

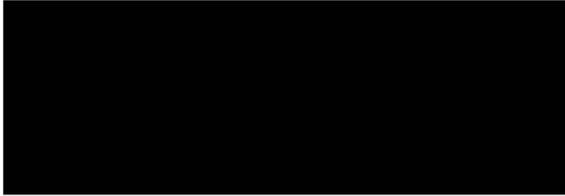
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W. Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



87

FILE: EAC 07 232 51401 OFFICE: VERMONT SERVICE CENTER Date: JUL 07 2008

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. 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 employ the beneficiary 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 described as a manufacturer of consumer products and claims to be an affiliate of the beneficiary's previous foreign employer, Reckitt Benckhiser (Canada), Inc. The beneficiary has been employed by the petitioner in L-1B classification since September 11, 2002 and was physically present in the United States in L-1B status at the time the petition was filed. The beneficiary's L-1B status was due to expire on October 8, 2007. The petitioner filed the instant "new" nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant from August 15, 2007 until October 8, 2009. The petitioner requested that United States Citizenship and Immigration Services (USCIS) notify the pre-flight inspection station in Toronto, Canada upon approval of the petition so that the beneficiary, a Canadian citizen, could be admitted to the United States in L-1A status.

The director denied the petition concluding that the beneficiary is not entitled to an extension of his L-1 status beyond the five-year limit imposed on L-1B nonimmigrant intracompany transferees by the regulation at 8 C.F.R. § 214.2(l)(12). In denying the petition, the director noted that in order for the beneficiary to qualify for the requested two-year extension, pursuant to 8 C.F.R. § 214.2(l)(15)(ii), the petitioner must establish: (1) that the beneficiary has been employed by the petitioner in a managerial position for at least six months prior to reaching the five-year limit on L-1B status; and (2) that it filed an amended, new or extended L-1 petition at the time the promotion took place. The director concluded that, because the petitioner did not file the petition at least six months prior to the expiration of the beneficiary's five-year stay as an L-1B nonimmigrant, the petitioner had not filed timely, and he therefore denied the petition, pursuant to 8 C.F.R. § 214.2(l)(15)(ii).

The director further acknowledged the counsel's contention that the regulation at 8 C.F.R. § 214.2(l)(15)(ii) is not applicable because the petitioner sought consular notification of the petition approval rather than an "extension of stay." However, the director determined that "it appears that it was your intent to circumvent immigration laws by requesting consular notification instead of extension on your petition."

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director's decision failed to address the specific issues and arguments raised in the petitioner's response to a request for evidence issued on August 21, 2007. Counsel asserts that there are "clear distinctions drawn in the regulations between new petitions and petition extensions, and the USCIS interpretation and application of the regulations renders those distinctions meaningless." Counsel further contends that USCIS regulations do not require that a beneficiary have been employed in a managerial or executive capacity for six months where no extension of stay is sought. Therefore, counsel claims the instant petition should not have been subject to the application of the regulation at 8 C.F.R. § 214.2(l)(15)(ii). Counsel asserts that a beneficiary who has worked in a specialized knowledge capacity for less than five years and then was promoted to a managerial capacity is not prevented from entering the United States based on a new L-1A petition for the balance of the seven year limit. Counsel submits a brief and additional evidence in support of the appeal.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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)(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.

The regulation at 8 C.F.R. § 214.2(l)(7)(i)(C) states:

The petitioner shall file an amended petition, with fee, at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e., from a

specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The regulation at 8 C.F.R. § 214.2(l)(12)(i) states in pertinent part:

[A] new individual petition may not be approved for an alien who has spent the maximum time period in the United States under section 101(a)(15)(L) and/or (H) of the Act, unless the alien has resided and been physically present outside the United States, except for brief visits for business or pleasure, for the immediate prior year.

Pursuant to section 214(c)(2)(D)(ii) of the Act, 8 U.S.C. § 1184(c)(2)(D)(ii), a nonimmigrant admitted to render services in a capacity that involves specialized knowledge under section 1101(a)(15)(L) of this title shall not exceed 5 years.

The nonimmigrant petition was filed on August 9, 2007. The petitioner indicated on Part 2, question 2 of the Form I-129, Petition for a Nonimmigrant Worker, that it was requesting "new employment" as opposed to a "continuation of previously approved employment without change with the same employer," or a "change in previously approved employment." At the same time, the petitioner stated that the beneficiary is already employed by the petitioner in the proffered position of "Senior Business Analyst," and that he is physically present in the United States pursuant to an approved L-1B classification petition that expires on October 8, 2007. The petitioner requested that the beneficiary be granted L-1A classification from August 15, 2007 until October 8, 2009. At part 5 of the Form I-129, the petitioner requested that the Vermont Service Center notify the pre-flight inspection station in Toronto, Canada upon approval of the petition so that the beneficiary can be admitted in L-1A status, rather than requesting an extension of the beneficiary's status.

