U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 272 50417 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)

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 is an organization incorporated in June 2001 in the State of Florida. It claims that it is operating as a "health and beauty salon." It seeks to extend the employment of the beneficiary temporarily as its financial manager. Accordingly, the petitioner endeavors to classify the beneficiary as a 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 claims that it is a wholly-owned subsidiary of Village Hair Limited, located in Bradford, United Kingdom.

The director denied the petition determining that the petitioner was still claiming to be in its start-up phase and that the petitioner had not employed anyone other than the beneficiary. The director concluded that the petitioner had not met its obligation as a start-up business to support a managerial or executive position by the end of the one-year period, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

On appeal, counsel for the petitioner asserts that the director misapplied law and regulations in denying the extension petition.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). 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) further 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 that 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 position 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 validity of the approval of the initial nonimmigrant petition that involved opening a "new office" expired on September 21, 2002. The issue in this proceeding is whether the petitioner has established that it had been doing business for the previous year.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states: "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."

In the August 8, 2002 letter appended to the extension petition, the foreign entity stated that the beneficiary had not yet found suitable premises and staff for the intended full-service beauty salon. The foreign entity's director noted in the same letter "we anticipate employing 10 licensed cosmetologists in our beauty center and 7 teachers plus 6 administrators at our school of cosmetology."

On October 29, 2002, the director requested evidence showing that the petitioner had been doing business in the year prior to filing the petition on September 19, 2002. The director also referenced the above definition of "doing business."

In a January 6, 2003 response, the foreign entity's director stated that the petitioner did not have employees in the United States, and that the beneficiary "has been looking at several options for our proposed expansion plans and has worked as an independent Beauty Management Consultant in the name of [the petitioner]." The petitioner further asserted that "we have made an offer to purchase a business in the United States," and that the purchase was dependent upon the beneficiary's approval to stay in the United States to set up and train extra staff. Although the letter referenced an enclosure consisting of an offer to purchase a business in the United States, the petitioner did not submit this evidence. 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 petitioner also attached three invoices for "consultancy service" dated: (1) January 7, 2000 in the amount of $5,000; (2) June 10, 2002 in the amount of $4,500; and, (3) July 8, 2002 in the amount of $7,500.

The director, citing 8 C.F.R. § 214.2(l)(3)(v)(C), concluded that the petitioner had not met its obligation as a start-up business to support a managerial or executive position by the end of the one-year period.

On appeal, counsel for the petitioner asserts that the petitioner is conducting business and has been doing so since December 3, 2001. Counsel submits a management agreement dated December 3, 2001 entered into between the petitioner and a beauty school to substantiate that the petitioner was providing its services from that date.

Counsel's assertion is not persuasive. First, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. 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). 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).

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 December 3, 2001 management agreement to be considered, it should have submitted the document 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 December 3, 2001 management agreement as evidence submitted on appeal.

Second, the petitioner did not establish that it was providing regular, systematic, and continuous services in the year subsequent to the approval of the "new office" petition. 8 C.F.R. § 214.2(l)(1)(ii)(H). The three invoices submitted by the petitioner in response to the request for evidence do not sufficiently establish that the petitioner was regularly versus intermittently providing consulting services. Of special note, the December 3, 2001 management agreement requires both parties to agree to the hours and periods of consulting service; thus the document does not establish that the petitioner's consulting services were regular, continuous, or systematic.

Third, the statements by the foreign entity's director acknowledge that the petitioner is still attempting to start a business in the United States. Counsel's assertions to the contrary on appeal have no merit. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Finally, the foreign entity's indication that "we anticipate employing 10 licensed cosmetologists in our beauty center and 7 teachers plus 6 administrators at our school of cosmetology," is not persuasive. 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 support an executive or managerial position. 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 instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Although unnecessary for the dismissal of this extension petition, the AAO will briefly address counsel's claim that the petitioner supports an executive position and that the petitioner is claiming that the beneficiary's assignment is in an executive capacity rather than a managerial capacity.

The petitioner provided the July 10, 2001 letter submitted in support of the initial "new office" petition (SRC 01 232 55457). In that letter the petitioner claimed that the beneficiary would be employed as the petitioner's financial manager. The petition in that proceeding also requested consideration of the beneficiary's assignment as a "financial manager." The petitioner stated that its business would be a health and beauty salon, with "at least two retail locations as soon as possible." The petitioner further provided an organizational chart that showed: (1) the beneficiary's position as "finance manager" reporting to the petitioner's general manager; (2) several tiers of managers under the beneficiary's supervision; and, (3) that no positions were filled except for the beneficiary's position of finance manager.

Counsel's claim on appeal that the beneficiary's assignment is in an executive capacity is neither plausible nor persuasive. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In this matter, the petitioner provided no substantive evidence that the beneficiary's assignment was to serve primarily as a financial manager. Moreover on appeal, counsel claims that the petitioner's business is to provide marketing, management, and training services, and further characterizes the beneficiary's performance of consulting services as executive tasks. This blatant attempt to make an obviously deficient petition conform to the requirements of this visa classification does not withstand even cursory scrutiny. Even if the petitioner had not materially altered the beneficiary's purported position and the nature of the petitioner's business, and the altered facts were considered, 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). The petitioner has established only that the beneficiary is directly providing the petitioner's marketing and consulting services; thus the beneficiary is not primarily performing in an executive capacity.

Beyond the decision of the director, the petitioner has not provided sufficient evidence of the financial status of the United States operation, as required by 8 C.F.R. § 214.2(l)(14)(ii)(E), or a statement describing the staffing of the new operation accompanied by evidence of the wages paid to employees, as required by 8 C.F.R.

§ 214.2(l)(14)(ii)(D). As previously discussed, the petitioner represented in the initial petition that it would function as a beauty salon, and operate at least two retail locations. The petitioner further represented that the beneficiary would have a full staff, including an accounts manager and bookkeeping manager, under his direction. The petitioner also stated that it had leased sufficient physical premises to commence doing business in the United States, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). Upon review, considering the dramatic change in the nature of the petitioner's business from the averred retail beauty salons to consulting and training services, the petitioner appears to have made serious misrepresentations in the initial petition. Because the petitioner has not satisfied the requirements for a new office extension, including those enumerated at 8 C.F.R. §§ 214.2(l)(14)(ii)(D) and (E), this petition may not be approved. For these additional reasons, the appeal will be dismissed.

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).

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.