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U.S. Citizenship and Immigration Services

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DEC 07 2004

File: SRC 03 097 50702 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[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 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 corporation organized in the State of Florida that is allegedly engaged in retail sales and investments. The petitioner claims that it is the subsidiary of [redacted] located in Karachi, Pakistan. The beneficiary was initially granted a two-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 (1) the petitioner did not establish that the beneficiary had been and would continue to be employed in the United States in a primarily managerial or executive capacity, and (2) the petitioner failed to show that the U.S. entity was doing business as defined by the regulations.

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. Specifically, counsel alleges that the director's decision is contrary to the precedents set by previous application approvals with similar circumstances, and further alleges that the director failed to consider extenuating circumstances that hindered the U.S. entity's growth in the preceding two years. Counsel submits a brief in support of these assertions.

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 first 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 as follows:

> [The beneficiary] is responsible for managing and directing company operations including hiring, development, and evaluation of staff, formulating corporate objectives, negotiating contracts, and overseeing purchasing and financial operations. [The beneficiary] functions as a senior executive and is responsible for the company's decision and policy making.

The petitioner further 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 Management Agreement with a food market. Under this agreement, the petitioner agreed to manage the market's operations and personnel. Consequently, the petitioner concluded that it needed to employ the beneficiary's "business development and managerial excellence" to help the U.S. entity rise to the "next level."

On June 6, 2003, the director requested additional evidence. Specifically, the director requested evidence establishing that (1) the beneficiary's duties were primarily managerial or executive in nature; (2) the U.S. entity was doing business as defined by the regulations; and (3) the foreign entity was doing business as defined by the regulations. In addition to these general requests, the director required the submission of specific documentary evidence, including tax returns, wage reports, and at least five separate documents evidencing that the U.S. entity was doing business during March and April of 2003.

On August 27, 2003, counsel for the petitioner submitted a written response accompanied by some of the requested documentation. Counsel did not submit tax returns for the U.S. entity, nor did it provide documentary evidence that the U.S. entity had been doing business as required by the regulations. It further

submitted only incomplete copies of Forms 941, Employer's Quarterly Wage Statements. Finally, the only evidence submitted that addressed the beneficiary's duties was a statement prepared by the beneficiary himself which provided a detailed overview of the beneficiary's recent medical history.

On September 26, 2003, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary was acting in a capacity that was primarily managerial or executive. Specifically, the director noted that the quarterly tax returns filed by the U.S. entity displayed minimal wages paid to its employees, thereby leading the director to conclude that there were no other employees working for the U.S. entity. In reaching this conclusion, the director determined that absent additional staff members, the beneficiary must have been performing a large portion of the routine, non-managerial tasks essential to the company's operations in order to insure the continued function of the U.S. entity.

On appeal, counsel for the petitioner contended that the director's conclusion was erroneous, and asserted that the petitioner had provided adequate evidence corroborating the stated claims in the petition. Additionally, counsel asserted that the director erroneously chose to ignore precedent decisions that would have warranted a favorable decision in this matter.

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. Although the petitioner alleges that the beneficiary is employed as a "senior executive," it does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. 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 vague and non-specific, which led the director to issue a request for additional evidence. Counsel, however, failed to submit adequate documentation corroborating these claimed duties despite the director's very specific requests for supporting documentation. In response to the director's request, a letter from the U.S. entity dated August 27, 2003, which was prepared by the beneficiary in his capacity as president, alleged that he had suffered a massive heart attack on June 20, 2002, and that he was still recovering from the aftereffects. Despite the director's specific requests, there was no discussion of the beneficiary's duties, and there was no additional information provided regarding the company's organizational structure. Furthermore, the petitioner did not address the staffing of the U.S. entity nor did it discuss its future business plan. The only evidence in support of the beneficiary's alleged managerial and/or executive duties were his statements and the statements of counsel. As discussed by the director in the denial, 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).[1] The AAO agrees with the director's conclusions, because the petitioner, despite being afforded the opportunity to clarify the issued raised by the director, failed to provide any evidence in support of its claims that the beneficiary was primarily operating in a managerial or executive capacity. 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).

With little documentary evidence upon which to rely, the director focused on omissions in the record as a basis for the denial. Since the petitioner failed to clarify the duties and activities of the beneficiary, the director examined the other evidence provided in an attempt to decipher the U.S. entity's composition, manner of operations, and organizational structure. The only documentation provided that indicated the presence of any employees in the U.S. entity was the first page of the quarterly tax returns (Forms 941) for the quarters ending March 31, 2003 and June 30, 2003. Although specifically requested by the director, the petitioner failed to submit complete copies of the quarterly tax returns. In addition, the petitioner submitted incomplete copies of its quarterly tax returns for only two of the preceding five quarters, although documentation from all five quarters was requested. The quarterly tax returns indicated that wages of $3,600.00 were paid each quarter. Assuming that these figures were accurate, the petitioner would be paying a total of $14,400.00 in wages annually, which is significantly less than the beneficiary's proposed annual salary of $25,000.00. Without any additional documentation to suggest otherwise, the director concluded that the beneficiary was the sole employee of the U.S. entity, since this evidence indicated that the petitioner could not even pay the beneficiary's salary let alone the salaries of additional employees.

