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U.S. Citizenship and Immigration Services

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JUN 01 2004

FILE: SRC 02 026 52004 Office: TEXAS SERVICE CENTER Date: JUN 01 2004

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)

ON 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 sells machine parts and exports parts to Venezuela. It presently employs the beneficiary as manager, and seeks to extend the temporary employment of the beneficiary. The petitioner filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary's employment in the U.S. is not in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary qualifies for an extension of his L-1A status because he "submitted the same information that he had submitted before in the original L-1 application," which was sufficient to meet the requirements of an intracompany transferee. Counsel also asserts that he and the beneficiary submitted information required by the regulation at 8 C.F.R. § 214.2(l)(14), regarding the extension of a petition involving a new office. Counsel also refutes the director's finding that the U.S. entity did not employ any workers, and contends that "[the beneficiary] had subcontractors, general office help to do the daily work and he worked as a manager."

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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)(14)(ii) states 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 issue in the present case is whether the beneficiary has been or will be employed in the United States in a primarily managerial or executive capacity, as defined at §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

The petitioner did not submit sufficient evidence with the petition establishing the beneficiary's employment in the United States as a manager or executive. As required by 8 C.F.R. § 103.2(b)(8), the director requested the following additional evidence on December 10, 2001: (1) documentation that the foreign company is currently engaged in systematic and continuous business operations; (2) a description of the staffing levels in the U.S. entity, including position titles and job duties of all employees, and copies of the state quarterly income tax returns; (3) a description of the beneficiary's job duties during the past year; and, (4) a percentage allocation of the amount of time the beneficiary spends on each job duty.

In response, counsel submitted a letter in which he stated that the beneficiary is the only employee of the U.S. entity, "as the new office has not made [s]ufficient income to expand the number of employees." Counsel also provided a brief list of the beneficiary's job duties and an allocation of time spent on each. The petitioner declined to submit the remainder of the requested evidence.

The director determined that the beneficiary's employment in the U.S. entity is not in a primarily managerial or executive capacity. The director noted that the petitioner does not employ any workers except for the beneficiary. The director therefore concluded that the beneficiary is likely engaged in the day-to-day operations of the business, rather than managing employees who perform the functions of the business.

On appeal, counsel asserts that the beneficiary "complied with all the requirements set forth in the regulations," as he has general subcontractors, and employs "office help to do the daily work" of the business. Counsel also contends that the beneficiary "supervises the personnel [and] has the authority to hire and fire personnel." In addition, counsel states that the record contains the same documentation previously submitted with the beneficiary's initial petition, which was approved. Counsel asserts, therefore, that the present record demonstrates the beneficiary's employment in a managerial capacity.

On review, the AAO agrees with the decision of the director. The record does not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The 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). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). As in the present matter, where 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); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have provided the additional explanation in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Should the petitioner wish the service to consider the submitted evidence, the petitioner may file a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is entitled to the status sought under the immigration laws.

The AAO also notes that it 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, 597 (Comm. 1988). 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 regulation at 8 C.F.R. § 103.3(a)(iii) states that for purposes of an appeal, the affected party entitled to the appeal means the person or entity with legal standing in a proceeding, and "does not include the beneficiary of a visa petition." In the present matter, counsel indicates on the Form I-290B, Notice of Appeal, that he is representing the beneficiary. Additionally, throughout the explanation for the appeal, counsel refers to the beneficiary's compliance and satisfaction of the regulatory requirements, including that the beneficiary personally applied for the extension of classification as a manager or executive. Pursuant to 8 C.F.R. § 103.3(a)(iii), the beneficiary is not the proper party to file the present appeal. For this additional reason, the appeal will be dismissed.

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.