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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: SRC 06 066 52596 Office: TEXAS SERVICE CENTER Date: FEB 22 2007

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, Chief
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 appeal will be dismissed.

The petitioner is a Florida corporation, and claims to be engaged in the retail sale of women's clothing. It states that it is a subsidiary of [redacted], located in Sao Paolo, Brazil. The U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 seeks to employ the beneficiary's services as the president of its new office in the United States for a one-year period.

The director denied the petition on April 10, 2006 concluding that there is insufficient evidence to demonstrate that a sufficient financial investment had been made in order to establish the new office. The director also noted that since the petitioner has not established that sufficient funds have been invested into the U.S. office, the petitioner has thus not established that the intended U.S. operation will support an executive or managerial position within one year of operation.

The petitioner subsequently filed an appeal on April 26, 2006. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the beneficiary asserts that the U.S. company was not provided adequate counsel from its attorney and was not told that the U.S. company's bank account should have funding from the foreign parent company. The beneficiary further explains that she personally paid all initial expenses such as rent, water and electricity. The beneficiary states that once she received the director's request for evidence asking for proof of funding or capitalization of the foreign company, she then initiated a wire transfer from the foreign company for deposit to the U.S. company's bank account. The petitioner submits a letter and additional evidence in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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; and

(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 primary issue to be discussed in this matter is whether the petitioner established that a sufficient financial investment has been made in the United States company, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2).

As outlined in 8 C.F.R. § 214.2(l)(3)(v), if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. §

214.2(l)(3)(v). The regulations specifically require the petitioner to disclose the new office's business plans and the size of the Untied States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year. *Id.*

In the instant matter, the petitioner has not provided sufficient evidence of the foreign entity's financial investment of the United States operation, as required by 8 C.F.R. § 214.2(l)(3)(C)(2). As evidence of a financial investment for the U.S. company, the petitioner submitted a copy of a Bank of America statement in the U.S. company's name for the period ended December 21, 2005. The bank statement indicates one deposit in the amount of $400.00 and two counter credits in the amount of $600.00 and $100.00.

On January 5, 2006, the director requested further documentation in order to proceed with the processing of the pending petition. Specifically, the director requested evidence of the funding or capitalization of the United States company, such as copies of wire transfers showing transfers of funds from the foreign organization, evidence of financial resources committed by the foreign company, copies of bank statements for checking and savings accounts, and/or profit and loss statements of other accountant's reports.

In the petitioner's response dated March 27, 2006, the petitioner submitted a wire transfer dated March 17, 2006 from the foreign company, transferring $15,000 to the U.S. entity's bank account in the United States. In addition, the petitioner submitted a bank statement from the Bank of America, under the account name of the U.S. entity, indicating that a wire transfer for the amount of $14,980 were credited to the company's bank account on March 17, 2006.

The director denied the petition on the ground that the petitioner failed to submit sufficient evidence of a financial investment in the United States company, as required by 8 C.F.R. § 214.2(l)(3)(v)(2). Specifically, the director observed that the wire transfer occurred three months after the instant petition was filed and two months after the director's request for evidence was issued.

On appeal, as noted above, the petitioner asserts that the petitioner's attorney provided bad counsel regarding the U.S. company's bank account. In addition, the petitioner states that the wire transfer occurred two months after receiving the request for evidence because there was a computer error which indicated that the foreign company was delinquent in paying a tax, and therefore the wire transfer was delayed two months.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner did not comply with any of the above-mentioned requirements.

Upon review, the petitioner has not provided sufficient evidence of a financial investment from the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner presented evidence of a wire transfer for the amount of $15,000 originated from the foreign parent company and deposited in the U.S. entity's bank account on March 17, 2006, four months after the instant petition was filed. 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).

On appeal, the petitioner explains that once she received the director's request for evidence, she became aware of the fact that the petitioner must present evidence of sufficient funding for the U.S. entity. It was at this time that the petitioner requested a wire transfer from the foreign company. Again, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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).

Furthermore, the petitioner has not submitted a business plan or other documentation to establish the U.S. company's anticipated start-up expenses and it is therefore not possible to determine what investment amount would be sufficient. Therefore, even assuming, *arguendo*, that the approximately $15,000 in the U.S. entity's account as of March 2006 was intended to be used as capitalization for the new U.S. company, the AAO could not conclude that this amount is adequate for the U.S. company to commence doing business in the U.S. The petitioner has not disclosed the size of the U.S. investment, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). 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)). For the foregoing reasons, the appeal will be dismissed.

As noted by the director, the petitioner has not submitted sufficient evidence to demonstrate that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position. Specifically, the petitioner has not adequately defined the proposed nature of the office, and has not realistically described the anticipated scope of the entity, its organizational structure and its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). As noted above, at the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, CIS will extend the validity of the new office petition only if the entity demonstrates that it had been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B).

Furthermore, as contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

*Id.*

The petitioner submitted a one page document entitled "company overview" that provides a very vague outline of certain goals the U.S. company wishes to achieve. The overview explains that the U.S. company's strategy will be to have "very attractive and competitive prices to fulfill the America market standards," and the company's strategy is to invest in advertising, participate in events and create a web page. The overview also states that the U.S. company plans to hire one administrative manager, one sales person and one secretary. The petitioner did not submit a business plan that outlines the U.S. entity's funding requirements and financial objectives, or explains how the U.S. entity will reach the listed goals and plans and if it is financially feasible to do so. 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. at 165.

In addition, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly

expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner has not submitted sufficient evidence to establish that the intended United States operations, within one year of approval, will support an executive or managerial position.

As noted above, the petitioner indicated that the U.S. company intends to hire an administrative manager, one sales person and one secretary. However, when the director specifically requested information regarding the staffing level of the U.S. entity by the end of the first year of operations, the petitioner indicated that the U.S. entity will hire one general manager, three sales persons, and two cashiers. The petitioner did not explain why the proposed staffing level of the U.S. entity changed after the request for evidence. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In its response to the director's request for further evidence, the petitioner expanded the beneficiary's duties by adding several subordinate positions in which the beneficiary will supervise. In sum, the initial description appeared to have the beneficiary doing more of the actual work since the U.S. entity would employ one administrative manager, one sales person and one secretary, while the second iteration of the staffing level has the beneficiary managing more of the actual work done in the petitioner's operation through proposed subordinates who will perform the day-to-day operations of the company.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, 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 its 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. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the beneficiary's level of authority, but rather elevated the beneficiary's level of authority within the organizational hierarchy. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The petitioner submitted a proposed hiring plan for the U.S. company. The petitioner indicated that the U.S. entity will hire one administrative manager, one sales person and one secretary. Thus, it appears from the record that the beneficiary will perform many or all of the marketing, finance operations, business development activities, and export and import operations. An employee who "primarily" performs the tasks necessary to produce a product or provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International* 19 I & N Dec. at 604.

Upon review of a totality of the evidence, the record is not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity within one year. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial capacity. The petitioner indicated that the beneficiary held the position of director at the foreign company and supervised all the employees of the company. However, the petitioner also submitted the beneficiary's pay stubs issued by the foreign company for 2005 which indicated the beneficiary's position as "financial analyst." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For this additional reason, the petition cannot be approved.

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 petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.