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U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 03 221 54963 Office: TEXAS SERVICE CENTER Date: JAN 27 2005

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 filed this nonimmigrant petition seeking to employ 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 is a corporation organized in the State of Florida that is operating as a book publishing and consulting company. The petitioner claims that it is a branch of the beneficiary's foreign employer, located in Ontario, Canada. The petitioner now seeks to employ the beneficiary as its president-chief executive officer for five years.

The director denied the petition concluding that the petitioner, as a new United States office, failed to demonstrate that it had secured sufficient physical premises to house the new office as required in the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A).

In an appeal filed on October 14, 2003, counsel acknowledges that at the time of filing the nonimmigrant petition the petitioner had not yet secured premises for the new office. Counsel states that the petitioner has since obtained office space, and submits a copy of the lease and photographs as evidence.

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)(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.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The issue in the instant proceeding is whether the beneficiary is eligible for the requested nonimmigrant classification, as the petitioner had not yet secured sufficient premises to house the new United States office at the time of filing the appeal.

It is a well-established rule that the petitioner must demonstrate eligibility for the benefit sought 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). Here, counsel recognizes that the petitioner did not possess sufficient premises to house the new United States office at the time of filing the petition. As the petitioner failed to conform to the regulatory requirements, the petition may not be approved. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner did not establish that the beneficiary's foreign employer and the United States entity possess a qualifying relationship as required in the Act at § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The petitioner claimed on the nonimmigrant petition that it is a branch of the beneficiary's foreign employer. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, 13 I&N Dec. at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Here, the petitioner provided its articles of incorporation, evidencing that the petitioner is a separate Florida corporation. As such, the petitioning organization cannot be deemed a branch of the beneficiary's foreign employer.

If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. The petitioner provided a stock certificate, which identifies the beneficiary's foreign employer as the owner of 200 shares of the petitioner's 10,000 authorized shares of common stock. However, in a "Consent" of the directors and shareholders, dated July 28, 2003, the petitioner's directors and shareholders approved the issuance of 200 shares of common stock to the beneficiary. The petitioner has not explained the inconsistencies in stock ownership. Therefore, the AAO cannot determine whether an affiliate or subsidiary relationship exists between the petitioning organization and the beneficiary's foreign employer. For this additional reason, the appeal will be dismissed.

An additional issue not addressed by the director is the petitioner's failure to demonstrate that within one year of approval of the petition the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The petitioner did not specifically identify the proposed scope of the entity, financial goals, or its anticipated organizational hierarchy as required in the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C). Additionally, while the petitioner provides a vague plan on how the petitioning organization would be financed, the petitioner did not translate the monetary figures into U.S. dollars. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. The record does not support the petitioner's claim that the beneficiary would be employed by the United States entity in a qualifying capacity. 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 appeal will be dismissed for this additional reason.

Moreover, although not addressed by the director, the petitioner did not demonstrate that the beneficiary has been employed abroad in a qualifying capacity. The petitioner's description of the beneficiary's job duties, which included creating technical books and videos, and providing engineering design and consulting services, indicates that the beneficiary is clearly devoting a portion of his time to performing non-qualifying functions of the foreign business. 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). Again, the appeal will be dismissed for this additional reason.

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. 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.