U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

D7

File: WAC-04-103-54305 Office: CALIFORNIA SERVICE CENTER Date: AUG 17 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)

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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its Vice President and Chief Financial Officer 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 California that imports traditional Japanese alcoholic beverages. The petitioner claims that it is the subsidiary of [redacted] located in Miyazaki-ken, Japan. The beneficiary was initially approved for L-1 status in the United States to open a new office, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the beneficiary is not eligible for an extension of his status in order to open a new office, as he has already been afforded the maximum length of time permitted by the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*).

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 beneficiary is eligible for an extension of his L-1A status. Counsel states that an inspector made an error on the beneficiary's Form I-94 Departure Record upon his entry to the United States, granting the beneficiary a period of stay in L-1A status that incorrectly extends beyond the ending date of the prior petition. Counsel asserts that this error has placed the beneficiary in the anomalous position of being in lawful L-1A status according to his Form I-94, yet without having a current L-1A approval notice with which to travel abroad and apply for a new visa, then re-enter the United States. In support of these assertions, counsel submits a brief and additional evidence.

On November 26, 2002, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) approved the petitioner's L-1A petition (WAC-03-046-54898) on behalf of the beneficiary to open a new office in the United States, valid from March 5, 2003 to March 5, 2004. On May 13, 2003 the United States Embassy in Tokyo, Japan issued an L-1A visa to the beneficiary, valid until March 5, 2004. The beneficiary was admitted to the United States at Los Angeles, California on February 2, 2004. Upon inspection, an immigration officer issued a Form I-94 [redacted] to the beneficiary that reflects that he is authorized to remain in the United States in lawful L-1A status until February 1, 2005, or one year from the date of his entry.

On March 3, 2004, the petitioner filed the present petition requesting an extension of the beneficiary's L-1A status. In an attached letter, counsel noted that the petition was filed within the validity period of the initial L-1A approval, and that the petitioner chose not to rely on the February 1, 2005 L-1A expiration date that appears on the beneficiary's Form I-94. On Form I-129 Supplement E/L, in Section 1 the petitioner checked the box that indicates that the beneficiary is coming to the United States to open a new office. In counsel's letter, he stated that "we would like to request for an additional one (1) year extension as a start-up company." Counsel further noted that the beneficiary did not enter the United States until February 2, 2004 "due to lengthy processing times in [the petitioner's] liquor license applications, which have now been approved . . . ."

On March 12, 2004, the director denied the petition. The director found that the beneficiary is not eligible for an extension of his status in order to open a new office, as he has already been afforded the maximum amount of time allowed by the regulations. *See* 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*). The director referenced the beneficiary's Form I-94, and noted that the expiration date shows that the beneficiary was permitted a one-year period in order to open a new office. The director stated that the beneficiary may remain in the United States for the duration permitted under his Form I-94, but that an extension of his status in order to open a new office is "prohibited per regulation."

On appeal, counsel explains the history of the present matter as discussed above. Counsel requests that CIS either approve the petition to extend the beneficiary's status until March 5, 2005, or approve the petition without an extension for a period congruent with the expiration of the beneficiary's Form I-94.

Upon review, it is apparent that errors have been made by both CIS and the petitioner. As noted above, the beneficiary was previously approved for L-1A status to open a new office from March 5, 2003 to March 5, 2004. The United States Embassy in Tokyo correctly issued a visa to the beneficiary valid until the expiration of the beneficiary's approved L-1A status, or March 5, 2004. Yet, upon entry, the beneficiary was erroneously issued a Form I-94 that authorizes a stay in L-1A status beyond the expiration of the L-1A approval notice. The regulation at 8 C.F.R. § 214.2(l)(11) provides that "[t]he beneficiary of an individual petition shall not be admitted for a date past the validity period of the petition." Thus, the beneficiary's Form I-94 was issued in error, and should not have authorized his stay in L-1A status beyond March 5, 2004.

