i ntifying data deleted to p.. vent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

D7

DATE: OCT 19 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the nonimmigrant visa petition. Subsequently, the director issued a notice of intent to revoke approval and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter to the service center director for further action and entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president and chief executive 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, a California corporation, states that it is engaged in the retail and wholesale of textiles and apparel. It claims to be a subsidiary of [redacted] The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States, and the petitioner sought to extend his status.

The director initially approved the petition and granted the beneficiary L-1A classification from March 1, 2008 through February 28, 2011. On February 17, 2009, following a site review of the U.S. entity and a telephone interview with the beneficiary, the director issued a notice of intent to revoke the approval, pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(A)(*2*). The director instructed the petitioner to submit additional evidence or arguments in rebuttal of the issues raised in the notice of intent to revoke. The petitioner submitted rebuttal evidence on March 16, 2009.

The director revoked the approval of the petition on March 27, 2009, based on two independent and alternative grounds. Specifically, the director determined that the petitioner failed to establish: (1) that the U.S. company is a qualifying organization doing business as defined in the regulations; and (2) that the U.S. office maintains a physical premises sufficient to house the petitioner's business.

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 director ignored the totality of the evidence the petitioner submitted in rebuttal to the notice of intent to revoke, applied an improperly high standard of proof, and unfairly based the final revocation decision on several pieces of adverse information that were withheld from the notice of intent to revoke. As such counsel asserts that the petitioner was denied its right to respond to derogatory evidence used against it pursuant to 8 C.F.R. § 103.2(b)(16)(i).

Upon review, the AAO agrees with counsel that the director's notice of intent to revoke did not provide adequate notice to the petitioner of all possible derogatory information that informed the director's final decision in this matter. Accordingly, the AAO has reviewed the additional rebuttal evidence submitted in support of the appeal. Upon review of the totality of the evidence submitted, the petitioner has overcome the stated grounds for revocation of the petition approval. The evidence of record, however, reflects that the beneficiary is no longer eligible for classification under section 101(a)(15)(L) of the Act because he is not currently employed in the United States in a managerial or executive capacity. Accordingly, the matter will

be remanded to the director for issuance of a new notice of intent to revoke pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(B).

I. The Law

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)(3)(v) also provides that 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 involves 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.

Under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B). In the present matter, the director provided a statement of the grounds for the revocation but did not cite to the specific provision of the regulations as a basis for the revocation. Upon review, the director revoked the approval on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(*2*), based on a finding that the beneficiary is no longer eligible under section 101(a)(15)(L) of the Act.

II. Discussion

The primary issue addressed by the director is whether the petitioner established that the United States company is a qualifying organization doing business in the United States.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *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[.]

Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H), "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 or abroad.

In determining that the U.S. company is no longer doing business, the director further found that the petitioner does not maintain sufficient physical premises in the United States to house the petitioner's business. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

A. Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 21, 2007, approximately two months prior to the expiration of the beneficiary's initial L-1A "new office" petition on February 28, 2008. The petitioner identified the beneficiary's worksite [redacted] The petitioner stated that it is operating a textiles retail and wholesale business with four employees and that the company achieved gross annual income of $448,560 in 2007.

The petitioner's supporting evidence included: payroll summaries for the months of November and December 2007, prepared by the petitioner's accountant, and indicating three employees in addition to the beneficiary; bank statements for the period May through November 2007; copies of purchase orders, sales invoices and shipping documents for textiles imported and sold by the company; a table summarizing the petitioner's sales transactions, gross profits and turnover during the first year of operations; photographs of the petitioner's office; and copies of the petitioner's lease agreement and renewal agreement for the premises located at the above-referenced address. The petitioner also submitted an organizational chart for the U.S. company indicating four filled positions (president, vice president, sales manager, and import/export department manager).

The director approved the petition on January 18, 2008 for a period of three years commencing on March 1, 2008.

