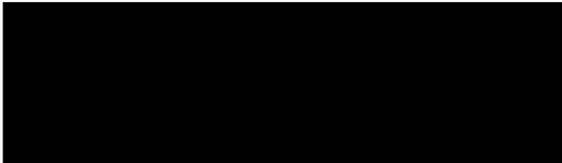




U.S. Citizenship
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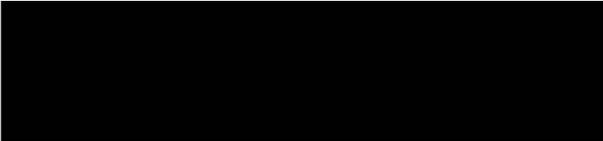


FILE: EAC 04 251 53318 Office: VERMONT SERVICE CENTER Date: DEC 01 2009

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

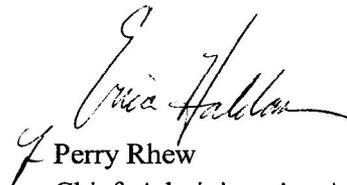
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the nonimmigrant visa petition. On the basis of new information received and upon further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of his intent to revoke (NOIR) the approval and subsequently ordered that the approval be revoked. The AAO rejected the petitioner's appeal, and the petitioner filed a motion to reopen and/or reconsider the AAO's determination. The director granted the motion and affirmed the revocation. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director for entry of a new decision.

The petitioner is a New York corporation that claims to be the subsidiary of [REDACTED] located in Shandong, China. The petitioner claims to be a private carrier service, and seeks to employ the beneficiary as its president 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 initial new office petition (EAC 04 251 53318) was approved on September 15, 2004 for a period of one year.

On the basis of new information received and upon further review of the record, the director determined that the beneficiary was not eligible for the benefit sought under the initial new office petition. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the nonimmigrant visa petition and his reasons therefore on December 12, 2006. Specifically, the director noted that the beneficiary was not employed in a primarily managerial or executive capacity in the United States, and further noted that the petitioner did not have a qualifying relationship with the foreign entity as claimed. On March 1, 2007, the director revoked the approval of the petition.

An appeal filed on April 4, 2007 was rejected by the AAO as untimely filed on September 24, 2007 and remanded to the service center for consideration as a motion. The director granted the motion but upheld the revocation in a decision issued on December 10, 2007. In the interim, the petitioner filed an appeal of the AAO's decision of September 24, 2007. The director treated the appeal as a motion and upheld the revocation in a decision dated May 5, 2008. The petitioner filed a timely appeal of the director's May 5, 2008 decision, and the matter is now before the AAO for consideration.

On appeal, counsel submits a ten-page brief and asserts that the director applied a higher standard of review applicable to established offices instead of applying the regulations pertaining to new office petitions. Counsel further asserts that the petitioner established that the beneficiary would be employed in a qualified capacity and urges the director to withdraw the revocation of the petition's approval.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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(1)(3) further 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.
- (v) 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 in the United States, 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 (1)(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.

In this matter, the beneficiary was granted a one-year period of stay to open a new office in the United States. As advised in the notice of revocation, issued on March 1, 2007, the director noted that the staffing of the petitioner did not create an organizational hierarchy that would allow the beneficiary to refrain from engaging in non-qualifying duties. Specifically, the director noted that while the petitioner claimed to employ 23 employees, the evidence of record indicated that only nine of those claimed to work for the petitioner actually received wages. Moreover, the director noted that only two of the nine employees were employed on a full-time basis. The director concluded that absent evidence to establish that the beneficiary would not be required to engage in non-qualifying duties, such as answering the phones or negotiating contracts, the approval of the petition was revoked.

After reviewing the petitioner's November 3, 2007 motion, the director affirmed his decision to revoke the petition's approval on May 5, 2008. The director noted that, while counsel submitted a nine page brief contending that the petitioner had satisfied the regulatory requirements for eligibility, counsel's contentions were not supported by documentary evidence that the petitioner met these requirements at the time of filing. The director noted that the documentary evidence submitted with the November 3, 2008 motion consisted of previously-submitted evidence as well as new evidence, such as pay stubs, affidavits, and contractor agreements, which were created subsequent to the filing of the petition. The director concluded that despite the documentary evidence submitted, the petitioner had failed to establish eligibility at the time of filing.

