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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

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U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 006 50107 Office: TEXAS SERVICE CENTER Date: JUN 17 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:

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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be an importer of African artifacts from Kenya and a fast food company. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the evidence did not demonstrate that the petitioner had been doing business as defined in the regulations.

On appeal, the petitioner disagrees with the director's decision.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *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.

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 (1)(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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;

B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);

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 regulation at 8 C.F.R. § 103.2(b)(14) states, in part:

> Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the applications or petition.

According to the documentary evidence contained in the record, the petitioner was established in 2001 as a coffee house and sandwich shop specializing in the retail of Kenyan arts and crafts. The petitioner states that the U.S. entity is a subsidiary of Electro Centre Ltd., located in Kenya. The petitioner anticipates the hiring of 10 to 14 employees and projects $658,373.00 in gross annual income. The petitioner seeks the continuation of the beneficiary's services as its president for two years, at a yearly salary of $30,000.

The issue to be addressed in this proceeding is whether the evidence establishes that the petitioner had been doing business by regularly and systematically providing goods and or services for the year following the opening of its new office.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

> *Qualifying organization* means 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.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

> *Doing business* means 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.

The petitioner submitted a letter in support of the petition, in which the petitioner summarized the history of the entities, the beneficiary's employment, the corporate relationship, and its development plans.

In a notice dated October 10, 2002, the director noted that the petitioner failed to submit the required initial evidence, and requested that it respond to the following, in part, concerning its business ownership and activities:

> You must send evidence that the U.S. company that was established in 2001 is actively doing business in the U.S. Send invoices, bills of sale, bills of lading, income tax reports and any other proof of ongoing, continuous business of the United States business venture.
>
> How many U.S. employees are working in the business currently? What are their job positions and titles? Is the applicant managing any subordinate managers or supervisors? If so, what are their names, titles and job duties?
>
> A statement in the supporting documents of the Form I-129 you filed said that recruitment has begun for employees for the U.S. business. Two different kinds of businesses were mentioned, a restaurant business and a Kenyan artifacts business. Has either one of these businesses actually been started? If not, what has the applicant been doing for the past year under his L1A manager/executive status?

In response to the director's request for additional evidence, the petitioner stated as follows:

> The US subsidiary was established in August 2001 for the purposes of investment into the United States. US [CIS] approved [the beneficiary] for the L-1 visa for October, and he entered the US in November. No trading was carried out in 2001.
>
> Throughout 2002 [the beneficiary] has been establishing the new US corporation, and has been organizing the establishment of the business, approving work and quotations, issuing checks for the work and equipment. Commencement of trading should have taken place prior to this, but because Quiznos' changed their "look" the refurbishment of the store has taken a lot longer than anticipated.
>
> . . . .
>
> Currently there is one US employee, [redacted] who has taken on the role of Vice President and Advisor. [He] has vast experience in commercial catering and [the beneficiary] has employed him to take on the responsibility for the set up of the store and to train the staff.
>
> . . . .
>
> As stated in the original petition, the main business is the fast food restaurant, and following its establishment [the beneficiary] will then concentrate on opening the Kenyan artifacts business, which will be in 2003.
>
> [The beneficiary] did not enter the US until the end of November 2001 and he commenced his search for a business opportunity in a restaurant at the beginning of January 2002.

The petitioner also submitted evidence pertaining to the start up of its Quiznos franchise, including copies of invoices relating to the purchase of equipment and quotations from builders, checks issued for equipment, letter from Quizno's corporate director confirming the petitioner's corporate order and length of procedure for accepting a Quiznos franchise, list of Quiznos sites, checks issued for franchise and finance fees, revised organizational chart of U.S. entity, and employment applications, etc.

