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File:

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Office: TEXAS SERVICE CENTER Date:

MAY 19 2005

IN RE:

Petitioner:

[Redacted]

Beneficiary:

Petition:

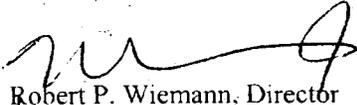
Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 seeks to employ the beneficiary temporarily in the United States as an L-1A nonimmigrant manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The U.S. petitioner, a corporation organized in the State of Georgia engaged in real estate development and retail operations, seeks to employ the beneficiary as its president and chief executive officer. The petitioner claims to be the subsidiary of [REDACTED] located in [REDACTED] Republic [REDACTED].

The director denied the petition concluding that the petitioner had failed to establish that: (1) it had secured sufficient premises to house its business; (2) the foreign entity had the financial ability to remunerate the beneficiary and to commence doing business in the United States; and (3) the foreign entity would continue doing business after the U.S. office was established.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that contrary to the director's conclusion, the foreign entity did transfer sufficient capital to commence operations in the United States, and also would continue to do business after the U.S. petitioner was organized, thereby remaining a qualifying organization as required by the regulations. In addition, counsel alleges that the director erred by not finding that the evidence the petitioner submitted pertaining to its temporary business premises, was acceptable to show that the petitioner had secured sufficient physical premises to house the new organization. In support of these contentions, counsel for the petitioner submits a brief and additional evidence.

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) 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 in this matter is whether the petitioner has secured sufficient physical premises in which to house the new organization. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) provides 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, the petitioner shall submit evidence that sufficient physical premises to house the new office have been secured.

In this matter, the director found that the evidence submitted with the initial petition was insufficient to satisfy this requirement. Consequently, the director issued a request for evidence on October 2, 2003, specifically requesting that the petitioner submit a copy of a commercial lease agreement. In response to the director's request, the petitioner submitted an agreement whereby the petitioner agreed to rent general office space for a rate of \$10 per hour, in addition to a \$70 fee per month for the agreement. The director found this agreement insufficient to

establish that the petitioner had secured sufficient physical premises for its business, and consequently denied the petition.

On appeal, counsel for the petitioner argues that the director determined that "physical premises" must be "exclusive to the lessee," and further asserts that the director has redefined "physical premises." Counsel further contends that the director should have considered what type of physical premises was sufficient to carry out the petitioner's business operations, and alleges that the petitioner eventually would have purchased a permanent physical office.

Upon review of the record of proceeding, the AAO concurs with the director's finding in this matter. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) 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 sufficient physical premises to house the new office have been secured.

In this case, the fact that the petitioner intends to engage in retail operations yet only has secured shared office space that is rented by the hour suggests that the petitioner's alleged business plan is not entirely legitimate. Although the petitioner indicates that it will eventually purchase its own commercial space, it will use this initial rental space to plan its future endeavors. This allegation is not acceptable. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248.; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Consequently, the petitioner is not eligible for the benefit sought when it is clearly not doing business and clearly has not secured adequate space for its intended operations. For this reason, the visa petition may not be approved.

The second issue in this matter is whether the foreign entity had the financial ability to remunerate the beneficiary and to commence doing business in the United States. See 8 C.F.R. § 214.2(l)(3)(v)(C)(2). In response to the director's request for evidence, the petitioner submitted copies of two wire transfers totaling \$80,000. Finding that the transfers were made between individuals and not directly between the foreign entity and the U.S. petitioner, the director concluded that the petitioner had failed to establish that the foreign entity was capable of financing the U.S. operation.

On appeal, counsel for the petitioner confirms that the transfers were in fact between individuals. However, counsel alleges that the supporting letters accompanying the transfers, signed by the Managing Director of the U.S. entity, confirm that the transferred funds were intended to be deposited into the U.S. entity's corporate bank account for the purposes of commencing business operations. Counsel for the petitioner alleges that this evidence was more than sufficient to establish the foreign entity's ability to remunerate the beneficiary and commence business operations.

Upon review, the AAO concurs with the director's finding in this matter. The wire transfers in the record show money exchanged between various individuals, none of whom are the managing director whose supporting letters are adequate evidence, according to the petitioner, to show the intended use of the funds. The petitioner has submitted no evidence, such as bank statements for the petitioner showing the deposit of these funds into a corporate account. The fact that the petitioner has not secured a physical lease also

suggests that funding may not be available to truly commence U.S. operations. Finally, the supporting letters are not acceptable as proof of the ultimate use of the transferred funds. 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)). Furthermore, although counsel repeatedly contends on appeal that these letters are acceptable evidence of the use of these funds, these statements are not acceptable. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). For this additional reason, the petition may not be approved.

The final issue in this matter is whether the foreign entity would continue doing business after the U.S. office was established. This issue is relevant because in order for a petition to be approved, the petitioner must show that the petitioner and the organization which employed or will employ the alien are qualifying organizations. 8 C.F.R. § 214.2(1)(3)(i). The regulations define the term "qualifying organization" as 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 (1)(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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Since the evidence of record indicates that the petitioner is a wholly-owned subsidiary of the foreign parent, the director focused on the second criteria above; namely, whether the U.S. entity is or will be doing business. The regulation at 8 C.F.R. § 214.2(1)(1)(ii)(H) defines the term "doing business" as "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 and abroad."

In this matter, the petitioner claims that the foreign entity is engaged in the retail sale of groceries, cosmetics, and household items. In support of the petition, the petitioner submitted the lease agreement, financial statements, bank statements, and tax documents for the foreign entity. The director found this initial evidence to be insufficient, and consequently issued a request for additional evidence on October 2, 2003. The director requested additional documentation pertaining to the foreign entity's ongoing business operations. In a response dated December 9, 2003, the petitioner submitted the requested documentation, and supplemented this evidence with a number of invoices for the period from June 2003 through September 2003. Counsel further contends that the director's denial was erroneous, and that the foreign entity would continue operations despite the beneficiary's transfer to the United States.

After reviewing this additional evidence, the AAO concurs with the director's denial. The invoices submitted provide a sporadic view of the petitioner's recent business activities. For example, the foreign entity is described as a retailer, who sells groceries, cosmetics, and household items. However, the only evidence submitted that evidences any sales by the foreign entity are four invoices from June 2003. There are numerous other invoices that evidence items purchased by the foreign entity; yet these documents are not translated and their contents are uncertain. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Nevertheless, the record lacks evidence showing that the foreign entity's retail services are still in effect and will continue over the coming months.

Other than the three invoices previously discussed, there is no additional documentation existing in the record to establish that the petitioner has been engaging in the sale of groceries, cosmetics, and household items as it claims in the petition and again on appeal. 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)). In addition, without documentary evidence to support his claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, in the event that the invoices were accepted as evidence, the petitioner overlooks the fact that these invoices represent, at best, a four-month series of business activity. There is no additional evidence of the foreign entity's alleged business operations prior to this time period, which therefore makes it impossible to conclude that the foreign entity had been regularly and systematically engaged in the provision of goods and services. The definition of doing business clearly requires the continuous provision of goods and services, yet the petitioner has failed to submit evidence establishing the foreign entity's business activities for the remainder of the first year. On appeal, counsel fails to address this pertinent issue. In the present matter, the evidence submitted is insufficient to establish that the foreign entity has been doing business as defined by the regulations. Therefore, the foreign entity cannot be deemed a qualifying organization under 8 C.F.R. § 214.2(l)(3)(i).

In addition, the petitioner indicates that the beneficiary is the majority owner of both companies. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

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.