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File: EAC 07 198 51662 Office: VERMONT SERVICE CENTER Date: OCT 02 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)

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of managing director to open a new office in the United States 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 director denied the petition based on the finding that the beneficiary was not employed abroad for the requisite one-year period within the three years prior to the date the Form I-129 was filed.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner argues that the director improperly considered the three-year time period prior to the filing of the petition rather than the three-year time period prior to the beneficiary's application for lawful admission to the United States.

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 (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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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.

The primary issue in this matter is whether the beneficiary was employed abroad for the requisite one-year time period. The director concluded that the beneficiary did not have the requisite foreign employment. More specifically, this conclusion was based on the fact that the beneficiary was employed abroad from December 2, 2002 until October 29, 2004 and entered the United States as a J-2 dependent of an exchange visitor on December 21, 2004, subsequently changing his status to that of an H-4 dependent of an H-1B nonimmigrant on November 2, 2006. In light of the beneficiary's December 21, 2004 admission to the United States and his continued U.S. presence up through and including the date the petition was filed, the director determined that the beneficiary could not have been employed abroad for the requisite one-year period during the three years prior to the filing of the petition on June 28, 2007.

In order to determine whether the director's conclusion was correct, the AAO must determine whether the relevant three-year time period is: a) the three years prior to the date the petition is filed; or b) the three years prior to the beneficiary's application for lawful admission to the United States.

In applying the three-year time period described in the first option discussed above, the director issued a request for additional evidence (RFE) dated December 12, 2007 instructing the petitioner to provide evidence that would establish that the beneficiary was employed by a qualifying foreign entity in a managerial or executive capacity for at least one out of three years prior to filing the current Form I-129.

In response, the petitioner provided a letter dated December 6, 2007 asserting that the beneficiary was employed abroad for at least one out of the three years prior to applying for lawful admission to the United States. The petitioner asserted that the beneficiary's lawful admission into the United States took place on December 21, 2004 and addressed the beneficiary's employment abroad prior to his date of admission.

On March 13, 2008, the director issued a decision denying the petitioner's Form I-129. The director determined that the beneficiary was not employed abroad for one year within the relevant three-year time period and therefore declined to address the issue of whether the beneficiary's employment abroad was within a qualifying managerial or executive capacity.

On appeal, the petitioner disputes the director's decision, arguing that the director used the incorrect three-year time period as his point of reference. Specifically, the petitioner asserts that the director should have considered the beneficiary's employment abroad in light of the fact that it took place within three years of the beneficiary's lawful admission into the United States in a nonimmigrant visa category. The petitioner further contends that 8 C.F.R. § 214.2(l)(3)(iii) is inconsistent with 8 C.F.R. § 214.2(l)(1)(ii)(A) and section 101(a)(15)(L) of the Act. In support of its position, the petitioner cites *Matter of Thompson*, 18 I. & N. Dec. 169 (Comm. 1981), in which the commissioner determined that section 101(a)(15)(L) of the Act "only requires the employment of the beneficiary outside of the United States by the foreign firm or other legal entity for one year prior to entry." The AAO points out, however, that Citizenship and Immigration Services (CIS) has since overturned *Matter of Thompson*, determining that the case was "an inappropriate precedent decision." 52 Fed. Reg. 5738, 5741 (Feb. 26, 1987). In addition, section 101(a)(15)(L) of the Act expressly states in pertinent part the following:

[A]n alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof *and* who seeks to enter the United States temporarily *in order to continue to render his services to the same employer or a subsidiary or affiliate thereof* in a capacity that is managerial, executive, or involves specialized knowledge

(emphasis added).

Thus, in no way does the Act support the petitioner's liberal interpretation. Rather, the Act indicates that CIS should only consider an alien's employment during the three years prior to entry into the United States under a specific set of circumstances, i.e., if the alien's U.S. entry was for the purpose of employment for a U.S. entity that is an affiliate or subsidiary of the foreign employer. In other words, if an alien had obtained a nonimmigrant employment-based visa and has spent his/her time in the United States working for a qualifying U.S. entity as described above, the time spent in the United States would not preclude the alien from being able to establish qualifying employment abroad for the requisite one-year period. Under this specific set of facts, CIS's three-year point of reference would be the time period prior to the beneficiary's lawful admission into the United States in a nonimmigrant visa category. Section 101(a)(15)(L) of the Act and 8 C.F.R. § 214.2(l)(1)(ii)(A) both work to ensure that an alien such as the one described herein gets adequate consideration for nonimmigrant classification as an L-1 intracompany transferee. However, this same language implies that an alien who enters the United States under a nonimmigrant classification for any purpose other than to be employed by a U.S. entity that is an affiliate or subsidiary of the foreign employer does not merit consideration under the express provisions of section 101(a)(15)(L) of the Act.

As such, we must rely on the relevant sections of Title 8 of the Code of Federal Regulations, which provide further insight on the interpretation and application of section 101(a)(15)(L) of the Act. Specifically, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) reiterates the provisions of section 101(a)(15)(L) of the Act and further adds the following, in pertinent part:

Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

As previously stated, the beneficiary in the present matter first entered the United States on December 21, 2004 as a J-2 dependent of an exchange visitor and subsequently changed his status on November 2, 2006 to that of an H-4 dependent of an H-1B nonimmigrant. This information indicates that the beneficiary had remained in the United States for approximately two and a half years prior to the date the instant petition was filed. As such, the extended period the beneficiary spent in the United States cannot be deemed to have been on behalf of a qualifying organization. In addition, it cannot be deemed to be the type of brief trip for business or pleasure described in the above regulatory provision.

Therefore, given that the beneficiary's presence in the United States has not been for the purpose of being employed by the same employer or a subsidiary or an affiliate thereof and/or if the beneficiary's stay in the United States prior to the filing of the petition cannot be deemed as brief trips for the purpose of business or pleasure, i.e., under the B-1/B-2 nonimmigrant visa classification, then we must rely on 8 C.F.R. § 214.2(l)(3)(iii), which expressly states that an individual petition filed on Form I-129 shall be accompanied by 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.

In the present matter, the beneficiary's stay in the United States was not for the purpose of being employed by the same employer or a subsidiary or an affiliate thereof. Rather, as explained earlier, the beneficiary remained in the United States for over two and a half years in two different visa classifications, both times as a dependent of the primary visa applicant. Therefore, the provisions specified in 8 C.F.R. § 214.2(l)(3)(iii) and 8 C.F.R. § 214.2(l)(3)(v)(B) must be applied. In other words, the petitioner must establish that the beneficiary was employed abroad by a qualifying organization for at least one out of the three years prior to the date the petition was filed. As the beneficiary was residing in the United States for over two out of the three years prior to the date the instant petition was filed, it would be factually impossible for the beneficiary to have been employed abroad for one year during the requisite three-year time period. Therefore, the petition was properly denied and the director's decision will be affirmed.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.