

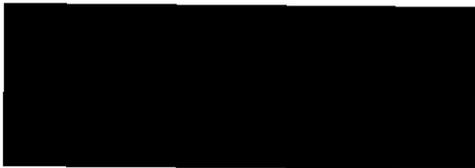
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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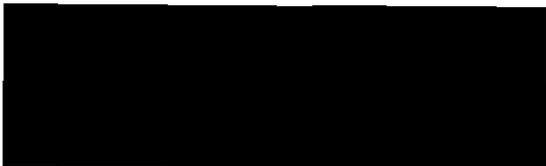


DATE: **SEP 17 2012** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker under 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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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 petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner filed this nonimmigrant petition on January 12, 2010 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 North Carolina corporation that began operations in 2009, is in the “restaurant/food wholesale/food distributor” business. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for a period of three years.¹

The director denied the petition on February 17, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the petition. In denying the petition, the director observed that the beneficiary would not be functioning at a senior level within the organization or would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties. The director also observed that, at the time of filing, the beneficiary would only be in charge of two butchers, three cashiers, one tortilla maker, and two cooks.

The petitioner subsequently filed an appeal.² The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner indicated on Form I-290B, Notice of Appeal or Motion, that it was filing this appeal because it had new evidence that it wanted the United States Citizenship and Immigration Services (USCIS) to consider. The petitioner stated:

We have new information to prove that [the petitioner] has sufficient workers to handle day-to-day production for the store, has increased total employees to 13, and that the General Manager will be primarily managing the work of another manager and two supervisors. Based on this new information that USCIS did not have when the case was decided, we request reopening of the denial. . . .

The regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

¹ The petition is treated as a new office petition because the petitioner began operations in 2009, even though it was incorporated in 2008. Because this is a new office petition, the petition could only have been approved for a period not to exceed one year, and not for the full three years as requested. *See* 8 C.F.R. § 214.2(i)(7).

² The petitioner requested an appeal on Part 2, Form I-290B, but the petitioner requested “a Motion to Reopen, and alternatively, an appeal” as its basis for appeal. Because the petitioner requested an appeal on Part 2, Form I-290B, and because the director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review, the Form I-290B must be adjudicated as an appeal.

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

On appeal, the petitioner has not specifically identified an erroneous conclusion of law or statement of fact on the part of the director as a basis for the appeal. Neither counsel nor the petitioner has stated that the director's decision was in error based on the evidence submitted prior to the adjudication of the petition. Rather, the petitioner's basis for appeal is a request for reopening and reconsideration based upon new evidence. Inasmuch as the petitioner has not identified specifically an erroneous conclusion of law or statement of fact as a basis for the appeal, the appeal must be summarily dismissed. 8 C.F.R. § 103.3(a)(1)(v).

The AAO notes that even if the petitioner has experienced financial growth and has hired additional employees since it filed the instant petition, these developments would not overcome the denial of the petition. The petitioner must establish eligibility at the time of filing; a new petition cannot be approved at a future date, or on appeal, after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). As discussed in the director's decision, the petitioner's evidence did not establish that the company would grow to the point where it would require the beneficiary to perform primarily managerial or executive duties. 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.

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 not met that burden.

ORDER: The appeal is summarily dismissed.