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File: EAC 05 173 53861 Office: VERMONT SERVICE CENTER

Date: MAR 06 2007

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:



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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter remanded to the service center for additional action and a new decision.

The petitioner seeks to change the beneficiary's classification from specialized knowledge worker (L-1B) to manager or executive (L-1A) and extend his period of stay as a nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L). The beneficiary was issued an L-1 nonimmigrant visa on June 6, 2000, and first entered the United States in L-1 status on June 10, 2000, under an approved blanket petition (EAC 00 029 52411) as an intracompany transferee having specialized knowledge. The beneficiary's current L-1 classification as a specialized knowledge worker (L-1B) expired on June 5, 2005 (EAC 03 163 52478). The petitioner filed the instant petition seeking the change of status and extension of stay on May 31, 2005, or 5 days before the expiration of the petition's validity. The petitioner identified the beneficiary's intended period of employment in the Form I-129 as June 6, 2005 until June 5, 2007. The director concluded that because the petitioner did not file the petition at least six months prior to the expiration of the beneficiary's stay as an L-1B nonimmigrant, the petitioner had not filed timely and denied the petition to change classification to L-1A status, and the application for an extension of stay, pursuant to 8 C.F.R. § 214.2(l)(15)(ii).

On appeal, counsel to the petitioner asserts that the petitioner was excused in this case from filing an amended, new, or extended petition within six months of the expiration of the beneficiary's L-1B five-year period of stay because the petitioner can establish that the beneficiary has been employed as a manager since first entering the United States in L-1 status and that the petition is based on the beneficiary's pre-existing qualifications and not on a "promotion." Counsel also asserts that the director improperly inferred from the regulations a requirement that such petitions be filed six months prior to the expiration of the beneficiary's L-1B status.

The regulation at 8 C.F.R. § 214.2(l)(15)(ii) states the following, in pertinent part:

The total period of stay may not exceed five years for aliens employed in a specialized knowledge capacity. The total period of stay for an alien employed in a managerial or executive capacity may not exceed seven years. No further extensions may be granted. When an alien was initially admitted to the United States in a specialized knowledge capacity and is later promoted to a managerial or executive position, he or she must have been employed in the managerial or executive position for at least six months to be eligible for the total period of stay of seven years. The change to managerial or executive capacity must have been approved by [Citizenship and Immigration Services] in an amended, new, or extended petition at the time that the change occurred.

In the denial, the director determined that the beneficiary is not eligible for the total period of stay of seven years because the petitioner did not file, and Citizenship and Immigration Services (CIS) did not approve, an amended, new, or extended petition changing the beneficiary's classification to L-1A status within six months of the expiration of the beneficiary's total permissible period of stay of five years.

It is noted that 8 C.F.R. § 214.1(c)(5) states that there is no appeal from the denial of an application for extension of stay, whether filed on a Form I-129 or Form I-539. However, while the AAO may not normally enter a decision on the appeal of the beneficiary's extension of stay, the AAO will review the matter as it pertains to the underlying L-1A petition and change of status request that were not addressed by the director, which are a proper bases for the appeal.¹

As noted above, the beneficiary was issued an L-1 nonimmigrant visa on June 6, 2000, and first entered the United States in L-1 status on June 10, 2000, under an approved blanket petition as an intracompany transferee having specialized knowledge (L-1B). The beneficiary later became a beneficiary of an individual petition filed by the current petitioner. This individual petition extended the beneficiary's period of stay as a specialized knowledge worker (L-1B) until June 5, 2005 (EAC 03 163 52478). Due to absences from the United States during his employment as an L-1 nonimmigrant, and due to his initial admission to the country on June 10, 2000, the petitioner could have potentially extended the beneficiary's stay until August 15, 2005, or for 71 days subsequent to June 5, 2005, the expiration of the current petition extension, before the beneficiary would have reached his five-year period of stay limitation.²

¹The AAO notes that an "extension of stay" must be distinguished from either an extension of status, which occurs through a "petition extension," or from a petition for new employment, which requests a new classification and/or term of employment. Although those seeking L-1A status or an extension of this status are currently permitted to file one form to request this new or extended classification, to request an extension of stay, and to request a change of status to this classification, these requests are still separate determinations. See 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). In addition, 8 C.F.R. § 214.2(I)(15)(i) specifically states that, "[e]ven though the requests to extend the visa petition and the alien's stay are combined on the petition, the director shall make a separate determination on each." Thus, 8 C.F.R. §§ 214.1(c) and 214.2(I)(15) are the relevant sections on extension of stay requests, 8 C.F.R. § 214.2(I)(14) deals only with L-1 petition extensions, and 8 C.F.R. § 248.3(a) addresses change of status requests to L-1A classification.

In this matter, the petitioner makes the following separate requests: (1) the approval of L-1A classification for the beneficiary, (2) a change of status from L-1B to L-1A classification, and (3) the extension of the beneficiary's authorized stay in the United States. Only in situations where a beneficiary has or will have exhausted his or her permitted stay in the United States in H or L status by the requested start date or at the time of filing, whichever is later, may the director deny a petition based solely on a beneficiary's ineligibility for an extension of stay. See 8 C.F.R. § 214.2(I)(12)(i). Otherwise, as discussed *supra*, the director must make separate determinations on each request made in the Form I-129.

²As documented in the record, the beneficiary was absent from the United States from August 25, 2001 until September 20, 2001; from October 20, 2002 until November 5, 2002; and from February 15, 2003 until March 11, 2003. When these absences are considered in conjunction with the beneficiary's initial admission to the United States in L-1 status (June 10, 2000) and the expiration of the current extended petition (June 5, 2005), the petitioner could have potentially extended the beneficiary's stay for 71 days.

