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FILE: SRC 02 201 51321 Office: TEXAS SERVICE CENTER Date: FEB 16 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

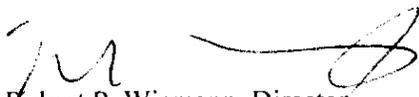
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-PETITIONER

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 extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to § 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 South Carolina that is engaged in the computer consulting business. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Harare, Zimbabwe. The petitioner now seeks to extend the beneficiary's stay for three years.

The director concluded that the limited evidence in the record did not support the petitioner's assertion that the beneficiary would be employed by the U.S. corporation in a primarily managerial or executive capacity. The director also noted that the petitioner did not establish that the petitioning organization is doing business in the United States. The director consequently denied the petition.

On appeal, the petitioner acknowledges that the record contained "insufficient supporting documentation," and states that additional evidence is submitted on appeal "to correct the wrong impression that the company has one employee and is not fully operational." The petitioner submits a one-page statement and documentation, such as invoices and proposals, in support of the appeal.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) 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 AAO will first address the issue of whether the beneficiary would be employed by the U.S. 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-

- (1) Manages the organization, or a department, subdivision, function, or component of the organization;
- (2) 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;
- (3) 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
- (4) 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-

- (1) Directs the management of the organization or a major component or function of the organization;
- (2) Establishes the goals and policies of the organization, component, or function;
- (3) Exercises wide latitude in discretionary decision-making; and
- (4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner stated in its October 25, 2002 response to the director's request for evidence that the beneficiary's job duties in the U.S. entity included the following:

1. Setup [sic] offices at [REDACTED] 8%
2. Processed application as Small Minority Business 12%
3. Setup [sic] links with the state web site on state bids and directed marketing personnel on how to do bids. 4%
4. Setup [sic] an electronics shop in downtown Beaufort and sourced for [sic] funds for the stock. 33%
5. Setup [sic] consulting contacts with United States Global Technical Network (USGTN). This is an American aid organization that links third world countries with American companies to exchange technologies. We have already consulted with companies in Uganda, Ghana, Zimbabwe and Botswana. 25%
6. He has directed the setting up of an electronics shop with E-bay auctions. 8%
7. General and personnel training. 10%

The petitioner also submitted an organizational chart which identified the beneficiary and three additional employees, including the vice-president, a financial director, and a consultant.

In the decision dated December 11, 2002, the director stated that within one year of commencing operation, a new U.S. business must be fully operational to support the need for a manager or executive. The director concluded that the petitioner in the instant matter did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director noted the petitioner's quarterly tax return did not support the petitioner's claim that it employs anyone other than the beneficiary. The director states that as the sole employee, the beneficiary's primary assignment would not be supervising a subordinate staff of professionals, managerial or supervisory personnel. The director therefore denied the petition.

In an appeal filed January 13, 2003, the petitioner neglects to specifically address the director's finding that the beneficiary would not be employed in a primarily managerial or executive capacity. Rather, the petitioner states that the reasons for not yet recruiting permanent employees are: (1) the lack of available personnel; (2) the influence of the recession on the business' growth; and (3) the need to train personnel. The petitioner explains that contract employees were hired during the petitioning organization's development phase, and that the petitioner is targeting "big cities" for experienced personnel.

On review, as the petitioner failed to specifically refute the director's finding, the AAO cannot conclude that the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity. 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). Therefore, the petitioner's assertion that the U.S. company intends to hire permanent "skilled and experienced personnel" has no merit.

Additionally, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the qualified personnel are unavailable in the petitioner's area does not qualify as independent and objective evidence. 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). For this reason the appeal will be dismissed.

The AAO will next address the issue of whether the petitioning organization is doing business in the United States.

In a June 10, 2002 letter attached to the nonimmigrant petition, the petitioner explained that the U.S. company recently received state certification as a small business enterprise, and was qualified to respond to bids and contracts from the state. In a request for evidence dated August 28, 2002, the director asked that the petitioner provide evidence, such as a business license, lease, sales contracts, invoices, bills of lading, shipping receipts, and orders, that the U.S. company is presently doing business. In response, the petitioner submitted a copy of the petitioner's lease, three invoices, and two E-bay "Seller's Checkout Summary," which identify the petitioner as the seller of electronics. The petitioner also provided copies of its retail license, zoning permit, and business license.

In her decision, the director noted the evidence submitted by the petitioner in response to the director's request, and concluded that there was insufficient documentation to establish the regular, systematic and continuous provision of goods and services by the U.S. entity.

On appeal, the petitioner submits additional invoices dated June 20, 2001 through December 16, 2002, work proposals, and E-bay sellers' checkout summaries. The petitioner also provides pictures of "gallery stock items," which are also sold by the U.S. organization.

On review, the record is not consistent in demonstrating that the petitioner is doing business as a computer consulting company, as claimed in the nonimmigrant petition. The petitioner provided various invoices, E-bay summaries, pictures, and proposals. While the invoices identify computer repairs completed by the petitioner, the remaining evidence is not related to computer consulting. The petitioner has not sufficiently explained its apparent function as a retailer. Additionally, the sale of items on E-bay is not reliable evidence that the petitioner is doing business. Again, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. 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. at 193.

Moreover, because the director specifically requested documentation regarding the petitioner's business, the sales invoices submitted by the petitioner on appeal will not be considered. The regulations affirmatively

require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). 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). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Therefore, the evidence will not be considered for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Based on the foregoing reasons, the AAO cannot conclude that the petitioner is doing business in the United States as a computer consulting company. For this additional reason the appeal will be denied.

Beyond the decision of the director, the record does not demonstrate that the beneficiary was previously employed by the foreign entity in a primarily managerial or executive capacity as required in the regulation at 8 C.F.R. § 214.2(l)(3)(iii). The petitioner submitted a single statement on the nonimmigrant petition noting that the beneficiary was the foreign entity's operations director, and was responsible for "planning the future of the business and refocusing." This brief statement is insufficient to establish the beneficiary's employment abroad as a manager or executive. 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. at 193. The appeal will be denied 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.