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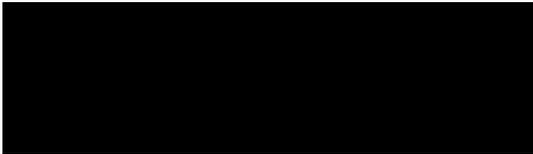
FILE: EAC 04 026 53944 Office: VERMONT SERVICE CENTER Date: OCT 11 2005

IN RE: Petitioner:
Beneficiary:



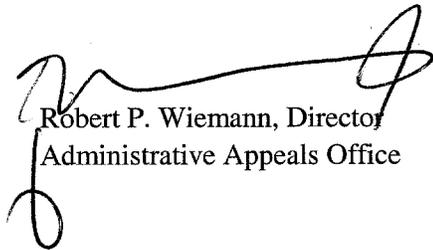
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Vermont 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 filed this nonimmigrant petition seeking to extend the employment of its president 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 New Jersey that claims to be engaged in diversified investments, including real estate investment and management. The petitioner claims that it is a subsidiary of [REDACTED] located in Nairobi, Kenya. The beneficiary was initially granted L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding the petitioner did not establish that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or that (2) the petitioner has commenced doing business in the United States.

On appeal, counsel for the petitioner emphasizes that the beneficiary was granted only nine months in which to open the new office and was further delayed in commencing business operations due to a long delay in the issuance of his U.S. social security number. Counsel contends that the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) requires that a new office be given one full year in which to support an executive or managerial position.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

As a preliminary matter, the AAO will address counsel's claim that the beneficiary's initial period of employment was reduced to only three months due to circumstances outside the beneficiary's control. Counsel appears to be suggesting that the present petition should be adjudicated under the regulations governing new offices, provided in 8 C.F.R. § 214.2(l)(3)(v), as the beneficiary did not receive a full year in L-1A status. Counsel takes issue with the director's application of the regulatory requirements for new office extensions as provided in 8 C.F.R. § 214.2(l)(14)(ii).

The initial new office petition (EAC 03 022 54296) was approved for a period from February 21, 2003 to November 14, 2003. If a beneficiary is coming to the United States to open a new office, the petition may be approved for a period "not to exceed one year." 8 C.F.R. § 214.2(l)(7)(i)(3). Any request for an extension of a petition that was originally approved as a new office must be evaluated under the criteria set forth at 8 C.F.R. § 214.2(l)(14)(ii). The fact that the beneficiary did not apply for a U.S. social security number until four weeks after the approval and did not obtain the number for an additional five months after he was approved for L-1A status does not render him eligible for additional time in order to open a new office. The director appropriately applied the regulation at 8 C.F.R. § 214.2(l)(14)(ii) in making his determination regarding the petitioner and beneficiary's eligibility in this matter.

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

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.

In an October 17, 2003 letter submitted in support of the petition, the petitioner discussed the delay in the issuance of the beneficiary's social security number, and stated that an extension of the beneficiary's status is needed to allow him "to complete the start up and direct the growth of our US operations." The petitioner submitted a proposed organizational chart depicting the beneficiary as president, a general manager position, an export manager position, office and export staff, and outsourced professional services. The petitioner indicated on the organizational chart that, as president, the beneficiary would be responsible for oversight of

company operations, setting financial and operational goals, growth strategies and objectives, and organizational leadership.

On February 2, 2004, the director requested additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity.¹ Specifically, the director instructed the petitioner to provide: (1) a complete position description for all of the petitioner's proposed employees, including the beneficiary, and a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis; (2) copies of IRS Forms 941, Employer's Quarterly Tax Return, for the last two quarters of 2003; and (3) copies of fully executed IRS Forms I-9 for all individuals employed by the petitioner, including documentation submitted to show that they are authorized to accept employment in the United States. The director also noted that one of the petitioner's proposed employees was identified as "export manager," although the petitioner claimed to be engaged in "real estate investment and management and diversified investments." The director requested clarification regarding the type of business the petitioner conducts.

