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File: LIN 06 069 51402

Office: NEBRASKA SERVICE CENTER

Date: DEC 08 2006

IN RE:

Petitioner:

Beneficiary:



Petition:

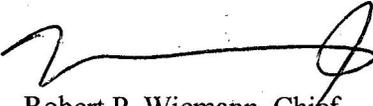
Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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, Chief
Administrative Appeals Office

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DISCUSSION: The Director, Nebraska 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-1B nonimmigrant intracompany transferee with specialized knowledge 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 District of Columbia, claims to be engaged in computer software applications, consulting, and licensing. It seeks to employ the beneficiary, a computer software specialist, as its branch manager. The petitioner claims to be an affiliate of [REDACTED] located in Berlin, Germany.

The director denied the petition concluding that the business entity in the United States was not a qualifying organization as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G) and as required under 8 C.F.R. § 214.2(l)(3)(i). Specifically, the director found that the minimal evidence of the petitioner's business dealings in the United States suggested that it was not doing business as defined by the regulations, and thus was unable to meet the definition of a qualifying organization.

The petitioner filed an appeal in response to the denial. On appeal, the petitioner contends that the director's basis for denial was erroneous. Specifically, the petitioner alleges that, contrary to the director's conclusion that the U.S. corporation was merely an agent for the foreign entity, the petitioner is in fact a functioning business engaged in the provision of computer services. In support of this contention, the petitioner submits a brief and additional evidence in support of the claim that the U.S. corporation is doing business as required by the regulations.

It is further noted that the petitioner submitted a request for oral argument before the AAO. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, the petitioner identified no unique factors or issues of law to be resolved. In fact, the petitioner set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 (1)(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 primary issue in this matter is whether the petitioner is a qualifying organization as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the regulation defines 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 (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; 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 an affiliate of the foreign parent by virtue of a common majority owner, 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(l)(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 it is engaged in computer software applications, consulting, and licensing, and provides evidence establishing its incorporation in the District of Columbia in 1998. In a letter of support accompanying the petition dated December 22, 2005, the petitioner indicated that its primary line of business was "the development, licensing, and servicing of software for acoustic modeling, primarily applied to automotive design." The petitioner further indicated that its proprietary software, known as "SFE-Concept," is currently

implemented by General Motors and Ford in the United States. The petitioner explained that in order to service these clients in the past, it sent qualified technicians from the foreign entity on short periodic visits to the United States. The petitioner claims that due to the increase of its business, it now requires a technician to be permanently based in the United States, and explains that the petitioner was incorporated in order "to maintain a permanent U.S. presence."

The director found this initial evidence to be insufficient, and consequently issued a request for additional evidence on January 17, 2006. The director requested additional documentation pertaining to the petitioner's business, including a complete U.S. tax return. The director also requested profit/loss statements, bank account statements, and/or personnel records. Additionally, the director requested corporate documentation establishing the affiliation between the U.S. and foreign entities. In a response dated March 24, 2006, the petitioner submitted the requested documentation. In an accompanying cover letter, the U.S. petitioner indicated that it had no employees aside from its president, [REDACTED] who did not qualify as an employee and did not receive a salary. The petitioner further explained that the intended purpose of the beneficiary's transfer to the United States was to expand the U.S. office, which had not been fully funded until now because it had taken a number of years to establish a presence in the United States. Specifically, the petitioner indicated that until now, it had attempted to utilize the services of an independent contractor, as well as the benefits of a partnership with another U.S. entity, in an effort to shelter the petitioner from the associated "burdens and income" of operating a business. The petitioner concluded by stating that the selling and servicing of software licenses had traditionally been handled by the foreign entity in Germany, and any activities undertaken and executed through the U.S. corporation were funded by income generated by the foreign entity.

As a result, the petitioner contended that its next logical step was to increase its personnel base in the United States. In support of this contention, the petitioner submitted letters from Ford and General Motors confirming their desire for a U.S.-based technician, as well as a selection of bank statements. Finally, the petitioner submitted a deed evidencing the purchase of a residence in Rochester Hills, Michigan, by [REDACTED] the petitioner's president.

After reviewing this additional evidence, the director denied the petition. The director concluded that the petitioner had failed to submit sufficient evidence to establish that it had been or would be doing business in the computer software industry. Specifically, the director noted that the bank statements submitted in support of its alleged computer software venture did not show that the petitioner had been continuously and systematically providing goods or services. In addition, the director noted that the acquisition of a residential property by the petitioner's president was not persuasive evidence that the U.S. corporation was in fact doing business as required by the regulations.