On February 17, 2009, the director issued a notice of intent to revoke the approval of the petition pursuant to 8 C.F.R. § 214.2(l)(9)(iii), advising the petitioner that USCIS "has received information" suggesting that the petitioner and the foreign entity are no longer qualifying organizations. Specifically, the director advised the petitioner as follows:

> The petitioning company [redacted] on Form I-129. A site visit was conducted on January 14, 2009. The site visit found that [the beneficiary] is not employed at the identified location.
>
> A phone call to the beneficiary identified [redacted] as an alternative business location. The above-mentioned address was visited by USCIS on

> February 4, 2009. The address did not reveal a location for a possible business entity. The site visit found that no business ever existed at the address.
>
> Information on record indicates that the U.S. entity may not exist in the capacity claimed in the petition. Further investigation revealed that the U.S. company no longer operates a business at the aforementioned address. The petitioning company does not appear to have secured a physical premises as regulated by the statute. There is no evidence on record that the business exists subsequent to the beneficiary's approved Form I-129.

The director provided the petitioner with 30 days to submit additional evidence or arguments for consideration and in rebuttal to the director's finding that the U.S. company is no longer a qualifying organization and no longer maintains physical premises.

In a letter dated March 13, 2009, the petitioner acknowledged that no one was in the U.S. company's [redacted] on January 14, 2009, as the beneficiary was in [redacted] at that time. The petitioner stated that when the beneficiary spoke to a USCIS officer in late January 2009, he explained that he had been out of town due to business in [redacted] and was staying at a friend's home located at [redacted] until early February 2009. The petitioner's response also included a more detailed statement in the form of an affidavit from the beneficiary. The beneficiary indicated that he flew to [redacted] on December 23, 2007, flew [redacted] stayed with a friend for a short period, and flew home to [redacted] on February 3, 2009. The beneficiary provided documentary evidence of his travel to [redacted] a copy of his Form I-94 confirming the date of his return to the United States, and evidence that he flew from [redacted] on February 3, 2009. The beneficiary stated that he told the USCIS officer that he was temporarily working [redacted] only until early February.

The petitioner indicated that, while USCIS did not give specific details as to how it reached its conclusions regarding the status of the petitioner's business, it was submitting evidence which demonstrates that the petitioner continues to exist and do business at [redacted] The petitioner submitted: (1) a copy of the company's original lease agreement, the previously submitted renewal agreement, and a second renewal agreement dated December 1, 2008, extending the term of the lease through November 30, 2009; (2) copies of rent checks issued to the lessor for the months of January 2008 through March 2009 and a copy of the property manager's business card; (3) copies of dozens of e-mails exchanged between the beneficiary and the petitioner's customers and potential customers over the previous year; (4) copies of purchase orders and invoices showing transactions for the previous year; (5) bank statements for the period January 2008 through January 31, 2009; (6) evidence of wire transfer credits received by the U.S. company from its customers between February 2008 and February 2009; and (7) the previously submitted photographs of the petitioner's office.

C. Notice of Revocation

The director revoked the approval of the petition on March 27, 2009, concluding that the rebuttal evidence was insufficient to overcome the grounds for revocation. The director acknowledged the petitioner's

statements, but noted that the beneficiary told an officer that he was working and living [redacted] The director further stated that USCIS officers had interviewed a representative from a neighboring office at the company's claimed [redacted] address, who informed the officer that he had been there since October 2008 and had never seen anyone go into the office.

In addition, the director noted that the site visit revealed that [redacted] address was not the home of the beneficiary's "friend" but rather is his daughter's apartment on t[redacted] The director advised that USCIS contacted the University Housing office and was informed that the beneficiary is listed as a dependent residing at the address since July 2, 2008. Finally, the director indicated that the University Housing Office's records did not indicate that a commercial business was operating at the address.

The director further found that the petitioner's lease, photographs, and checks for rent payments "do not represent clear and convincing evidence that the business still occupies the above-mentioned address." The director observed that the size of the leased premises is only 180 square feet and that such space does not appear to be sufficient to accommodate the staff of four people claimed by the petitioner, particularly as only one workstation was depicted in the submitted photographs.