However, the director concluded that because the petitioner did not file the petition at least six months prior to the expiration of the beneficiary's stay as an L-1B nonimmigrant (June 5, 2005), the petitioner had not filed timely and denied the petition to change status to L-1A classification, and the application for an extension of stay, pursuant to 8 C.F.R. § 214.2(l)(15)(ii). The director ignored the fact that the petition was filed five days before the expiration of the current petition on June 5, 2005; that the petitioner was potentially able to extend the beneficiary's stay for 71 days beyond June 5, 2005; and that the petitioner was potentially able to change the beneficiary's classification to L-1A status for the five days remaining in the validity period of the current petition plus the 71 day period subsequent to the expiration of the validity of the current petition, i.e., until August 15, 2005.

Upon review, the AAO partly concurs with counsel's contention that the regulations do not mandate that a petition seeking to change a beneficiary's classification from L-1B to L-1A be filed six months prior to the expiration of the beneficiary's period of stay. The director denied the petitioner's application for extension of stay in this matter due to its reliance on the visa validity dates and the filing date of the petition. The director did not, however, address the petitioner's separate and distinct requests to approve L-1A classification for the beneficiary and to change his current L-1B status in the United States to this new classification. The director merely noted that the simultaneous extension request was filed less than six months prior to the expiration of the validity period, and thus precluded the granting of an extension. The director failed, however, to evaluate the merits of the petitioner's request to amend the beneficiary's status, and failed to review the exact dates during which the beneficiary was in fact present in the United States.³

For this reason, the decision must be withdrawn and the matter remanded to the service center for additional action and a new decision.

It should be noted that the AAO disagrees with the remainder of counsel's arguments regarding the interpretation of 8 C.F.R. § 214.2(l)(15)(ii). As explained above, counsel asserts that this regulation should be construed to excuse the petitioner in this case from filing an amended, new, or extended petition documenting the beneficiary's "change" to managerial duties within six months of the expiration of the beneficiary's L-1B five-year period of stay because the petitioner can establish that the beneficiary has been employed as a manager since first entering the United States in L-1 status and that the petition is based on the beneficiary's pre-existing qualifications and not on a "promotion." In other words, since the beneficiary has arguably been employed primarily as a manager from the beginning, was never "promoted," and his duties never "changed," there was nothing to document in an amended petition and, thus, the petitioner is entitled to

³It is noted for the record that, when reviewing the requested extension of stay, the director should calculate the total time the beneficiary has spent in the United States and, if eligible for the extension, grant it up until the maximum five-year period permitted by regulation. The beneficiary would then be ineligible for an extension of stay beyond the five year maximum until he has been employed in the approved managerial or executive position for at least six months, thereby necessitating a second petition at that time to extend the beneficiary's stay for the maximum seven years permitted for L-1A nonimmigrants. 8 C.F.R. § 214.2(l)(15)(ii). As noted above, in this case it appears that the beneficiary would not have reached his five-year period of stay until 71 days after June 5, 2005, or August 15, 2005.

extend the beneficiary's stay for the full seven years provided it can establish that the beneficiary has been primarily employed as a manager for at least six months and will continue to be so employed. Counsel, however, ignores the last sentence of 8 C.F.R. § 214.2(I)(15)(ii):

The change to managerial or executive capacity must have been approved by [CIS] in an amended, new, or extended petition at the time the change occurred.

This sentence of the regulation clearly mandates the documentation of a beneficiary's change to a managerial or executive capacity *at the time the change occurred* and not at some future time, e.g., when the petitioner decides to extend the stay of a specialized knowledge worker beyond the fifth year. In this case, the petitioner was obligated to document the beneficiary's alleged change to a managerial capacity when the change occurred, even if this occurred on his first day of his employment. While counsel asserts in the appeal that "the beneficiary has been employed as a manager since entering the United States in L-1 status," the petitioner was nevertheless obligated to document his assumption of managerial duties in an amended, new, or extended petition at least six months before the beneficiary reached the end of his L-1B five-year period of stay if it had wanted to preserve its opportunity to extend the beneficiary's stay through the seventh year. In this case, as the petitioner chose not to document the beneficiary's assumption of managerial duties as required by the regulations, the regulations prohibit an extension beyond the fifth year even if the beneficiary could be established to have been performing managerial duties from the beginning of his employment in 2000. Counsel's argument is without merit.

Furthermore, although the director did not enter a decision addressing the beneficiary's alleged change of status from an L-1B intracompany transferee with specialized knowledge to an L-1A manager or executive, the AAO notes that the evidence presently contained in the record appears insufficient to establish that the beneficiary was employed primarily in a managerial position. The petitioner asserts that the beneficiary has been managing "professionals," although the record is devoid of any evidence that a bachelor's degree is actually required for any of the positions supervised by the beneficiary. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

Moreover, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the

definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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).

However, as the director failed to address the critical issue of whether the beneficiary has been and will be employed in a managerial capacity, this matter must be remanded for a full decision.

The decision of the director will be withdrawn and the matter remanded so that the director may examine the record to determine whether the beneficiary was promoted to a qualifying managerial capacity, and was thereby eligible for a change of classification and extension of stay until the end of his five-year period of stay, i.e., August 15, 2005.

ORDER: The decision of the director is withdrawn. The matter is remanded to the director for additional action and a new decision.