On appeal, the petitioner discusses the nature of its business, and contends that the director's decision only considers one aspect of its current business dealings. The petitioner notes that although established in 1998, it is still a relatively new business in its development stage, and that it is currently seeking to expand its presence in the United States. The petitioner claims that despite this relatively new status, it is not merely an agent or administrative conduit for the foreign entity. Specifically, the petitioner states that, in conjunction with the foreign entity, it has "systematically marketed and applied its services with *the intent* to mount a larger operation in the U.S." (Emphasis added). It further states that the U.S. entity may be considered a

partner of the foreign entity, and claims that it is intent on growing to be able to service the North American market.

On review of the evidence submitted, the AAO concurs with the director's finding that the petitioner failed to demonstrate that it had been and will be doing business, and thus, by definition, is not a qualifying organization for purposes of this analysis. First, in the course of examining whether the petitioning company has been doing business in the field of computer software consulting, it is reasonable to expect copies of documents that are required in the daily operation of the enterprise, such as invoices or contracts evidencing the nature and extent of the consulting services provided. Any company that is doing business through the regular, systematic, and continuous provision of goods or services may reasonably be expected to submit copies of such invoices or other similar documents evidencing the amount of services rendered.

Other than the bank statements previously discussed, there is no documentation contained in the record to establish that the petitioner has been engaging in the provision of computer software consulting. Although the petitioner's U.S. Corporation Income Tax Return for 2004 indicates sales in the amount of \$80,000, it paid no salaries or wages that year, thus suggesting that any services provided were supplied by an exterior source. While the petitioner claims it has been incorporated since 1998 and regularly doing business in the United States by virtue of servicing its two automotive clients, no documentation corroborating this claim is contained in the record. Furthermore, although the petitioner submits a copy of a warranty deed evidencing the purchase of a residential property in Michigan by the petitioner's president, this document has little evidentiary significance. 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).

Second, the petitioner on appeal appears to believe that the provision of consulting services in the United States by employees of the foreign entity, who visit the U.S. periodically, constitutes doing business for purposes of the regulations. This is not the case. The petitioner notes, for example, that software consulting does not necessarily require permanent physical premises at the customer's location. Specifically, the petitioner indicates that its consulting services for Ford and General Motors in 2005 were provided by qualified technicians of the foreign entity, who made fifteen visits to the United States from Berlin to provide such services. Furthermore, the petitioner confirms on appeal that "the main server and the bulk of personal expertise, including research, are positioned in Berlin, and *will remain there for the foreseeable future.*" (Emphasis added).

Based on the above excerpt from the petitioner's appeal, the petitioner confirms that it does not have an operational business in the United States. While it appears that a good faith effort is in place to expand into the United States and to maintain a permanent presence there, it has not yet achieved this goal. By virtue of the petitioner's claims and the evidence submitted in support thereof, it cannot be concluded that the petitioner is doing business as required by the regulations. 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). It is impossible to conclude, therefore, that the petitioner has 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 its business activities which are rendered separate and apart from those of the foreign entity. Therefore, the petitioner cannot be deemed a qualifying organization under 8 C.F.R. § 214.2(l)(3)(i).

A related issue raised by the director in this matter is whether the petitioner has secured sufficient physical premises in which to house the organization. The regulation at 8 C.F.R. § 214.2(l)(3)(vi)(A) provides that if the petition indicates that the beneficiary is coming to the United States in a specialized knowledge capacity 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. Upon review of the record of proceeding, the AAO disagrees with the basis for the director's finding in this matter. Despite the fact that the petitioner appears to still be in a start-up phase, the petitioner has been incorporated since 1998 and consequently cannot be deemed a new office. Since the beneficiary was not intended to come to the United States to open a new office or be employed in a new office, the regulatory requirement set forth above is inapplicable.

However, the fact that the petitioner's president, as an individual, has secured a residential property for the intended computer software business obligates a reexamination of the evidence in this matter. If Citizenship and Immigration Services (CIS) fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d at 15. In this case, the fact that the petitioner intends to become a computer software consulting firm yet has not secured a commercial lease and intends to use the residence of its president as its primary place of business suggests that the petitioner's alleged business plan is not entirely legitimate. 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 appropriate space for its intended operations. For this additional reason, the visa petition may not be approved.

Beyond the decision of the director, the record as presently constituted is not persuasive in demonstrating that the beneficiary is to perform a job requiring specialized knowledge in the proffered position. Although the petitioner asserts that the beneficiary's position requires specialized knowledge, the petitioner has not articulated any basis to the claim that the beneficiary is currently and will continue to be employed in a capacity requiring specialized knowledge. Other than submitting a general description of the beneficiary's job duties, the petitioner has not identified any aspect of the beneficiary's position which involves special knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests. The petitioner has not submitted any evidence of the knowledge and expertise required for the beneficiary's position that would differentiate that employment from the position of "computer specialist" at other employers within the industry. As previously stated, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190. Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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.