D. Appeal

On appeal, counsel for the petitioner asserts that the petitioner submitted more than sufficient evidence to establish that the beneficiary has not moved to [redacted], and that the petitioner has secured physical premises and continues to do business at the address provided on the Form I-129 Petition.

Counsel contends that the director ignored the totality of the evidence that the petitioner provided in rebuttal to the notice of intent to deny, and instead focused upon irrelevant discrepancies, and based the decision on information that was withheld from the notice of intent to revoke. Counsel asserts that the petitioner was denied its right to respond to the evidence used against it pursuant to 8 C.F.R. § 103.2(b)(16)(i).

Specifically, counsel emphasizes that the director failed to advise the petitioner that USCIS interviewed a tenant in the petitioner's building [redacted] or that it contacted the University Housing Office of the [redacted] Counsel indicates that "in response to the USCIS's previously undisclosed interview with an unnamed person working in the same building as the beneficiary, we are submitting several letters that clearly demonstrate that the USCIS is mistaken about the location of [the petitioning company]." These letters include a letter from the office manager of the commercial leasing company that manages the petitioner's building, and letters from two other occupants of the building, confirming that the petitioner occupies the premises.

In addition, the petitioner submits a letter and business card from [redacted] at the [redacted] states that the beneficiary is not a resident at the university housing complex located at [redacted] She indicates that the address is that of [redacted] the

beneficiary's daughter. [redacted] indicates that University policy requires the student to be the leaseholder, while any family staying as a guest are listed as a "dependent" or guest.

The petitioner also submits evidence that the beneficiary and his spouse purchased a condominium in [redacted] in February 2009, evidence of mail addressed to the petitioning company at its [redacted], copies of additional rent checks with proof of deposit by the lessor, additional photographs of the premises, evidence of mail addressed to the petitioning company at the address listed on the Form I-129, and evidence that the petitioner maintains telephone service at the [redacted]

E. Discussion

Upon review, the AAO finds the petitioner's assertions persuasive. The AAO agrees with counsel that the director's notice of intent to revoke was deficient in that it did not identify all derogatory information considered in rendering the final decision in this matter. For this reason, the AAO has considered the additional rebuttal evidence submitted in support of the appeal.

The petitioner has established by a preponderance of the evidence that it maintains its physical premises at the address listed on the petition. The petitioner's maintenance of the original lease agreement and continuous payment of rent for the premises are well-documented in the record.

The petitioner has also provided sufficient evidence, in the form of business correspondence, purchase orders, invoices, bank statements, and evidence of wire transfers from clients, to establish that the beneficiary continues to operate the petitioner's textile import and sales business. The petitioner has not demonstrated that the company conducts a large volume of transactions, but there is sufficient evidence to conclude that it is involved in the regular, systematic and continuous provision of goods and services.

The petitioner has not explained why the company's office remained vacant during the beneficiary's temporary absence from the United States and subsequent stay[redacted] However, these facts raise questions regarding the employment capacity of the beneficiary, rather than doubts as to whether the company is doing business. Further, given the nature and apparent size of the business, it is feasible that the beneficiary could operate the business from a small office, or even off-site, as the evidence of record indicates that much of the day-to-day work is conducted by e-mail.

While there appeared to be some discrepancies in the record with respect to the beneficiary's purpose for being [redacted], the AAO is satisfied that the beneficiary did not permanently relocate there to reside with his daughter as suggested by the director. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003).

Accordingly, the AAO will withdraw the director's revocation decision. Although the petitioner has overcome the grounds for revocation, there is evidence in the record indicating that the beneficiary is not employed by the U.S. company in a primarily managerial or executive capacity. Pursuant to 8 C.F.R.