The director denied the petition after determining that the record did not support a finding that the petitioner had been doing business in the United States for one year preceding the filing of the instant petition. The director stated that the U.S. entity had a twofold purpose: to import and sell Kenyan artifacts and to establish a chain of fast food restaurants. The director also stated that although the response packet contained evidence that the U.S. entity had been established, there was no proof that continuous provision of goods or services had been produced or performed throughout the first year of the company's existence. The director further stated that by its own admission, the petitioner had indicated that no trade was carried out during the first year. The director stated that the facts as stated reveal that the beneficiary entered the United States in order to investigate other business opportunities, and not to manage and develop a business of goods/services related to the foreign entity. The director noted "the L1A manager executive

transferee classification was not created to establish self-employment, nor was it intended to accommodate dabbling in new business speculations with no intention of providing continuity between the foreign business and U.S. business."

On appeal, the petitioner disagrees with the director's decision and asserts: "even though the [p]etitioner has not yet generated substantial revenues in the United States, it is actively pursuing its business . . . ." The petitioner further asserts that the U.S. entity is a new business and as a new business it is still in the training and development phase of operations. The petitioner continues by stating, "even though it has taken [the petitioner] close to one year to establish the type of business identified in the Business Plan and identified in the I-129L petition, [the petitioner] has now shown . . . a strong commitment of hiring workers . . . ." The petitioner further states that once this process is completed, it will allow the beneficiary to engage in managerial and executive tasks on a full-time basis. The petitioner resubmitted on appeal copies of the U.S. entity's business plan, incorporation documents, Quizno business documents, and other company documents.

In review, the evidence submitted is insufficient to establish that the U.S. entity has been engaged in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. The petitioner's compliance with inquiries made by the service director in the request for additional evidence is marginal, at best. The petitioner was given ample opportunity to produce the required initial evidence and other business records to substantiate its claim of doing business as a viable entity in the United States. There has been insufficient documentary evidence submitted on appeal to refute the director's decision. 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." The conclusions made by the petitioner, in reference to the start-up of the U.S. entity being stalled for various reasons, were not supported by documentary evidence. Simply 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).

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 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 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 instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The petitioner provided a chronological explanation of the beneficiary's actions since being in the United States to include, engaging in business discussions, negotiating contracts, and identifying business sites for businesses other than the U.S. entity. It appears from the evidence that the beneficiary entered the United States not to serve as a manager or executive and develop the import and food business, but rather to investigate and invest in viable business opportunities in the United States.

Likewise, the petitioner failed to produce relevant documents such as corporate tax returns, sales invoices, bills of sale, bills of lading, bank statements, and other recently dated documentation attesting to the U.S. entity's engagement in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. On appeal, the petitioner submits documents relating to the Quiznos franchise including: correspondence from the Quiznos' marketing and training departments concerning the purchase of a Quiznos franchise; a franchise agreement entered into by the petitioner; franchise opening requirements; and a certificate recognizing the beneficiary's completion of owner/operator training. The petitioner also submitted a revised organizational plan for the U.S. entity, a listing of potential employees, and completed employment applications for employment at Quizno's. This evidence was either not submitted to the director prior to her rendering her decision or was not in existence at the time the petition was filed. 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts, *See Matter of Michelin Tire,* 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981).

Furthermore, the evidence submitted on appeal does not demonstrate that at the time the petition for continuation of status was filed the petitioner had been engaged in the regular, systematic, and continuous provision of goods and/or services throughout the first year of the company's existence. It is noted that at the time the letter in support of the petition was written, October 24, 2002, the Quiznos' franchise had yet to be opened. The petitioner stated, "[the petitioner] has entered into a franchise agreement with the renowned fast food chain of Quizno's, and will be opening its first store in the first week of November."

Contrary to the petitioner's contentions, the U.S. entity's development plan demonstrates that the organizing and importing of Kenyan artifacts was among the entity's top priorities, rather than opening a sandwich franchise. There has been no demonstrative evidence submitted to show that the petitioner has been doing business in relation to the Kenyan artifacts during the entity's first year in business. By the petitioner's own admission, "no trade was carried out in 2001." The record as presently constituted is not persuasive in demonstrating that the U.S. entity had been doing business pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G)(2) during its first year of operations. In

the instant case, doing business requires activity not just investigating business potentials, registration of a business or office, or mere presence of an agent.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary has been or would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. In addition, there is no evidence to establish that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States pursuant to 8 C.F.R. § 214.2(l)(3)(vii). For these additional reasons, the petition will 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.