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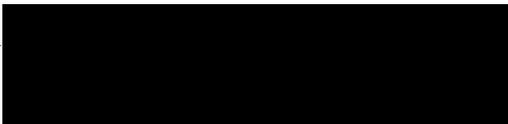
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FEB 15 2005



FILE: SRC 03 175 52397 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
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, Director
Administrative Appeals Office

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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 extend the employment of its president-general manager 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 Florida that is operating as a mall retail store. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Lima, Peru. The petitioner now seeks to employ the beneficiary for an additional two years.

In a decision dated October 6, 2003, the director denied the petition concluding that the petitioner did not demonstrate that the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity. The director specifically noted that the petitioner did not establish the need for an executive or managerial employee after one year of operations. The director concluded that the beneficiary's job duties do not qualify as those of an executive or manager.

In an appeal filed on November 7, 2003, the petitioner states "the mere fact that at one point the company has only [two] employees does not mean that the beneficiary will involve [sic] in day-to-day operations of the business" The petitioner claims that the beneficiary also manages a function of the organization, and notes that the Florida economy has negatively affected the business of the petitioning organization. The petitioner also claims that it requires more than one year to become fully operational.

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, 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.

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.

The issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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), provides:

The term "executive capacity" means 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.

In a letter submitted with the initial petition in June 2003, signed by the beneficiary, the petitioner describes the beneficiary's duties as follows:

Her duties among others: the discretionary decision making of the business and affairs of the corporation; resides of all the meetings of the shareholders and all the meetings of the Board of Directors; execute bonds, mortgages and other instruments requiring seal; sign certificates of stocks; represent all the business and interest of [the petitioner] sign certificates of stocks; represent all the business and interest of [the petitioner]; hire and fire employees; manage the short and long term [sic] financial planning; establish general guidelines which must be followed and executed by employees.

On July 16, 2003, the director requested additional evidence, including information regarding the petitioner's current staffing level. Specifically, the petitioner was asked to provide position titles and duties of all employees, and to provide the educational background of the professionals that are employed.

In response, the petitioner submitted the following description of the beneficiary's job duties:

MANAGING THE ORGANIZATION (hours/day)

Managing the short term financial plan: 1 ½ hours/week
Managing the long term financial plan: 1
Controlling income and expenses: 2
Establishing international contacts: ½

MANAGING AND CONTROLLING THE WORK OF SUBORDINATE STAFF

Establish general guidelines: 1
Setting quality standards: ½
Controlling the work of subordinates: ½
Establishing goals and policies: ½
Other managerial activities: ½

The petitioner also claims that the company employs an administrative assistant who performs the following duties:

Plan, direct and coordinate supportive services of an organization, such as record keeping, mail distribution, invoicing and collection, file keeping, oversee facilities planning and maintenance and custodial operations, coordinates activities of clerical and administrative personnel, analyzes and organizes office operations, solicit orders from established clients, secure new clients, recommends products to customers, based on customers' specific needs and interests, answer questions about products and prices, durability, etc., meets with customers to demonstrate and explain features of products, etc.

The director denied the petition on October 6, 2003 noting that the petitioner only has one employee other than the beneficiary, and concluding that the petitioner has not established a need for an executive or managerial employee one year after opening the new office.

On appeal, the petitioner asserts that beneficiary is an executive and manager, and "the mere fact that at one point the company has only 2 employees does not mean that the beneficiary will involve [sic] in the day-to-day operations of the business. In addition, the petitioner contends that the beneficiary also manages a function, and notes that it takes more than one year to have the organization fully operational, particularly in the Central Florida economy.

Upon review of the record, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

While the petitioner provided an outline of the beneficiary's managerial and executive duties and an itemization of how she will spend her time during each work day, a critical analysis of the petitioner's business seriously undermines the petitioner's assertions that the beneficiary actually performs the managerial duties indicated, much less that these duties occupy her entire work day. Moreover, the record does not establish that the petitioner actually employs the claimed administrative assistant. The petitioner's 2002 Form 1120 and 2002 financial statements show that the company paid no wages in 2002, and the financial statements for the period ended on March 31, 2003 reveal that the company paid only the beneficiary during the first quarter of 2003. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Even if the petitioner had provided evidence that it employs the administrative assistant, the duties described for this position, as well as for the beneficiary's position, are not credible given the nature of the petitioner's business, which is selling incense, perfume oils and aroma therapy products from a small kiosk in a retail shopping mall. Based on the license agreement provided, it appears that the kiosk is expected to operate during the mall's regular business hours, which would presumably be approximately ten to eleven hours a day on weekdays, plus weekends, totaling at least 60 hours of retail operations per week. The administrative assistant, if he or she actually works for the petitioner, is not claimed to be involved in selling incense, nor is the beneficiary. However, since the beneficiary is the only documented employee, it can only be assumed, and

has not been proven otherwise, that she is performing all of the non-qualifying duties involved in operating a small retail business, including stocking inventory and operating a cash register. Based on the record of proceeding, the AAO concurs with the director that the beneficiary's job duties are principally composed of non-qualifying duties that preclude her from functioning in a primarily managerial or executive role. 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 does not specifically address on appeal the director's finding that the beneficiary's job duties do not qualify her as a manager or an executive. The petitioner merely claims that the petitioner's employment of only two workers does not imply that the beneficiary is performing the daily operations of the business. The petitioner does not address who is performing the petitioner's non-qualifying functions if not the beneficiary. The petitioner also fails to provide a detailed explanation substantiating its claim that "the beneficiary also manages a function within the corporation." 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 claims on appeal that it requires more than one year to become fully operational. 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 conceded that it has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Consequently, the appeal will be dismissed.

Beyond the decision of the director, the record does not establish that the petitioner had secured sufficient physical premises to commence doing business as required by the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A). In lieu of a lease agreement, the petitioner has submitted two license agreements, one signed by the beneficiary in September 2002 and one signed in August 2003, which allow the petitioner to set up a temporary kiosk in a designated space in a shopping mall. In each agreement, neither of which is signed or dated by the licensor, the assigned space is described as "0 sq. ft." and it appears that the petitioner is required to supply the materials to construct the kiosk. However, in both financial statements submitted, the petitioner reports that it has no property, equipment inventory or assets of any type except for several hundred dollars in its checking account and notes receivable owed by the beneficiary. This lack of assets raises questions as to whether the petitioner has even constructed the kiosk as contemplated by the licensing agreement. If the initial petition was supported by the same deficient evidence with respect to the petitioner's physical premises, the approval would have constituted gross error on the part of the director.

Further, while not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner has been engaged in the regular, systematic and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted a number of invoices showing that it

purchased incense, incense burners, perfume oils and related products from local retailers or wholesalers. The earliest invoice documenting any business activities dates back to January 2003; however, the new office petition was approved in June 2002. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from June through December of 2001. For this additional reason, the petition may not 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).

It is noted that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's original petition expired on June 7, 2003. However, the petition for an extension of the beneficiary's L-1A status was filed on June 9, 2003, two days following the expiration of the beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. Therefore, the petitioner failed to file a timely petition extension, and thus is precluded from extending the L-1A status of the beneficiary.

Further, pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the beneficiary's status expired on June 7, 2003, and the extension petition was not filed until June 9, 2003, the beneficiary is ineligible for an extension of stay in the United States.

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.