

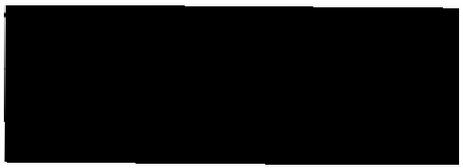
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U.S. Citizenship
and Immigration
Services

D7



FILE: SRC 05 202 51579 Office: TEXAS SERVICE CENTER Date: JAN 08 2007

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

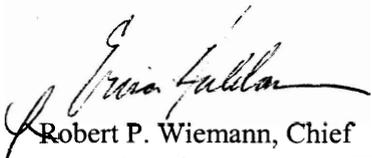
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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

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 appeal will be summarily dismissed.

The petitioner, a Georgia corporation, claims to be an affiliate of _____ Ltd. located in Kenya. The petitioner states that the United States entity is engaged in the business of investments and trade. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of chief executive officer and president.

The director denied the petition on December 5, 2005, concluding that: (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) the petitioner did not establish that the United States company was doing business. In addition, the director stated that the United States entity does not appear to have sufficient subordinate managerial employees, and thus the beneficiary will be carrying out the day-to-day operations of the U.S. entity rather than supervising subordinate employees who would relieve the beneficiary from primarily performing non-qualifying duties.

On the Form I-1290B, Notice of Appeal, the petitioner asserts the following:

Service Center has erroneously concluded that there are insufficient number of employees to justify an L-1A manager. As the supporting evidence shows, the Petitioner has hired additional employees and now the total employees are 7 for Petitioner.

The petitioner submits a brief asserting that the petitioner hired four additional employees in November 2005. In addition, the petitioner submitted a copy of the United States company's payroll register, paystubs, and the tax Forms W-4 for the employees hired in November 2005.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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.

On appeal, counsel does not dispute the director's findings, or assert that the decision was based on an erroneous conclusion of law or statement of fact. Instead, counsel submits evidence that the petitioner hired additional employees subsequent to its response to the director's request for evidence, and four months subsequent to the filing of the petition.

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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the

petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations 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." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in 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 has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

As the United States company appeared to employ only the beneficiary at the time of filing, it is reasonable to assume, and has not been proven otherwise, that the beneficiary is directly performing client development, negotiations, marketing and financial development, and all or many of the various operational tasks inherent in operating a business on a daily basis, such as market research, paying bills, and customer service. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Accordingly, the director reasonably concluded that the beneficiary will be performing the day-to-day operations and directly be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The instant nonimmigrant petition was filed on July 13, 2005. During the initial year of operation, the petitioner asserted that the beneficiary was the only employee of the U.S. company. On appeal, counsel for the petitioner asserts that six additional employees were hired in November 2005, nearly four months after the instant petition was filed. 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). Accordingly, the evidence submitted on appeal need not and will not be considered.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on the totality of the record whether the description of the beneficiary's duties represents a credible account of the beneficiary's role within the organizational hierarchy. As noted by the director, the record does not demonstrate that the petitioner has any employees to perform the routine non-executive and non-managerial functions of the business. Accordingly, the director reasonably concluded that the beneficiary as the petitioner's only employee will be performing the day-to-day

operations and directly be providing the services of the business rather than directing such activities through subordinate employees. Therefore, the appeal must be dismissed.

In addition, as noted by the director, the evidence submitted is insufficient to establish that the U.S. entity has been or is engaged in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. In response to the director's request for evidence dated October 27, 2005, counsel for the petitioner asserted the following:

For background, please note that in the I-129 petition, the Company explained that at that time it had not started an investment even though it had made many numerous contacts with business brokers and with sellers. The Company had at least one contract for a purchase of a business which did not go through. However, on October 24, 2005, the Company entered into a Management Agreement with ██████ Inc. in which the Company paid \$47,000.00 to ██████ Inc. and the Company will manage ██████ Inc.'s business for one year and option for anything year and be paid \$4,000 per month management fee.

As noted above, the petitioner entered into a management agreement in October 2005, three months after the instant petition was filed, and over one year after the beneficiary was granted L-1A status. The petitioner has failed to provide any documentation of the U.S. company when the petitioner first commenced the business in July 2004. Again, 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. at 248. The petitioner has not provided sufficient evidence of the U.S. entity doing business in the United States during the initial year of business and up to the date the instant petition was filed. Counsel does not address this issue on appeal.

In addition, the petitioner indicated that the beneficiary is the sole owner of the U.S. entity and a 70% owner of the foreign company. 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.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

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. Inasmuch as

counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the petitioner has not sustained that burden. Therefore, the appeal will be summarily dismissed.

ORDER: The appeal is summarily dismissed.