The petitioner indicated on the L Classification Supplement to Form I-129 that the beneficiary has been in the United States in L-1 status from September 11, 2002 to the present, "with absences." The petitioner indicated that it was including an attachment, presumably with additional information regarding the beneficiary's absences from the United States. However, upon careful review, no attachment can be located in the record of proceeding. The petitioner provided a copy of the beneficiary's most recent Form I-797B Approval Notice, for an I-129 petition filed on February 28, 2007 and approved on March 27, 2007. The petition approval granted the beneficiary an extension of his L-1B status from August 2, 2007 until October 8, 2007.

In a letter dated August 6, 2007, the petitioner indicated that the beneficiary will continue to hold the position of Senior Business Analyst for which he was previously granted L-1B classification. The petitioner explained that during "this past year," the beneficiary's duties had "advanced from the design and maintenance of the computer system to management and oversight of a regional IS infrastructure and its operating teams." The petitioner did not identify a specific date of promotion or otherwise indicate when the beneficiary assumed the claimed managerial duties. However, as noted above, the petitioner did file a petition on behalf of the beneficiary less than six months prior to the filing of the instant petition, and, at that time, requested that he be classified as an L-1B specialized knowledge employee, rather than as an L-1A manager or executive.

The director issued a request for evidence on August 21, 2007. The director advised the petitioner as follows:

Pursuant to 8 C.F.R. 214.2(l)(15)(ii) when a beneficiary is 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. In addition, the USCIS, in an amended, new or extended petition, must have approved the change to managerial or executive capacity at the time the change occurred.

The record indicates that the beneficiary has been in L-1B classification since August 29, 2002. On August 28, 2007, the beneficiary will have met the five-year time limit for being in this status. To be eligible for L-1A status, you must prove that the beneficiary has been employed by your company in a managerial capacity for the six months prior to August 28, 2007. Such proof must be documented by a USCIS approval notice for an amended, new, or extended petition that was filed to reflect the change in the beneficiary's duties.

In response, counsel for the petitioner submitted a letter dated September 11, 2007. Counsel asserted that the provisions set forth in 8 C.F.R. § 214.2(l)(15)(ii) apply only to situations in which an extension of the beneficiary's status is sought. Counsel emphasized that the petitioner is not seeking an extension of status, but rather, the beneficiary will travel internationally and seek to enter the United States in L-1A status upon approval of the instant petition.

Counsel further asserted that "the language and structure" of the regulation at 8 C.F.R. § 214.2(l)(15)(ii) establish that the requirement that the applicant must have been employed in a managerial or executive position for at least six months in order to be eligible for the total period of stay of seven years only applies to petitions requesting an extension of status. Counsel contends that based on the "clear and unambiguous language and structure of the regulations, this provision does not apply to the situation in which a new L-1 petition is filed and the applicant is leaving the United States to return in L-1 status, i.e., where no request for extension of status is being made."

In addition, counsel stated that this interpretation is consistent with the regulation at 8 C.F.R. § 214.2(l)(12), which provides that a beneficiary may not be readmitted to the United States in L or H status if he or she has already spent five years in the United States in a specialized knowledge capacity or seven years in the United States in a managerial or executive capacity." Counsel explained his position as follows:

Hence, an applicant who worked in a specialized knowledge capacity for less than five years (in this case four years and 10 months), and then was promoted to a managerial capacity, is not prevented from entering the United States based on a new L-1A petition for the balance of the seven-year limit. To deny a new petition on the basis of 8 C.F.R. § 214.2(l)(15)(ii) would essentially limit the period of authorized stay in L-1B status to 4 1/2 years rather than the regulatory (and statutory – see below) limit of five years articulated in 8 C.F.R. § 214.2(l)(12).

The regulations on their face establish two distinct standards to enforce the five-year and seven-year caps for L-1B and L-1A status, with a higher standard imposed for extensions of stay. While reasonable minds may differ as to whether the imposition of a higher standard for

extensions is an appropriate implementation of the statutory requirements and Congressional intent . . . , it is beyond dispute that the regulations, on their face, clearly and unequivocally establish two distinct tests, one for extensions and one for new petitions/admissions.