Upon review of the record of proceeding, the AAO concurs with the director's findings. The petitioner provided no information about the daily functions of the beneficiary within the organization. The financial evidence of wages paid indicates that in 2003, one year after the initial visa was granted, the U.S. entity was not yet paying the beneficiary his proposed annual salary of $25,000.00. Absent evidence to the contrary, the AAO agrees that the documentation contained in the record suggests that the petitioner relied on the beneficiary to perform all the duties and obligations required to sustain a struggling business without the help of subordinate employees or co-workers. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As previously stated, Citizenship and Immigration Services (CIS) was precluded from thoroughly examining this issue due to the petitioner's failure to provide a complete response to the director's request for evidence.

On appeal, counsel alleges that the petitioner did in fact provide documentation supporting the beneficiary's alleged managerial or executive capacity. Specifically, counsel alludes to the management agreement

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[1]On appeal, counsel for the petitioner asserts that the director's reliance on *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972), is erroneous because the facts in the instant case are completely different. The AAO notes that the director did not cite to *Treasure Craft* in the decision in this matter; therefore, counsel's assertions are misplaced. Nevertheless, the proposition cited under *Treasure Craft*, despite the differences in factual scenarios between the two cases, remains applicable here: The failure to corroborate statements in the record without independent documentary evidence is insufficient to meet the burden of proof.

pertaining to the food market, the quarterly tax returns, the business lease for the U.S. entity, and its banking records. Although these documents are contained in the record, none of this documentation addresses the director's *specific* request for evidence supporting the beneficiary's managerial and/or executive duties. The director's request for evidence on this issue specifically stated the following:

> Please submit evidence the beneficiary is acting **primarily** in an executive/managerial capacity. Who performs the routine tasks of the business? List their names, titles, and duties. If supervising other professionals, please list their names and titles. Submit documentation of their educational credentials.

Counsel further alleges that "[CIS] has routinely and customarily approved in agency precedent processing similarly situated petitions in the past, and this denial in not in conformance with prior service processing." This argument is not persuasive. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593 at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *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).

Without adequate evidence to clearly establish that the beneficiary met the regulatory requirements for a manager or executive, the director was unable to grant the visa classification sought. Bank statements and a management agreement do not answer the above questions. The petitioner failed to submit the requested evidence regarding this issue, and the petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The record, therefore, is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Although the petitioner may intend to hire additional employees in the future as its business expands, 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). Furthermore, 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 support an executive or managerial position. There is no provision in the regulations of Citizenship and Immigration Services (CIS) 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 instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition may not be approved.

The second issue in this proceeding is whether the U.S. entity is doing business pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H).

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines 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 the decision dated September 26, 2003, the director determined that the petitioner had failed to provide sufficient evidence to establish that the U.S entity was regularly and systematically conducting business as required by the regulations. Specifically, the director noted that in response to the request for evidence, which specifically requested five examples of documentation that demonstrated that the U.S. entity was engaged in business in March and April 2003, the petitioner submitted bank statements in lieu of invoices or other relevant business documentation. The director determined that such evidence, while sufficient to show that the U.S entity had opened a bank account and had deposit and withdrawal activity, did not establish that it had been systematically doing business during the relevant period.

On appeal, counsel alleged that the serious health setbacks of the beneficiary should not be a prejudicial factor in the determination of eligibility in this matter.

Upon review of the record, the AAO concurs with the director's finding that the record is devoid of evidence establishing that the foreign entity was regularly, systematically, and continually providing services for the relevant period as required by the regulations. Although counsel did provide a management agreement, dated January 21, 2003, and bank statements, this documentation is unacceptable for two reasons. First, the director, in the request for evidence, requested five separate documents supporting the functions of the U.S. entity's business for both March and April of 2003, as well as copies of its federal tax returns for the years 2001 and 2002. Counsel submitted none of the requested documents. 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). Second, the documents submitted establish that the petitioner merely maintained a bank account and entered into a management agreement. They do not support a finding that the U.S. entity, described in the initial petition as being involved in "retail and investments," has systematically, regularly, and continuously provided goods and/or services since the granting of the initial petition in 2001.

On appeal, the petitioner cites the beneficiary's ongoing health problems as a reason for the lack of prosperity on the part of the U.S. entity. While the beneficiary's health issues are certainly serious, under 8 C.F.R. § 214.2(l)(14)(ii)(b), the petitioner must present evidence that the U.S. entity has been doing business for the previous year in order to be eligible for an extension. This requirement is not met by the mere presence of an agent or office of the qualifying organization in the United States. 8 C.F.R. § 214.2(l)(1)(ii)(H). In this case, the petitioner did not even secure a business lease until July 2003, several months after the filing of the extension request. As previously discussed, 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. at 248. Consequently, the petitioner has failed to established that the U.S. entity is doing business pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). For this additional reason, the petition may not be approved

Beyond the decision of the director, the AAO notes one additional deficiency with regard to the alleged qualifying relationship between the U.S. entity and the foreign entity. The petitioner has not demonstrated that the U.S. entity is in fact a wholly-owned subsidiary of the foreign entity. The petitioner alleges that the U.S. entity is 100% owned by [redacted] In support of this relationship, the petitioner provided an undated membership certificate evidencing that [redacted] is the owner of the 1,000 outstanding shares of the U.S. entity. There are no additional documents clarifying the ownership interests in the U.S. entity, but there are numerous documents in the file showing the existence of both [redacted] which appear to be separate entities. 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). Since the ownership of the U.S. entity is unclear, the record is insufficient to support a finding that the U.S. entity is indeed the subsidiary of the alleged foreign entity. For this additional reason, the petition may not be approved.

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.