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U.S. Citizenship
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Services

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File: SRC 06 114 52581 Office: TEXAS SERVICE CENTER Date:

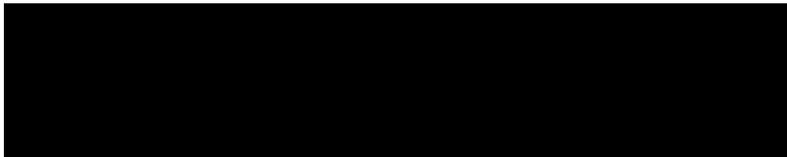
IN RE: Petitioner:
Beneficiary:



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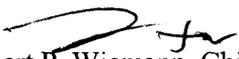
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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 extend the employment of its chief executive officer/president 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 is a limited liability company organized in the State of Florida that is engaged in real estate investment and development. The petitioner claims that it is the subsidiary of [REDACTED] located in Tel Aviv, Israel. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the business entity in the United States had not been doing business for the previous year as required under 8 C.F.R. § 214.2(l)(14)(ii)(B). Specifically, the director found that the minimal evidence of the petitioner's business dealings in the United States suggested that it was not doing business as defined by the regulations, and thus was unable to meet the definition of a qualifying organization.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the facts and evidence presented prior to adjudication show that the petitioner has satisfied all the regulatory requirements. In support of this contention, counsel for the petitioner 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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in this matter is whether the petitioner has been doing business for the previous year as required by 8 C.F.R. 214.2(l)(14)(ii)(B), and is thus a qualifying organization as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the regulation defines the term “qualifying organization” as a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Since the evidence of record indicates that the petitioner is a wholly-owned subsidiary of the foreign parent, the director focused on the second criteria above; namely, whether the U.S. entity has been doing business. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term “doing business” as “the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.”

In this matter, the petitioner submitted a letter of support dated February 21, 2005.¹ In this letter, the petitioner claims that it is engaged in real estate investment and development and states that “the company has been established for the purpose of developing single and multi-family homes as well as commercial construction projects in South and Central Florida.” It further claimed that it had purchased multi-million dollar real estate development projects including condo conversion and preconstruction projects.

In support of this claim, the petitioner contended that it had purchased the following two properties and had incorporated each as limited liability companies: ([REDACTED] and (2) [REDACTED]. Sales contracts and statements from the Department of Housing and Urban Development were submitted as evidence of their existence. The record, however, did not include any documentation or evidence suggesting that the petitioner had engaged in the sale, rental, or development of real estate property during this period.

The director found this initial evidence to be insufficient and consequently issued a request for additional evidence on March 1, 2006. The director requested additional documentation of the business conducted by the U.S. entity for the previous year, including bills of sale, sales contracts, invoices, and receipts. In a response dated April 3, 2006, counsel for the petitioner resubmitted the contacts of sale pertaining to the newly-formed limited liability companies, as well as the statements from the Department of Housing and Urban Development. In the response, counsel indicated that the petitioner was scheduled to begin construction of 10 units in May 2006 on the property located at [REDACTED] in addition to the 20 units scheduled for construction on the property located at [REDACTED]. Finally, counsel submitted documentation evidencing the petitioner’s office expenses for the previous year, including bank statements, utility bills, invoices for office furniture, and insurance information.

After reviewing this additional evidence, the director denied the petition. The director concluded that the petitioner had failed to submit sufficient evidence to establish that it had been doing business as a real estate investor and developer for the previous year. Specifically, the director noted that the two contracts of sale and the subsequent establishment of two limited liability companies in support of its alleged real estate business did not show that the petitioner had been continuously and systematically providing goods or services as required by the regulations.

On appeal, counsel for the petitioner discusses the nature of the petitioner’s business and contends that the director’s decision unfairly ignored relevant evidence of the petitioner’s business dealings. Specifically, counsel contends that the petitioner managed the two properties it acquired in the previous year and that the bank statements provided in response to the request for evidence showed the petitioner’s receipt of these management fees. In addition, counsel contends that contrary to the director’s contentions, the petitioner did in fact submit a list of tenants for both of the identified properties and contends that this evidence clearly established that it was responsible for receiving rent payments each month. As a result, counsel contends that based on its 2005 profits from the management fees it received for the services rendered to these two properties, the petitioner had in fact been doing business as required by the regulations. The AAO disagrees.

¹ It is noted that the letter referred to above appears to have been prepared in 2006 but erroneously dated 2005.

The petitioner failed to demonstrate that it had been and will be doing business, and thus, by definition, is not a qualifying organization for purposes of this analysis. First, in the course of examining whether the petitioning company has been doing business as a real estate investor and developer, it is reasonable to expect copies of documents that are required in the daily operation of the enterprise, such as invoices for construction materials and laborers, as well as contracts of sale for the units to be developed and sold. In response to the director's request for such documents, the petitioner maintained that the development of new units was not scheduled to start until May 2006, three months after the filing of the extension. Any company that is doing business through the regular, systematic, and continuous provision of goods or services may reasonably be expected to submit copies of such documents, or at the very least, copies of a business plan and meeting minutes outlining this potential development and showing the continuous progress made on each project. 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). Therefore, despite the fact that the petitioner intends to begin development of units later this year, the fact remains that there is no evidence in the record that such projects were being promoted during the previous year.

There is no documentation existing in the record to establish that the petitioner has been engaging in the development of single and multi-family homes, condo conversion, or commercial construction during the past year as alleged in its initial letter of support. 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). In addition, without documentary evidence to support his claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, however, counsel relies on the fact that the management services provided by the petitioner to the limited liability companies and their associated properties constitute doing business as contemplated by the regulations. This contention, however, is unacceptable for two reasons. First, in the event that the minimal evidence of the petitioner's management services was accepted as sufficient evidence of its doing business in the United States, counsel overlooks the fact that these services, at the earliest, began in June 2005 with the acquisition of the project known as [REDACTED] on June 20, 2005. It is further noted that the project known as [REDACTED] was not acquired until October 18, 2005, a mere three months prior to the expiration of the initial petition. Therefore, management income generated from the petitioner's unclear involvement with these properties represents, at best, a seven-month series of business activity. There is no additional evidence of the petitioner's alleged business operations prior to this time period, which therefore makes it impossible to conclude that the petitioner had been regularly and systematically engaged in the provision of goods and services for the entire year prior to the filing of the extension as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The definition of doing business clearly requires the continuous provision of goods and services, yet the petitioner has failed to submit evidence establishing its business activities for the beginning of the first. On appeal, counsel fails to address this pertinent issue.

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 establish the new office. Furthermore, at the time a petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). 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 present matter, the evidence submitted is insufficient to establish that the petitioner has been doing business as defined by the regulations.

Beyond the decision of the director, the record reflects that the U.S. entity did not secure a commercial lease until June 7, 2005, nearly three months after the approval of the original new office petition. 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. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

In addition, the record as presently constituted is not persuasive in demonstrating that the beneficiary is to perform a job that is primarily managerial or executive in nature. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "negotiate and enter into real estate development project purchase contracts" and "obtain financing from various banks and investors" do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary will be employed primarily in a managerial or executive capacity. Moreover, the AAO is also prohibited from finding that the beneficiary will be primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Therefore, the petition must be denied 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).

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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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.