Counsel explained that USCIS's imposition of a higher or more restrictive standard on those in the United States seeking an immigration benefit has its precedent in the context of both extensions and changes of stay, citing restrictions on granting a change of status to J-1 exchange visitors who are subject to the foreign residence requirement of the section 212(e) of the Act. Counsel states that "the imposition of different standards for extensions of L-1 status and admissions in L-1 is therefore consistent with USCIS's overall regulatory structure and scheme."

Counsel further argued that The Immigration Act of 1990, Pub. L. No. 101-649, which extended the statutory limit on L-1A status to seven years, "is ameliorative in nature and should be construed liberally." Counsel asserted that the "restrictive requirement imposed by 8 C.F.R. § 214.2(l)(15)(ii) is inconsistent with the ameliorative nature of the statute and with [C]ongressional intent to expand the availability of the L-1A category." Therefore, counsel argued that "principles of statutory construction mandate that the application of 8 C.F.R. § 214.2(l)(15)(ii) be narrowly limited to requests for extension of stay only, as its application to admissions based on new petitions would violate the letter and spirit of the statute and would therefore be ultra vires."

Counsel cited to the legislative history of section 214(c)(2)(D) of the Act, as enacted by the Immigration Act of 1990, as well as to the legacy INS comments accompanying the 1991 proposed regulations implementing the 1990 Act. Specifically, counsel stated:

The legislative history highlights the ameliorative nature and purpose of the statute:

The L visa has provided multinational corporations the opportunity to rotate employees around the world and broaden their exposure to various products and organizational structure. This visa has been a valuable asset in furthering relations with other countries but the Committee believes it must be broadened to accommodate changes in the international arena **Fourth, the bill's seven-year period of admission for managers and executives provides greater continuity for employees.**" H.R. Rep. No. 101-723(I), 101st Cong. 2nd Sess., p. 69. (Emphasis added.)

Legacy INS confirmed in its commentary to the 1990 proposed regulations that "[t]he intent of Public Law 101-649 as it relates to the L classification was to broaden its utility for international companies." INS Commentary to proposed rule on temporary aliens seeing nonimmigrant classification, 56 Fed. Reg. 31553, 31554 (July 11, 1991). Legacy INS deemed the extension of the total period of stay for managers and executives to seven years a "significant change made by Public Law 101-649." (*Id.*, at 31555.)

Counsel cited *Nix v. James*, 7 F. 2d 590, 592 (9th Cir. 1925), *Tibke v. INS*, 335 F.2d 42, 47 (1964), and *Padesh v. INS* 358 F. 3d 1161, 1173 (9th Cir. 2004) in support of his contention that “it is a long-established principle of statutory interpretation that remedial statutes should be liberally construed to give effect to their remedial purposes, and that, most importantly, ameliorative statutes should be interpreted in an ameliorative fashion so doubts can be resolved in favor of the foreign nationals.” Counsel asserts that the regulations on their face clearly imposed the requirement of a promotion six months in advance only to requests for extensions of stay, and they should therefore be applied only in that context.

Counsel concluded by stating that based on his experience, “legacy INS did indeed subscribe to this interpretation for many years in the past and has routinely granted such petitions on this basis.” In support of his claims, counsel submitted copies of the relevant portions of The Immigration Act of 1990; 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991)(Final Rule); 56 Fed. Reg. 31553 (July 11, 1991)(Proposed Rule); and copies of the above-cited federal court decisions.

The director denied the petition on September 26, 2007. Citing to 8 C.F.R. § 214.2(l)(12) and 8 C.F.R. § 214.2(l)(15)(ii), the director stated that to be eligible for a total period of stay of seven years, an alien who was initially admitted to the United States in a specialized knowledge capacity and is later promoted to a managerial or executive position must: (1) have been in the managerial position for a least six months prior to reaching five years in L-1B status; and (2) have an amended, new, or extended L-1 petition filed at the time the promotion took place. The director noted that the record shows that “the beneficiary was promoted to a managerial or executive capacity a year prior to the filing of your petition;¹ however, you did not file a request for change to managerial or executive capacity until August 9, 2007.” The director further found that the change to managerial or executive capacity was not approved by USCIS at the time the change occurred and that less than six months remain before the beneficiary reaches five years in L-1B status. Consequently, the director concluded that the beneficiary did not meet the regulatory requirements for an extension of L-1 status, and denied the petition on that basis.

