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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D7

File: SRC 02 216 50907 Office: TEXAS SERVICE CENTER Date: DEC 07 2010

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)

IN BEHALF OF PETITIONER:

[redacted]

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its executive director 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 corporation organized in the State of Florida that is allegedly engaged in financial investment services and retail sales. The petitioner claims that it is the subsidiary of Merchant and Associates, located in Karachi, Pakistan. 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 petitioner did not establish that the U.S entity had commenced business by the expiration of the one-year start-up period, and simultaneously failed to support the beneficiary in a position that was primarily managerial or executive in nature.

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 conclusions were erroneous, and alleges that in light of unexpected financial hardships and the petitioner's choice to restructure its business ventures, the petition should be approved. In support of these assertions, counsel submits a brief.

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 management or executive capacity; and

(e) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary has been and will continue to be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner described the beneficiary's job duties in its business plan as follows:

> [The beneficiary] has created and developed many of the tools used to underwrite and manage both the commercial and residential mortgage operations. In addition to the analytical tools that [the beneficiary] has developed, he credits his superior level of customer service to be the critical ingredient of his success.

The petitioner further stated that the beneficiary held a Masters of Business Degree, a Master's degree in Finance, and a Bachelor's degree in Commerce.

The petitioner stated that it wished to extend the beneficiary's employment for an additional three years due to the fact that it had recently entered into a new business market and needed the beneficiary's expertise and experience to ensure the U.S. entity's continued success.

On May 10, 2003, the director requested additional evidence. Specifically, the director requested evidence establishing that the U.S. entity had established a business in the one-year period allotted for its development. The director requested documentation establishing that the U.S. entity had become established and viable during this period, and requested evidence demonstrating that the U.S. entity was simultaneously employing the beneficiary in a primarily managerial or executive capacity during this period.

On or about August 7, 2003, the petitioner submitted copies of: (1) the U.S. entity's federal quarterly wage report dated October 28, 2002 for what appears to be the quarter ending September 30, 2002; (2) the U.S. entity's Form W-3, Transmittal of Wage and Tax Statements for 2002; (3) the Forms W-2, Wage and Tax Statement, for the beneficiary and Kenneth Manning, the other employee of the U.S. entity, for 2002; and (4)

the state quarterly wage report for the quarter ending December 31, 2002. The petitioner submitted no cover letter or additional evidence addressing the issues raised by the director.

On September 28, 2003, the director denied the petition. The director determined that the petitioner had failed to establish that the U.S. entity had become a viable business by the expiration of the one-year period. Additionally, the director concluded that since the U.S. entity had not become viable, it consequently could not support the beneficiary in a position that was primarily managerial or executive in nature.

On appeal, counsel for the petitioner contends that the submission of the U.S. entity's detailed business plan with the initial petition clearly established that the beneficiary, on behalf of the U.S. entity, is actively engaged in the pursuit of new enterprises. Moreover, counsel contends that the acquisition of a convenience store during the first year of operations, and the petitioner's statements regarding the active role the beneficiary assumes in the management of this business, were both equally sufficient to establish that the beneficiary was primarily engaged in managerial and executive duties at the expiration of the first year of operations.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

In this case, the petitioner's initial description of the beneficiary's duties was provided in its business plan, which outlined the U.S. petitioner's goals of becoming a dominant leader in the mortgage banking industry. The brief description of the beneficiary's proposed duties, summarized on page 4 of this decision, outline his proposed role in this industry. The evidence contained in the record, however, demonstrated that for the previous year, the U.S. entity had acquired a convenience store/gas station, and the beneficiary had been training under the prior owners. Furthermore, counsel's letter accompanying the petition, dated July 3, 2003, stated that after acquiring the convenience store/gas station and training the beneficiary to operate the enterprise, the U.S. entity had "entirely changed its business plan to develop and expand its business operations in . . . commercial real estate lending." Counsel concluded by requesting that the director consider the petitioner's eligibility under the regulations governing new enterprises.

The director noted in the request for evidence that the current state of the U.S. entity suggested that it did not meet the requirements for extension of a new office. The director requested specific documentation to establish that the U.S. entity had in fact become a viable business during the one-year period, and that it had been able to employ the beneficiary in a position that was primarily managerial or executive by the year's end.

The petitioner provided no written response or explanation to this request. Instead, counsel for the petitioner merely submitted copies of tax documents indicating that wages had been paid to the beneficiary and to

another employee. No additional documentation, such as tax returns, invoices, or receipts, were submitted to support the proposition that the petitioner was in fact doing business during the start-up period. 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).

Additionally, although the record contains evidence that the beneficiary and a fellow employee were each paid $10,400.00 as wages for 2002, there is no explanation or discussion of the relationship between the employees or their roles in the alleged business. Furthermore, the employee on the tax documents is identified as [redacted] whereas the petitioner's business plan identifies the beneficiary's co-worker as [redacted] The record contains no evidence that [redacted] was actually employed by the U.S. entity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). This lack of explanatory statements precluded the director and now precludes the AAO from thoroughly examining the beneficiary's role as a manager or executive, and renders it impossible to determine whether the beneficiary was supervising other professional, supervisory, or managerial employees. As previously stated, 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).

Upon review of the record of proceeding, the AAO is proscribed from finding that the petitioner is eligible for an extension of the petition. 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 the petitioner seeks an extension of the new office petition, the regulation 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). The regulations of Citizenship and Immigration Services (CIS) do not allow 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.

On appeal, counsel discusses for the first time the hardship experienced by the petitioner during the initial one-year period and its subsequent effect on its commencement of business. These statements are not persuasive for two reasons. First, unforeseen financial hardship, such as the tragic events of September 11, 2001, does not provide the petitioner with a license to disregard the regulations governing new office petitions. As stated above, 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. There is no provision in 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. Secondly, the petitioner provided no discussion or explanation as to the current financial and operational status of the U.S. entity in response to the director's request for evidence. 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. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Most importantly, the arguments submitted on appeal are uncorroborated by supporting evidence. Without documentary evidence to support these 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. at 534; *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Under the circumstances, the AAO need not and does not consider the sufficiency of the arguments submitted on appeal. Consequently, the appeal will be dismissed.

Beyond the decision of the director, the minimal documentation of the parent company's business operations raises the issue of whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. As the previous decision will be affirmed, this issue need not be examined further.

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.