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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**



87

DATE: **JUN 20 2012**

Office: CALIFORNIA 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:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the petition to the director for further action and entry of a new decision.

The petitioner filed this petition seeking to classify the beneficiary as a nonimmigrant intracompany transferee with specialized knowledge 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 a Montana corporation engaged in pipeline construction. It seeks to employ the beneficiary in the position of construction foreman/manager. The petitioner indicates that U.S. Citizenship and Immigration Services (USCIS) approved three prior L-1B classification petitions filed on the beneficiary's behalf in October 2003, September 2006 and September 2008.¹ The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that the basis for classification is "continuation of previously approved employment without change with the same employer," and requested an extension of the petition approved in 2008.

The director denied the petition on July 19, 2010, concluding that the petitioner failed to establish that the beneficiary is eligible for admission in L-1B classification pursuant to section 214(c)(2)(D) of the Act and the regulations at 8 C.F.R. § 214.2(l)(12)(i). In denying the petition, the director noted that the beneficiary was initially granted L-1B status approximately six and one-half years prior to the filing of the instant petition, while the maximum period of authorized admission for 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 five (5) years. The director acknowledged that USCIS policy allows beneficiaries of L-1 petitions to "recapture" time spent outside of the United States during the validity of an approved petition. However, the director emphasized that the burden of proof rests with the petitioner and beneficiary to establish eligibility for any "recapture" benefits, and that USCIS is not required to send a request for evidence of the beneficiary's absences from the United States.²

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 submits a notarized declaration from the beneficiary, who provides information regarding the number of days he has been absent from the United States since October 14, 2003. He states that he has spent a total of 1,698 days (approximately four years and eight months) in Canada between December 2003 and April 2010. Further, the beneficiary indicates that he has been outside the United States continuously from October 11, 2008 until April 23, 2010.

I. The Law

¹ USCIS records indicate that these three previous petitions had the following validity dates: October 7, 2003 to October 6, 2006 (LIN 04 010 51789); October 7, 2006 to October 6, 2008 (EAC 06 265 51170); and October 7, 2008 to April 23, 2010 (EAC 08 249 51576).

² The director cited the 2005 Memorandum of Michael Aytes, Acting Assoc. Dir. for Domestic Operations, USCIS, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants* (October 21, 2005).

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:

An alien who has 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 under section 101(a)(15)(L) and/or (H) of the Act may not be readmitted to the United States under section 101(a)(15)(L) 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 view of this restriction, 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.

II. Discussion

The sole issue addressed by the director is whether the petitioner established that the beneficiary is eligible for admission in L-1B classification pursuant to section 214(c)(2)(D) of the Act and the regulations at 8 C.F.R. § 214.2(l)(12)(i).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 8, 2010. On the L Classification Supplement to Form I-129, where asked to provide the beneficiary's actual periods of stay in the United States in an L classification, the petitioner provided the following dates:

From: 10/06/2002	To: 11/30/2003
From: 09/01/2004	To: 11/17/2004
From: 09/30/2005	To: 11/15/2005
From: 04/15/2006	To: 05/05/2006
From: 07/05/2006	To: 10/06/2008

The petitioner indicated that the beneficiary was residing in [REDACTED], Manitoba, Canada at the time of filing the petition.

Based on this information, the beneficiary has been admitted to the United States in L-1B status for a total of 1,298 days, and, if otherwise eligible for the requested classification, would have 527 days remaining before reaching the five-year limitation on admission imposed by statute.

Furthermore, based on the information provided by the petitioner, the beneficiary had been physically absent from the United States for a period of 18 months at the time the petition was filed. Pursuant to 8 C.F.R. § 214.2(l)(12)(i), an L nonimmigrant who has resided and been physically present outside the United States for more than one year becomes eligible for a new five- or seven-year period of stay. Therefore, even if the director believed that the beneficiary had reached the five-year limit on admission, the beneficiary's 18-month absence from the United States would render him eligible for a new period of admission.

Based on the initial evidence submitted, the petitioner was not in a position in which it was required to establish the beneficiary's eligibility to "recapture" time in order to obtain an extension of the beneficiary's previously-approved L-1B petition, and the director improperly denied the petition based solely on the petitioner's failure to provide documentary evidence of the beneficiary's absences from the United States. The director failed to take into account the information the petitioner provided on the L Classification Supplement and concluded that the beneficiary's reached the five-year limitation in October 2007, notwithstanding the fact that USCIS approved a petition filed on his behalf in September 2008. Accordingly, the director's decision dated July 19, 2010 is withdrawn.

Although the director's decision will be withdrawn, the record as presently constituted does not establish the beneficiary's eligibility for the benefit sought. The AAO will remand the petition to the director for further action and entry of a new decision.

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.

Upon review of the record, the petitioner has not provided a detailed description of the beneficiary's proposed duties in the United States or any information regarding the beneficiary's employment abroad to support its assertion that he has been and would be employed in a capacity requiring specialized knowledge. Moreover, the petitioner did not identify the name of the beneficiary's foreign employer, the petitioner's relationship with that foreign employer, or the beneficiary's dates of employment with the foreign employer. Accordingly, the petitioner has not submitted evidence to satisfy the requirements set forth at 8 C.F.R. §§ 214.2(l)(3)(i)-(iv).

At this time, the AAO takes no position on whether the beneficiary qualifies for the classification sought. The director must make the initial determination on that issue. So far, the director has not done so. By remanding this matter, the AAO does not necessarily find that the beneficiary is ineligible. Rather, we remand the matter because the director based the decision on incorrect grounds and failed to adequately address the beneficiary's eligibility under the requested classification.

Accordingly, the AAO will withdraw the director's decision and remand the petition to the director for entry of a new decision. The director is instructed to review the petition pursuant to the above-cited statutory and regulatory provisions applicable to the L-1B nonimmigrant classification, and to request any additional evidence deemed necessary to adjudicate the petition.

As always in these proceedings, the burden of proof 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 further action in accordance with the foregoing discussion and entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.