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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

PUBLIC COPY



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DATE: **MAY 13 2011** Office: VERMONT SERVICE CENTER FILE:

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)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 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, a Texas limited liability company established in June 2008, intends to operate a radio broadcasting and advertising business. The petitioner claims that it is a subsidiary of [REDACTED], located in Venezuela. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a period of three years.¹

The director denied the petition, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

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 asserts that the petitioner has now secured a lease of an office and requests that the petition be approved. In support of the appeal, the petitioner submits a copy of the lease valid on February 1, 2009, photographs of the premises, and updated financial projections for 2009 and 2010.

I. The Law

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.

¹ Pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (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)(3)(v) further provides 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 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 (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.

II. Discussion

The sole issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new office.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 20, 2008. The petitioner identified its address on the Form I-129 as [REDACTED], Georgia. The petitioner did not submit evidence, such as a lease agreement, indicating that the company had secured sufficient physical premises to house the new office at this address.

On October 22, 2008, the director issued a request for additional evidence in which he instructed the petitioner to submit, *inter alia*, the following: (1) documentary evidence establishing that the company has acquired a leased premises of sufficient size to conduct business, including original lease agreements, a

statement from the lessor identifying the square footage of the leased premises, and the lessor's telephone number; and (2) photographs of the interior and exterior of all premises secured for the United States entity.

In a letter dated January 19, 2009, counsel for the petitioner stated:

[The petitioner] has not obtained permanent physical space for its U.S. operations. Currently located in Georgia, [the petitioner] does not have staff in the U.S. to visit and approve a permanent or long-term physical location. Indeed, [the petitioner's] ability to inspect any potential locations is limited unless and until the above-referenced petition is approved by the Service.

The petitioner's response to the request for evidence included a chart titled [REDACTED] for the Execution of the goals," which outlines the petitioner's planned actions for October 2008 through December 2010. According to the information provided therein, the petitioner anticipated searching for and leasing an office between July 1 and September 30, 2009. The petitioner had requested that the validity of the beneficiary's L-1A classification, if approved, commence in October 2008.

The director denied the petition on January 26, 2009 on the sole grounds that the petitioner failed to establish that it had secured sufficient physical premises to house the new office, pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A).

On appeal, the petitioner submits an "Office Lease Agreement" between the U.S. company and [REDACTED] LLC, executed on January 30, 2009, and valid for a three-month period commencing on February 1, 2009.

Upon review, the AAO concurs with the director's conclusion that the petitioner failed to establish that it has secured sufficient physical premises to house the new office.

The critical facts to be examined are those that were in existence at the actual time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner conceded that it had not secured physical premises intended to house the new office in the United States at the time it filed the petition. According to the petitioner's own business plan, it did not originally intend to locate and lease an office until months after the expected approval of the petition.

Therefore, the petition cannot be approved as the petitioner has not satisfied the evidentiary requirement at 8 C.F.R. § 214.2(l)(3)(v)(A). Counsel's claim that no office could be secured prior to the beneficiary's arrival in the United States does not exempt the petitioner from satisfying the initial evidence requirements for the requested classification. The evidence submitted on appeal demonstrates that the beneficiary was in fact able to secure a lease despite the denial of the instant petition.

With respect to the lease agreement submitted on appeal, we emphasize that where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Furthermore, as discussed above, the evidence submitted on appeal does not demonstrate the petitioner's and beneficiary's eligibility as of the date of filing the petition.

If the petitioner or beneficiary becomes eligible under a new set of facts, the proper course of action is to file a new petition. Despite the previous denial, there is no bar to the petitioner's filing of a new petition supported by new evidence of eligibility.

Based on the foregoing, the petitioner did not submit evidence to establish that it had secured sufficient physical premises to house the new office as of the date of filing. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, a remaining issue in this matter is whether the petitioner established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined at 8 C.F.R. § 214.2(l)(1)(ii)(B) or (C). The petitioner is required to submit supporting evidence regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals, and to provide evidence of 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. 8 C.F.R. § 214.2(l)(3)(v)(C).

If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

Here, the petitioner's own business plan offers no indication that the company anticipates rapid growth during the first year of operations. Although the petition was filed in October 2008, the petitioner indicated on its "Chronogram of detailed Work for the execution of goals" that it anticipates beginning production of its Internet radio programming and other services in January 2010, more than one year later. Between April and December 2009, the petitioner indicated that the beneficiary would be planning his trip to the United States, locating and furnishing a U.S. office, improving his English language skills, recruiting and training personnel, designing the company's webpage, and beginning preliminary promotional work prior to going live with its radio programming.

Furthermore, the petitioner's business plan, and the record as a whole, provided minimal information regarding the financial position of the U.S. company, the petitioner's anticipated start-up costs, operating costs, and financial objectives for the first year of operations. The petitioner has not submitted sufficient evidence to meet the regulatory requirement at 8 C.F.R. § 214.2(l)(3)(v)(C)(1).

With respect to the petitioner's requirement to provide evidence of 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, the petitioner has stated that the company received an initial contribution of \$5,000 and that it would receive gradual financing from the beneficiary and the foreign entity. Again, the petitioner's business plan does not outline the company's projected start-up costs or contain any other evidence of any financial transactions corroborating the petitioner's claims regarding the investment. Without such evidence, the petitioner has not met its burden to establish the size of the United States investment pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C)(2).

The regulations require the petitioner to present a credible picture of where the company will stand in exactly one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within one year. The evidence submitted fails to demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). Given that the petitioner indicated that it would take more than one year to even commence its intended business activities, it has not met this burden. For these additional reasons, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.