13, 2005 at which time she changed status to that of a B-2 nonimmigrant visitor for pleasure. The beneficiary was in B-2 nonimmigrant status at the time the instant petition was filed on January 23, 2006.

Moreover, it is noted that the petitioner's evidence regarding alleged prior approvals by Citizenship and Immigration Services (CIS) of petitions for L-1A nonimmigrants who had been employed for one continuous year abroad more than three years prior to the filing of the relevant petitions is not persuasive for two reasons. First, even if a service center director had approved the nonimmigrant petitions on behalf of beneficiaries in accordance with the petitioner's erroneous interpretation of the regulations, the AAO would not be bound to follow these decisions of the service centers. See *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Second, the redacted Forms I-797 and I-129 submitted by the petitioner fail to provide enough information for CIS to confirm what the petitioner asserts is even true. For example, in its brief the petitioner refers to the purported approval of an L-1A petition on November 17, 2005 for a beneficiary who had been in the United States since August 2001, and who had not worked abroad since July 1999, as evidence that its interpretation of the regulations is correct. However, the petitioner did not reveal whether the beneficiary in that case had been employed in the United States beginning in 2001 in H-1B status for an employer who has a qualifying relationship with the foreign employer. In such a case, the November 17, 2005 would have been entirely appropriate under the regulations because "periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof . . . shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted towards fulfillment of that requirement." 8 C.F.R. § 214.2(l)(1)(ii)(A). In the instant case, because the beneficiary was in the United States in either H-4 or B-2 status, she was not in the United States on behalf of the foreign employer, and CIS may not "reach over" her stay in the United States and consider employment abroad which concluded more than three years prior to the filing of the instant petition.²

Accordingly, as the petitioner has failed to establish that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to establish that the foreign entity has made an investment in the United States operation as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2) or that the foreign entity has a qualifying relationship with the petitioner.

In support of its assertion that the foreign entity has made an investment in the United States operation, the petitioner submitted evidence that the foreign entity issued a check for approximately \$25,147.00 in Indian rupees to [REDACTED], a third party, in December 2005. [REDACTED] and [REDACTED] then wrote a check made payable to the petitioner on January 17, 2006 for \$25,147.00. The petitioner further

²It is also noted for the record that the interim decision cited by the petitioner, *Matter of Thompson*, 18 I&N 169 (Comm. 1981), is not relevant to the instant matter. First, the facts of the decision are entirely inapposite to the instant matter. The decision and underlying facts are not analogous to the instant case and the holding of the decision has nothing to do with the petitioner's interpretation of the definition of intracompany transferee. Second, this decision has been overturned. See 52 Fed. Reg. 5738, 5741 (February 26, 1987).

alleges that, on January 9, 2006, the sole member of the petitioning limited liability company conveyed 51% of the membership interests to the foreign entity.

Upon review, the petitioner has not credibly established that the foreign entity has made an investment in the United States entity. The evidence submitted by the petitioner establishes only that [REDACTED] and [REDACTED], apparently residents of New Jersey, have written a check to the petitioner for \$25,147.00. The fact that [REDACTED] and [REDACTED] may have received an identical amount of money from the foreign entity a few weeks earlier, a fact that the record also does not clearly establish, does not prove that the foreign entity has actually invested this sum in the United States operation. The petitioner offers no credible explanation as to why the foreign entity did not transfer this sum directly to the petitioner. Likewise, the petitioner offers no evidence that [REDACTED] and [REDACTED] were obligated to make their investment in the United States entity on behalf of the foreign entity upon their supposed receipt of the money from India. Finally, the petitioner offers no explanation as to why the membership certificate was issued to the foreign entity over one week before it received the "investment" or why the \$25,147.00 was transferred to the petitioner when the sole member, [REDACTED], was actually the seller of the membership interest.

In view of the above, the petitioner has failed to establish that the foreign entity has made an investment in the United States operation, and the petition may not be approved for this additional reason.

Moreover, because it has not been established that the foreign entity actually paid for its 51% membership interest, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity. As ownership and control are critical elements in determination whether the foreign entity and the petitioner are the same employer for purposes of this visa classification, CIS may reasonably inquire beyond the issuance of paper stock or membership certificates into the means by which ownership or control was acquired. In this matter, because it has not been credibly established that the foreign entity has made an investment in the United States operation, it has not been established that the issuance of a membership certificate to the foreign entity truly represents the vesting of ownership and control in the foreign entity. Therefore, the petitioner has not established that it has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(i). For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to demonstrate that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position because the petitioner failed to sufficiently describe the scope of the United States operation as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(I).

In support of its petition, the petitioner submitted a business plan allegedly describing the scope of the United States operation. However, this business plan, and the record as a whole, fails to describe with any specificity the proposed business operation in the United States. The business plan states generally that the petitioner "assists investors and other businesses in developing properties – be it a convenience store, hotel, motel, office building or apartment complex. [The petitioner] help[s] in securing loans as well as getting approvals from various authorities. We also do [a] market study before you make [a] buy/sell decision[.]" However, the petitioner never specifically defines what services it will provide or how it will help secure loans or perform market studies. Simply put, the business plan reveals absolutely nothing material about the proposed

business in the United States. 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)). Specifics are clearly an important indication of whether a petitioner will likely expand beyond the developmental stage and become fully functional business enterprise; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See generally Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). In order for a business plan to be sufficient, it must be credible. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998).

Accordingly, as the petitioner has failed to credibly describe the scope of the United States operation, the petition may not be approved for this additional reason.

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.