The petitioner correctly chose not to rely on the expiration date of the Form I-94, and filed the present petition for an extension of the beneficiary's status within the period approved under the prior new office petition. Thus, the petition was filed in a timely manner. Yet, as noted above, the petitioner indicated on Form I-129 Supplement E/L, in Section 1 that the beneficiary will remain in the United States to open a new office. In counsel's letter, he noted that the petitioner seeks additional time "as a start-up company." Yet, as correctly stated by the director, the regulations allow a beneficiary a maximum of one year in L-1 status in order to open a new office. 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*). There is no provision in CIS regulations that allows for an extension of this one-year period. The beneficiary has already been approved for a one-year period in L-1A status in order to open a new office under the prior petition, valid from March 5, 2003 to March 5, 2004.

The director stated that the beneficiary was granted L-1A status to open a new office from February 2, 2004 to February 1, 2005, the dates presented on the beneficiary's Form I-94. The director provided that the beneficiary's L-1A status "remains effective" until the expiration on the Form I-94. Yet, as the Form I-94 was issued contrary to the regulations, it is not a valid document for determining the beneficiary's status. The one-year period of time that the beneficiary was granted L-1A status as contemplated by 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*) is from March 5, 2003 to March 5, 2004, the dates presented on the prior L-1A approval notice. The director's comments in this regard will be withdrawn.

Counsel stated that the beneficiary did not enter the United States until February 2, 2004 "due to lengthy processing times in [the petitioner's] liquor license applications . . . ." However, this circumstance does not negate the fact that the beneficiary was approved for a one-year period. The regulations clearly state that a new office petition "may be approved for a period not to exceed one year," irrespective of the length of time

the beneficiary actually spends in the United States. 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*). The fact that the beneficiary did not enter the United States until 11 months after he was approved for L-1A status does not render him eligible for additional time in order to open a new office. The director correctly found that the present petition may not be approved as an extension of the beneficiary's L-1A status in order to open a new office. *See* 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*); 8 C.F.R. § 214.2(l)(3)(v).

Yet, when a petition for an extension of a beneficiary's L-1A status is requested after the beneficiary has been afforded a period of stay in L-1A status to open a new office, that petition is treated as a new office extension under the requirements of 8 C.F.R. § 214.2(l)(14)(ii).

Generally, 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.

Thus, the director should have adjudicated the present petition as a request for an extension of stay after opening a new office. The director's decision does not reflect that he analyzed the petitioner's eligibility in light of each of the requirements of section 101(a)(15)(L) of the Act and 8 C.F.R. § 214.2(l). However, 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). The AAO will herein discuss the petitioner's eligibility for L-1A classification.

The petitioner has failed to establish that it has been doing business for the previous year, as required by 8 C.F.R. § 214.2(l)(14)(ii). If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

> [T]he 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.

As noted above, the petitioner's prior petition in order to open a new office was approved for the period from March 5, 2003 to March 5, 2004. Yet, the beneficiary, as the petitioner's sole employee, did not enter the United States until February 2, 2004. Thus, it appears that the petitioner had no employees for the first 11 months of the one-year period prior to filing the present petition. Further, the petitioner submitted no evidence that it had begun to sell its products as of the filing date. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). While the petitioner provided that it was delayed in receiving a liquor license, it failed to explain the reasons for the delay or to submit relevant documentation. In the petitioner's letter of February 24, 2004, it stated that its "active operations will commence when the company's . . . products arrive in the U.S. [The petitioner] estimate[d] that to happen in the month of May 2004." Thus, the evidence of record reflects that the petitioner was not engaged in "the regular, systematic, and continuous

provision of goods and/or services" at any time during the one-year period prior to filing the present petition. For this reason, the petition may not be approved.

Further, the petitioner has failed to show that the beneficiary would be employed in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). The beneficiary was the sole employee at the time the petition was filed. The petitioner has not established that, at the time the petition was filed, it employed sufficient subordinate staff members in order to free the beneficiary from performing primarily non-qualifying duties. In a letter submitted with the initial petition, the petitioner indicated that it intends to hire additional staff including five new sales representatives, one manager, and three support staff. However, 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). The petitioner has not shown that, at the time of filing the petition, the beneficiary would be relieved from performing primarily non-managerial or non-executive duties. *See* section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). 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. The petitioner has not met this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.