

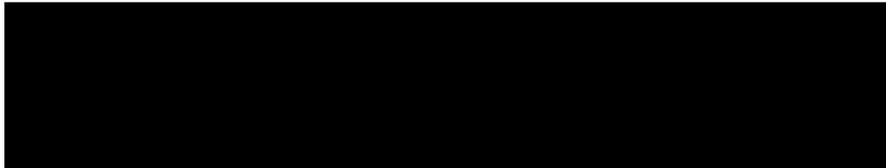
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



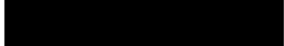
U.S. Citizenship  
and Immigration  
Services



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DATE: FEB 07 2012

Office: VERMONT SERVICE CENTER

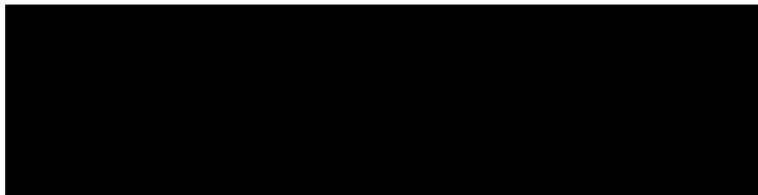
FILE: 

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)

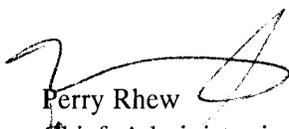
ON BEHALF OF PETITIONER:



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.

Thank you,

  
Perry Rhew  
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 appeal will be sustained.

The petitioner filed the petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L). The petitioner operates a business information technology consulting firm and claims that it has a qualifying relationship with the beneficiary's foreign employer in Mumbai, India. The petitioner states that the beneficiary was first admitted to the United States in L-1B status on August 20, 2004. The beneficiary's L-1B status was due to expire on October 2, 2009. The petitioner now seeks an amendment of the beneficiary's stay from L-1B to L-1A status for the remaining period of September 4, 2009 through October 25, 2009. The petitioner seeks to employ the beneficiary in the position of Project Manager.

The director denied the petition concluding that the beneficiary is not entitled to a period of 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 the petitioner is not requesting an extension beyond the original five years including recaptured time, but that recognizing an L-1A classification for the beneficiary "could allow a subsequent petition to be filed requesting the seven-year managerial executive extension, thus circumventing the second criteria." The director therefore determined that the extension was prohibited by the regulation at 8 C.F.R. § 214.2(l)(15)(ii).

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 application of the regulations is incorrect. Counsel contends that the regulation at 8 C.F.R. § 214.2(l)(15)(ii) does not apply because the instant petition is not a request for an extension of stay beyond a fifth year in L-1 status. Therefore, counsel claims that the regulation at 8 C.F.R. § 214.2(l)(15)(ii) was inapplicable to the facts of this petition. Counsel submits a brief and additional evidence in support of the appeal.

### **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 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.

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 101(a)(15)(L) of the Act shall not exceed 5 years.

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.

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.

Finally, 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.

(Emphasis added.)

## **II. Request to Amend Stay from L-1B to L-1A**

The nonimmigrant petition was filed on September 9, 2009. The petitioner indicated on Part 2, question 5 of the Form I-129, Petition for a Nonimmigrant Worker, that the requested action was "Amend the stay of the person(s) since they now hold this status."

The petitioner stated that the beneficiary is currently in the United States in L-1B status valid until October 2, 2009 as a Project Manager. The petitioner indicated that the beneficiary will continue in the role of Project Manager until the expiration of his previously approved period of stay. The petitioner requested approval of an amended petition reclassifying the beneficiary as an L-1A manager rather than an L-1B specialized knowledge worker. The petitioner did not request any additional period of stay in L-1 status for the beneficiary beyond the expiration of the current approval.

In denying the petition, the director determined that the beneficiary is not eligible for the total period of stay of five years because the petitioner did not file, and USCIS 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 in L-1B status. The director therefore concluded that the petitioner failed to establish that the beneficiary meets the regulatory requirements for an extension of stay, pursuant to 8 C.F.R. § 214.2(l)(15)(ii).

The beneficiary was initially admitted to the United States in L-1B status on August 20, 2004. The beneficiary's L-1B status was subsequently extended through October 2, 2009. The beneficiary has reached the five year maximum in L-1B status. If the petitioner establishes that the beneficiary meets all requirements for L-1A classification, then the petition may be approved for L-1A status for the period of time remaining on the beneficiary's stay as initially requested on the Form I-129, September 4, 2009 to October 2, 2009.

Upon review, the petitioner established that the beneficiary is eligible for the requested period of L-1A classification on the initial Form I-129, from September 4, 2009 to October 2, 2009.

First, the regulations discuss a change in capacity of employment from a specialized knowledge position to a managerial position in the context of an amended petition. 8 C.F.R. § 214.2(l)(7)(i)(C). The regulations continue to state that this change in capacity may be approved by USCIS in an amended, new, or extended petition. 8 C.F.R. § 214.2(l)(15)(ii). Additionally, the change of status regulations do not distinguish between L-1A and L-1B. The regulation at 8 C.F.R. § 248.3(a) states in relevant part: "An employer seeking the services of an alien as an . . . L-1 . . . , must, where the alien is already in the U.S. and does not currently hold such status, apply for a change of status on Form I-129." A change of status, therefore, would not include a change within the L-1 classification from specialized knowledge (L-1B) to managerial or executive (L-1A) status.