The director acknowledged counsel’s contention that the beneficiary is not held to the requirement that the petitioner filed an amended, new or extended L-1 petition at the time the promotion took place, because the petitioner requested “consular notification” rather than an “extension of stay.” The director advised that the petitioner’s interpretation of the regulations governing the situation “is not accurate.” The director stated that the regulation at 8 C.F.R. § 214.2(l)(15)(ii) “specifically states that when an alien is initially admitted to the United States in a specialized knowledge capacity and later promoted to a managerial or executive position, the alien must have been in the managerial position for at least six months prior to reaching five years in L-1B status in order to be eligible for an total period of stay of seven years and that the change to managerial or executive capacity must have been approved by the USCIS at the time the change occurred.” The director noted that it appeared that the petitioner intended to “circumvent immigration laws by requesting consular notification instead of extension on your petition.” The director noted that “consular notification does not deter the enforcement of the above-cited regulation.”

¹ As discussed, *infra*, the director’s statement that such promotion occurred “a year prior” to the filing of the instant petition is not supported by any evidence in the record.

On appeal, counsel for the petitioner asserts that the director's decision failed to address the specific issues and arguments raised in the petitioner's response to the request for evidence, to which the petitioner, as a matter of due process, is entitled "a meaningful response." Counsel notes that the director's decision included no discussion or analysis of the petitioner's claim that there is a distinction between the regulatory provision governing an extension of stay and that governing new petitions. Counsel asserts that the denial of the petition was arbitrary, capricious and an abuse of discretion, as the director merely asserted that the petitioner's interpretation of the regulations "is not accurate," with no reasoned explanation offered in support of this conclusion. Counsel recognizes that agency regulations are ordinarily accorded deference, citing to *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446(1987)(citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981)), which provides that "[a]n Agency interpretation of a relevant provision which conflicts with the agency's early interpretation is 'entitled to considerably less deference' than a consistently held agency view."

Counsel emphasizes that "there is a long history of inconsistent interpretation and application of 8 C.F.R. § 214.2(l)(15)(ii)," and that based on counsel's own experience, legacy INS had "routinely granted such new L-1A petitions during the last six months of the five-year period in L-1B status." Counsel again contends that not granting such petitions would "impose an additional requirement not contained in the statute, which would be inconsistent with the statute's language, spirit and ameliorative purpose." Counsel asserts that "nowhere in INA 101(a)(15)(L), 214(c)(2)(D), or anywhere else in the Immigration and Nationality Act is there a requirement of a promotion from L-1B to L-1A six months in advance to qualify for admission in L-1A status."

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary is eligible for the requested period of L-1A classification.

As a preliminary matter, however, the AAO will address the petitioner's and counsel's contention that the instant petition is a "new petition," and thus not governed by the regulation at 8 C.F.R. § 214.2(l)(15)(ii), which, as discussed further, *infra*, is applicable to both petition extensions and requests for extensions of stay. The beneficiary in this matter has been continuously employed by the petitioning company since August or September of 2002 pursuant to three approved L-1B petitions, and based on the petitioner's statements, currently serves in the proffered position of senior business analyst. He was physically present in the United States and working for the petitioner at the time of filing in the very same position for which the petitioner is seeking L-1A classification. Under the circumstances, the petitioner's indication on Form I-129 that the "Basis for Classification" for the requested L-1A classification is "new employment" was inaccurate. The petitioner has provided no reasonable explanation for classifying the beneficiary's continued and uninterrupted employment in his current position as "new" employment. The fact that he intends to travel to Canada to be re-admitted to the United States upon approval of the petition does not change the fact that he is seeking to continue his L-1 employment in the same position with the same employer. Since the petitioner now seeks to employ the beneficiary in his current position in L-1A classification rather than in L-1B classification, it is clear that the petitioner is seeking to amend and extend the beneficiary's still valid petition, notwithstanding its indication that it is filing a "new petition." Simply annotating the Form I-129 as "new employment" does not create a situation in which USCIS is required to treat the matter as a "new" individual petition without any consideration of the beneficiary's ongoing employment with the petitioning company and the applicable regulations governing petition extensions.

Furthermore, the AAO disagrees with the remainder of counsel's arguments regarding the interpretation of 8 C.F.R. § 214.2(l)(15)(ii) and its applicability in this matter.

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

In individual petitions, the petitioner must apply for the petition extension and the alien's extension of stay concurrently on Form I-129. . . . The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time the extension of stay is filed. Even though the request to extend the visa petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply.