The petitioner responded to the director's request on April 21, 2004, the petitioner submitted a February 18, 2003 letter from the foreign entity that provided the following description of the beneficiary's proposed duties:

The beneficiary will be performing many of the duties of establishing the export platform, researching the markets, sourcing products, negotiating with vendors, suppliers and shippers, assembling a team of custom brokers, freight [sic] forwarder, accountant, information technology and other contract service providers. [The beneficiary] will be coordinating closely with the parent company management in Kenya in developing an effective distribution network for the import of US goods. Once the initial start up is completed, [the beneficiary] will commence hiring managerial and professional staff and assuming responsibility for executive functions of establishing company goals and targets, overseeing company operations and determining growth strategies and objectives.

The above duties, and the acquisition of a motel to steady and diversity organizational income stream, and insuring a successful start up in diverse operations, in very competitive environments will take up all of [the beneficiary's] time. As the start up of [the petitioner] progresses [the beneficiary] will be delegating the day to day management of the company's operations to export and general manager, and devoting his time to expanding the company's business ventures, setting financial and operational goals, providing organizational leadership and insuring the creation of a profitable niche and operational excellence for our U.S. operations.

¹ The AAO notes that the director erroneously stated on the February 2, 2004 request for evidence: "This petition is considered to be a 'new office' petition, as the record contains no evidence that it has conducted business for a full year." As discussed above, this petition is for the extension of a petition that involved the opening of a new office. In spite of this statement in the request for evidence, the director appropriately applied the requirements for a new office extension set forth at 8 C.F.R. § 214.2(l)(14)(ii) and cited the appropriate regulation in her June 22, 2004 decision.

The foreign entity indicated that the petitioner expected to hire an export manager within the next 12 months and a general manager and supporting staff within the next 12 to 18 months. The petitioner also submitted a business plan indicating that the petitioner plans to purchase and operate a franchised motel in mid-2004. The business plan indicates that the motel will employ 13 to 15 employees, including a chief executive officer, general manager, sales and marketing manager, front desk personnel, housekeeping staff, a maintenance and landscaping worker, and contracted legal and accounting staff. The petitioner did not submit the requested IRS Forms 941 or Forms I-9 as evidence that it had hired employees.

On June 14, 2004, the director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a managerial or executive capacity. The director noted conflicting statements regarding the type of business to be conducted by the petitioner and concluded that, as the U.S. company has not yet commenced doing business, it had not grown to the extent that it can support a managerial or executive position.

On appeal, counsel for the petitioner emphasizes that the beneficiary did not have a full year to develop the United States business due to a shortened period of approval from CIS and a delay in obtaining his social security card. Counsel does not specifically address the director's finding that the beneficiary was not employed in a managerial or executive capacity at the time the petition was filed, but instead asserts that he should be granted additional time in which to establish the petitioner's business operations in the United States. Counsel emphasizes that 8 C.F.R. § 214.2(l)(3)(v)(C) requires that a new office be able to support an executive or managerial position within one year.

Counsel's statements are not persuasive. Upon review of the petition and the evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition. 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(l)(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.*

As discussed above, this matter involves the extension of a petition that involved the opening of a new office in the United States and therefore must be adjudicated accorded to the requirements set forth at 8 C.F.R. § 214.2(l)(14)(ii). While the delay in the issuance of the beneficiary's social security number was likely an inconvenience, the petitioner has not persuasively demonstrated how this factor prevented the petitioner from hiring employees and commencing business operations in the United States. The petitioner concedes that at the time of filing, the U.S. company was not yet doing business and had no employees other than the beneficiary, who is primarily engaged in non-qualifying duties such as conducting market research, sourcing products, researching potential investment properties, and locating potential suppliers and vendors. 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 beneficiary's ongoing responsibility for guiding the start-up company in the early stages of its development does not constitute managing or directing the management of the company in this instance.

The AAO acknowledges that the record contains numerous references to the future objectives of the U.S. operation, and outlines at least two different prospective business ventures and two proposed staffing structures. However, business activity that occurs after the date of filing is not probative of the petitioner's eligibility as of the filing date. The AAO cannot consider the petitioner's speculations about future activity. 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). While the beneficiary may have achieved significant accomplishments toward planning the petitioner's operations in the United States, the petitioner has not shown that it has reached the point that he will be employed in a primarily managerial or executive capacity as of the date this petition was filed. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner has established that it has been doing business in the United States for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "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."