Second, the language of 8 C.F.R. § 214.2(l)(15)(ii) limits the maximum period of stay of an L-1B to five years if: (1) the beneficiary has been employed in the managerial or executive position for less than six months when the beneficiary's period of stay as an L-1B expires, or (2) the petitioner fails to seek approval of a new managerial position in an amended, new, or extended petition at the time that the change occurred. Either condition will bar the beneficiary from an extension of stay to the full seven years as an L-1A.

When read as a whole, the regulations do not prohibit a petitioner from requesting an "amended stay" from L-1B to L-1A to recognize a change in capacity of employment within the last six months of the beneficiary's stay. The amendment would simply be limited to the beneficiary's original five-year period of stay as an L-1B.

The petitioner clearly stated, and properly marked on the Form I-129, to request that USCIS "amend the stay" of the beneficiary from L-1B to L-1A status. The original petition did not request any additional time beyond the beneficiary's five year maximum in L-1B status. In other words, the petitioner requested an amendment to the beneficiary's remaining period of stay in L-1 status, not an extension of stay beyond the remainder of the beneficiary's authorized period of stay. Therefore, 8 C.F.R. § 214.2(l)(15)(ii) does not apply to the petitioner's request, as this section is only applicable to extensions of stay. As stated above, this section does not bar approval of an amended petition requesting an amendment from L-1B status to L-1A status in the last six months of the beneficiary's five year period.

The AAO notes, however, that the beneficiary is not eligible for a new petition or a future extension of stay beyond the five year maximum in L-1 status without first spending at least one year outside the United States. The regulation at 8 C.F.R. § 214.2(l)(12)(i) states:

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.

In the present case, the beneficiary has spent the maximum period of time – five years – in the United States as an L-1B.

With respect to any future extension, the regulation at 8 C.F.R. § 214.2(l)(15)(ii) further states: “The change to managerial or executive capacity must have been approved by [USCIS] in an amended, new, or extended petition at the time the change occurred.” While the beneficiary's claimed promotion occurred more than six months prior to the expiration of the beneficiary's L-1B status, according to the petitioner's representations, the petitioner failed to file a new or amended petition to obtain approval of the change from a specialized knowledge to a managerial or executive position. As the petitioner chose not to document the beneficiary's assumption of managerial duties as required by the regulations, the regulation prohibits an extension beyond the fifth year.

Based on the foregoing discussion, the AAO will reverse the decision of the director and sustain the appeal, granting the beneficiary an amended stay in L-1A status from September 3, 2009 to October 2, 2009.

### **III. Request to Recapture Time**

The second issue to be addressed is whether the beneficiary is eligible for the additional period of recaptured time as requested in the petitioner's response to the director's request for evidence and on appeal.

On the Form I-129, the petitioner stated in response to Part 5, Section 8, that the dates of intended employment of the beneficiary were September 4, 2009 to October 2, 2009. On the L Classification Supplement to Form I-129, the petitioner listed the beneficiary's prior periods of stay in L-1A status from August 20, 2009 to June 16, 2009, and then from August 16, 2009 to Present.

In response to the director's request for additional evidence, however, counsel stated the following:

In our current petition, the Petitioner requests an extension of the Beneficiary's L-1 status until October 2, 2009. However, the Beneficiary has spent additional periods outside of the United States during the validity of her L-1 visa classification which we would like to recapture at this time. At Exhibit Q we have included an amended page 3 of Form I-129 and amended page 1 of the L Classification Supplement to Form I-129 so that we may request an extension of the Beneficiary's status until October 25, 2009.

The director denied the petitioner's request for recaptured time due to the fact that the beneficiary's nonimmigrant visa petition was denied. On appeal, counsel for the petitioner reiterates the requests to recapture the sixty-one day time period the Beneficiary spent outside of the United States.

Upon review, the petitioner is ineligible to recapture the requested sixty-one day period.

On the initial Form I-129, the petitioner request a period of stay from September 4, 2009 and October 2, 2009. The petitioner did not submit any evidence of time spent by the beneficiary outside of the United States to support an additional 61 days in L-1 status beyond the beneficiary's five-year maximum. The petitioner included an amended request and supporting documentation only in response to the director's request for evidence, filed on September 25, 2009.

A petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. See 8 C.F.R. §§ 103.2(b)(8) and (12). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary or materially change the requested dates of employment. The petitioner must establish the position and terms of employment when the petition is filed. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the period of employment requested, but rather requested a completely new period of additional recaptured time over the initial filing. Therefore, the analysis of this criterion will be based on the requested dates of employment in the initial petition.

#### IV. Conclusion

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, the petitioner has sustained that burden. Accordingly, the director's decision dated March 18, 2011 is withdrawn and the petition is approved for the period from September 4, 2009 to October 2, 2009.

**ORDER:** The appeal is sustained.