Therefore, the regulations clarify that 8 C.F.R. §§ 214.2(l)(15)(i) and (ii) are applicable not only to situations in which the petitioner specifically requests that the beneficiary be granted an extension of status, but in any situation where the petitioner is seeking to extend the beneficiary's underlying L-1 petition, even if the beneficiary intends to apply for a visa abroad and be re-admitted to the United States. As discussed, *infra*, the petitioner's argument that the instant petition is for "new employment," and not an extension petition because the petitioner indicated as much on the Form I-129 is not persuasive.

The AAO acknowledges that the regulation at 8 C.F.R. § 214.2(l)(15)(ii) refers specifically to the alien's "period of stay"; however, 8 C.F.R. 214.2(l)(15)(i) clarifies that "the dates of extension shall be the same for the petition and the beneficiary's extension of stay." Contrary to counsel's arguments, there is no separate standard for petitions requesting an extension of stay based upon an underlying extended petition and petitions requesting consular notification so that a beneficiary may obtain a visa and be readmitted under an extended petition. If a beneficiary is not eligible for an extension of stay beyond a certain date, the petition extension cannot be approved beyond that date, and vice versa. The fact that the beneficiary intends to briefly depart the United States and seek re-admission in L-1A status does not exempt him from the five-year limit imposed by the statute and regulations, or the regulatory provision governing the promotion of a specialized knowledge worker to a managerial or executive position. Therefore, it was appropriate for the director to consider whether the petitioner established that the beneficiary is eligible for the requested two-year period in L-1A classification under 8 C.F.R. § 214.2(l)(15)(ii).

Accordingly, the director properly considered: (1) whether the beneficiary had been employed in a managerial or executive position for at least six months prior to the expiration of his L-1B status; and (2) whether the change to a managerial or executive position was approved by USCIS at the time the change occurred.

Although the director requested evidence to establish that the beneficiary was promoted to managerial or executive position at least six months prior to August 28, 2007, the AAO notes that the beneficiary's L-1B

status was due to expire on October 8, 2007.² Therefore, the petitioner must establish that the beneficiary's claimed promotion occurred on or before April 8, 2007.

Given that the petitioner filed an L-1B petition on the beneficiary's behalf on February 28, 2007, it is reasonable to assume that the claimed promotion to a managerial or executive position did not occur prior to this date, as the regulation at 8 C.F.R. 214.2(l)(7)(i)(C) mandates that the petitioner file an amended petition to reflect a change in capacity in employment. The petitioner did not seek to amend the beneficiary's status at that time, which was less than six months prior to the filing of the instant petition.

In his letter dated August 6, 2007, counsel vaguely stated that the beneficiary's duties had advanced "this past year" to include management and oversight functions, without identifying a specific date. Therefore, the director reasonably requested evidence that the beneficiary had been employed in a managerial or executive capacity for at least six months prior to the expiration of his L-1B status, and evidence that the petitioner filed a petition with USCIS to reflect this change in accordance with regulatory requirements.

In response, counsel for the petitioner argued that the "restrictive provision" requiring a promotion six months prior to the expiration of the beneficiary's status, as set forth at 8 C.F.R. § 214.2(l)(15)(ii) was not applicable because the petitioner sought consular notification upon approval of the petition rather than extension of stay. However, counsel did state that "an applicant who worked in a specialized knowledge capacity for less than five years (in this case four years and 10 months), and then was promoted to a managerial capacity, is not prevented from entering the United States based on a new L-1A petition for the balance of the seven-year limit." Therefore, it appears that counsel conceded that the beneficiary's promotion occurred at approximately the time of filing in August 2007, just two months prior to the expiration of the beneficiary's L-1B status. Therefore, pursuant to 8 C.F.R. § 214.2(l)(15), the beneficiary is not eligible for an additional two years in L-1A classification.

Counsel further argued that the regulation at 8 C.F.R. § 214.2(l)(12) supports the conclusion that the regulations establish "two distinct tests, one for extensions and one for new petitions/admissions." However, 8 C.F.R. § 214.2(l)(12)(i) specifically applies to a "new individual petition," and does not create a loophole for an employee who has already been in L-1B status for four years and ten months to obtain the full seven years allowed for L-1A nonimmigrants simply by briefly leaving the United States and seeking re-admission to continue employment in the same position with the same L-1 employer. Rather, the regulation provides specific guidance on the handling of new petitions for beneficiaries who have previously reached the limits on stay imposed by statute on the H and L visa categories. Regardless, as discussed, *supra*, the instant petition is not a "new" petition as contemplated by the regulations.