On the I-129 Petition submitted on November 6, 2003, the petitioner stated that it is engaged in "Real Estate Investments & Management & Diversified Investments," and indicated that it anticipated gross annual income of \$150,000. In an October 7, 2003 supporting letter, the petitioner indicated that the company was still completing start up activities including "the establishment of a platform for the export of US products to Kenya" and "entry into the U.S. real estate industry." The petitioner submitted copies of classified advertisements placed in a newspaper as evidence that the company is attempting to locate and purchase or lease a property with 50 or more rooms.

In his February 2, 2004 request for evidence, the director requested, in part, that the petitioner submit a detailed business plan, clarify what type of business it intends to operate, and provide copies of its bank statements for November and December 2003.

In response, the petitioner submitted a letter from the foreign entity that states: "The U.S. operations of [the petitioner] are at a start up stage with growth objectives in import-export and investments including research opportunities for export of US goods to Kenya and other East African markets, establishment of an export platform for U.S. goods...." The petitioner also submitted a detailed business plan which states that the purpose of the company is "[t]o purchase a motel under the franchise name in 2004." The business plan indicates that the beneficiary is currently "looking for an investment opportunity" in the motel industry, but nevertheless states that the company will begin operating a motel in July 2004. The petitioner submitted the requested bank statements for November and December 2003. Both statements indicate a beginning and ending balance of \$2861.11.

The director denied the petition on June 22, 2004 determining that the petitioner is not "doing business" as defined by 8 C.F.R. § 214.2(l)(1)(ii)(H). Specifically, the director noted: "[Y]ou have not clearly

demonstrated that the United States entity has actually commenced doing business or even convincingly explained the scope and nature of the business activities it has or will engage in.”

On appeal, counsel for the petitioner asserts that, because of the beneficiary’s delay in obtaining a social security number, the petitioner has had only three months in which to meet the “doing business” standard. Counsel clarifies that the company intends to engage in hotel management and export operations, but has had insufficient time in which to achieve its business objectives.

Counsel’s assertions are not persuasive. As noted above, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) provides that a petition to extend a visa petition that involved the opening of a new office must be accompanied by evidence that the United States entity has been doing business for the previous year. Since the approval of a new office petition is granted for no more than one year, the regulations implicitly require that the petitioner be operational, i.e., engaged in the provision of goods and/or services, as soon as it is granted authorization to employ an intracompany transferee in the new office. Since the beneficiary’s previous petition was approved for a period of only nine months, the petitioner in this matter must establish that it has been doing business since the approval of the previous petition in February 2003, rather than for a full year.

Upon review of the evidence submitted, the petitioner has not established that the U.S. entity has been doing business since the initial new office petition was approved in February 2003, nor does it appear to have progressed beyond the planning stage. The AAO acknowledges the petitioner’s claim that the beneficiary did not obtain a social security number until August 2003. As noted above, the petitioner has not adequately explained how the beneficiary’s lack of a social security number prevented the U.S. company, a legal entity separate from the beneficiary, from engaging in any type of business whatsoever. Furthermore, the AAO notes that at the time the petitioner responded to the director’s request for evidence in April 2004, seven months after the beneficiary received his social security number, the petitioner was still not operational or even prepared to commence doing business. All of the company’s limited activities to date are prospective in nature, and the petitioner has failed to submit evidence that it had generated any income prior to the date of filing, or even prior to the director’s decision seven months later. The majority of the petitioner’s bank statements for 2003 reflect no activity, which raises questions as to whether the company is paying rent or utilities for its purported office space. Accordingly, it is evident that the petitioner is still engaged in preliminary planning and developmental activities that would normally be completed prior to filing a petition for a new office. The petitioner has not met the requirements set forth at 8 C.F.R. § 214.2(l)(14)(ii)(B) and is therefore ineligible by regulation for an extension. For this additional reason, the appeal will be dismissed.

The petition will be denied 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.

ORDER: The appeal is dismissed.