§ 214.2(l)(9)(iii), the petition approval may still be revoked on notice. The matter will be remanded to the director who is instructed to issue a new notice of intent to revoke the approval of the petition, pursuant to the discussion below.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

As discussed above, the petitioner filed the Form I-129 to request an extension of the beneficiary status on December 21, 2007, and claimed to employ four employees as of that date. In a letter dated December 8, 2006, the petitioner described the beneficiary's duties as follows:

[The beneficiary] has taken charge of planning, directing and managing the overall business activities of [the petitioner]. His duties include planning, administering and developing the company's commercial and financial goals and objectives. He will continue to exercise discretion over the financial operations, and continue to report market changes and opportunities to the Board of Directors. To accomplish this, [the beneficiary] will continue to review sales and purchasing reports and meet with executive officers of key and current potential partners. [The beneficiary] is also responsible for hiring and firing office personnel within the U.S. organization. While the support staff will handle the day-to-day processing, import/export and marketing operations, the President will provide supervisory assistance and make critical managerial decisions on important issues.

During his extension, it is anticipated that 50% of [the beneficiary's] time will be spent finalizing negotiations with current and potential customers such as textile retailers and wholesalers. Utilizing his technical background and prior executive and managerial experience in [redacted], he will make discretionary decisions on our investment projects and the establishment of long-term business relationship with qualifying new suppliers.

In order to meet staffing needs and full-time business operations, [the beneficiary] has spent approximately 40% of his time during the first year interviewing, hiring and training qualified personnel. While we are in hopes of finding experienced employees to fill these positions, extensive training is required in order for them to be familiar with the particular needs of our operations.

The remaining 10% of [the beneficiary's] time was spent communicating and coordinating with [the foreign entity], ensuring that the personnel temporarily assigned to his duties [redacted] are performing adequately and to provide guidance to them. This may involve travel back to [redacted] periodically once the U.S. employees are adequately training to handle the business operations in North America.

The petitioner provided an organizational chart indicating that it had filled the positions of vice president, import/export department manager, and sales manager. The petitioner stated that the company would fill the positions of commissioned sales representative, customer service representative, shipping clerk and warehouse reception by June 2008. It submitted copies of its accountant-prepared payroll statements for the last two months of 2007 as evidence of wages paid to the beneficiary and the three named employees. These payments were reflected in the petitioner's bank statements.

The evidence submitted in rebuttal to the notice of intent to revoke, however, strongly suggests that the beneficiary may be the only employee currently working for the petitioning company. Further, the record reflects that the beneficiary communicated to the USCIS officer who interviewed him by telephone in January 2009 that he originally managed three people, but now operates the business alone with his wife.

The extensive e-mail correspondence in the record reflects that the beneficiary, through 2008 and the first quarter of 2009, has been directly involved in all aspects of sourcing, importing and selling textiles to the petitioner's clients, and appears to have been operating the business singlehandedly. An employee who "primarily" performs the tasks necessary to produce a product or to 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 Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

Such a conclusion is further supported by the fact that the petitioner's office was vacant while the beneficiary was traveling. In addition, the petitioner's bank statements for 2008 indicate that there were several months in which the company issued only one check, for rent, thus suggesting that that there were no employees earning salaries or wages.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services*, 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F 2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); Q *Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

At the time the petition was filed and approved, the petitioner provided evidence that it had four employees and anticipated filling at least four additional positions in the near future. However, it appears that the beneficiary remained as the sole employee of the company within months of the approval of his extension of status. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president with no staff to perform the day-to-day operations of the business. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The regulation at 8 C.F.R. § 214.2(l)(9)(iii)(2) provides that a petition may be revoked on notice if the alien is no longer eligible under section 101(a)(15)(L) of the Act. As the evidence on record indicates that the beneficiary is no longer eligible to be classified as a manager or executive pursuant to the statutory definitions at section 101(a)(44) of the Act, the matter is remanded to the director, who is instructed to issue a new notice

of intent to revoke the petition approval in accordance with 8 C.F.R. § 214.2(l)(9)(iii)(B) and 8 C.F.R. § 103.2(b)(16)(i).

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.