The AAO acknowledges counsel's argument that the Immigration Act of 1990 is "ameliorative in nature," but disagrees with counsel's assertion that the requirement imposed by 8 C.F.R. § 214.2(l)(15)(ii) is "inconsistent with the ameliorative nature of the statute and with congressional intent to expand the availability of the L-1A

² As noted above, the beneficiary's most recent L-1B petition extension was granted from August 2, 2007 until October 8, 2007, and was presumably filed by the petitioner to "recapture" periods of time in which the beneficiary was not physically present in the United States during the initial five years of visa petition validity.

category.” Counsel requests that the application of 8 C.F.R. § 214.2(l)(15)(ii) be “narrowly limited to requests for extension of stay only, as its application to admissions based on new petitions would violate the letter and spirit of the statute.” The ameliorative provisions of the Immigration Act of 1990 as it applied to the L-1A category included liberalizing the statutory definitions of manager and executive capacity to include management or direction of an “essential function,” and extending the total period of stay for managers and executives to seven years. At the same time, the maximum period of stay for L-1B specialized knowledge intracompany transferees was maintained at five years. The legacy INS clearly saw the potential for abuse of the L-1A classification as a means to lengthen the stay of individuals initially admitted as L-1B nonimmigrants:

The final rule will be amended to require that the alien beneficiary be employed in a managerial capacity for only six months in order to be granted an extension for a sixth and seventh year. The petitioner will be required to document this change of duties through the filing of a new or amended petition. The Service deems the requirement of six months previous managerial or executive employment to be an appropriate indicator of the legitimacy of the managerial position.

56 Fed. Reg. 61111, 61114 (December 2, 1991)(Final Rule).

The regulations reflected an understandable concern that the new, longer statutory limit on L-1A status may lead petitioners to file questionable or even fraudulent L-1A petitions as a means to keep specialized knowledge employees in the United States beyond the five-year limit on L-1B status established by statute. This concern for “the legitimacy of the managerial position” is no less valid if the L-1B beneficiary seeking an additional two years in the L-1A nonimmigrant classification intends to obtain a visa abroad rather than seeking an extension of status. As discussed, *infra*, the regulation at 8 C.F.R. § 214.2(l)(15)(ii) applies to both petition extensions and extensions of stay. The employer is seeking to continue, without interruption, its employment of the beneficiary in the position for which he was granted L-1B classification, and the petitioner cannot circumvent the regulations by simply marking “new employment” on the Form I-129 and requesting consular notification.

Finally, counsel’s suggestion that the agency has inconsistently interpreted the applicable regulation is not supported by the record. Counsel has not pointed to any “inconsistent interpretations” or provided any specific examples; instead, counsel relies on his own anecdotal experience. Additionally, counsel’s reference to the Supreme Court’s footnote in *INS v. Cardoza-Fonseca*, 480 U.S. at 446, is not applicable to the current matter. When the *Cardoza-Fonseca* opinion discussed inconsistent “agency interpretations,” the Supreme Court was clearly referring to the inconsistent published precedent decisions of the Board of Immigration Appeals. *Id.* at n.30.

To be inconsistent and actionable, it is well established that an agency “interpretation” that serves to modify a previous interpretation must be in the form of an actual precedent decision, regulation, or other published rulemaking. *See e.g. SBC Inc. v. Federal Communications Com’n.*, 414 F.3d 486, 498 (3rd Cir., 2005) (citing *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C.Cir. 1997)). Rulemaking by “practice” does not exist. Only when the agency specifically designates a decision as precedent can it bind future decisions. 8 C.F.R. § 103.3(c). The stream of unpublished, non-binding service center decisions, such

as counsel's vague reference to unpublished contradictory adjudications, would not be enough to document an inconsistent agency interpretation. *See, e.g. R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp.2d 1014, 1024-25 (D.Hawai'i, 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001).

The director correctly determined that the regulation at 8 C.F.R. § 214.2(l)(15) is applicable in this matter, and correctly determined that the beneficiary is not entitled to the requested two years in L-1A classification. However, the director's determination that the beneficiary was promoted to a managerial position more than a year prior to the filing of the instant petition is not supported by any evidence in the record and will be withdrawn. The petitioner has not established that the beneficiary has been employed in a managerial position for at least six months prior to reaching five years in L-1B status, nor has it demonstrated that it filed a petition reflecting the changes in employment with USCIS at the time the claimed promotion took place. Accordingly, the appeal is dismissed.

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.