The matter now before the AAO is whether the director's upholding of the revocation of the initial new office petition in the decision issued on May 5, 2008 was proper.

Under United States Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

In the present matter, the director revoked the approval of the petition on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(2), noting that the beneficiary was not employed in a primarily managerial or executive capacity at the time of the petition's filing, as required under section 101(a)(15)(L) of the Act.

In the appeal brief currently before the AAO for review, counsel contends that the standards for review for new offices should not be confused with those for established offices. Specifically, counsel asserts that under the provisions of 8 C.F.R. § 214.2(l)(3)(v), the petitioner should be allowed time to develop its operation in

the United States, and establish an organizational structure that will ultimately permit the beneficiary to function in a primarily managerial and/or executive capacity. Counsel contends that in revoking the petition's approval, the director reviewed the evidence submitted at the time of filing under the provisions of 8 C.F.R. § 214.2(l)(3)(i)-(iv), thereby placing a larger evidentiary burden on the petitioner than required for a new office petition.

Counsel contends on appeal that the petitioner submitted sufficient evidence in support of the initial new office petition to demonstrate: (1) that it had secured sufficient physical premises as required by 8 C.F.R. § 214.2(l)(3)(v)(A); (2) that the beneficiary had been employed for more than one continuous year in the three year period preceding the filing of the as the president of the foreign entity, and that the proposed employment involved executive or managerial authority over the new operation, as required by 8 C.F.R. § 214.2(l)(3)(v)(B); and (3) that it would support a managerial or executive position at the end of the initial year of operations, supported by evidence of its proposed organizational structure, financial goals, and the financial ability of the petitioner to remunerate the beneficiary, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). Based on the above, counsel contends that the approval of the petition in September 2004 was proper when considered under the regulations governing new offices.

Upon review, the AAO notes that the director focused on the staffing levels of the petitioner and the wages paid to its employees in the years 2005, 2006 and 2007 in revoking the petition's approval. Based on a review of the petitioner's recent organizational structure, the director concluded that while the petitioner's business had become operational since the filing of the initial new office petition, it had not reached the level of organizational complexity required to support the employment of the beneficiary in a primarily managerial or executive position.

The AAO finds that the points raised by counsel on appeal are persuasive. Counsel correctly contends that the petition in this matter is governed by the regulations for new offices. However, upon review of the petition, the director based the revocation upon the status of the petitioner after the initial year of operations, rather than focusing on whether the petitioner was eligible for the benefit sought at the time of filing. While the AAO notes that the ultimate organizational structure of the petitioner may not have supported the employment of the beneficiary in a qualifying capacity, the relevant issue here is whether the petitioner satisfied the requirements for a new office petition under 8 C.F.R. § 214.2(l)(3)(v).

Another issue, raised briefly by the director but not specifically cited as a basis for revocation, is whether the petitioner and the foreign organization are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

The petitioner claimed that it was the subsidiary of [REDACTED] and [REDACTED], located in Shandong, China. It further claimed that it was a 70-30 joint venture between [REDACTED] and [REDACTED], located in Shanghai, China. Service records indicate that upon further investigation, it became known that as of May 16, 2006, [REDACTED] had no corporate relationship with the

petitioner as claimed. In the notice of revocation, the petitioner was requested to submit documentation of the qualifying relationship between the entities. However, no such documentation was submitted.

The regulation at 8 C.F.R. § 214.2(l)(9)(iii)(A)(I) provides that the approval of an L-1A petition may be revoked on notice when one or more entities are no longer qualifying organizations. The petitioner failed to submit documentary evidence to establish that this relationship continued, as required by the regulations. Although counsel later contended that ██████ acquired 100% ownership in the petitioner as of April 2007, this contention is not supported by documentary evidence. Moreover, the petitioner's ownership in 2007 is not relevant for purposes of this petition, since the petitioner is required to show that a qualifying relationship existed at the time of filing and was maintained through the course of the initial validity period. This requirement has not been satisfied.

Accordingly, the director's decision will be withdrawn and the matter remanded for the entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issues of whether the petitioner met the requirements for a new office petition and whether the petitioner had established that a qualifying relationship existed between the petitioner and a qualifying foreign entity at the time of filing through the issuance of a new NOIR. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.