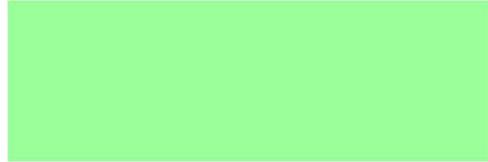




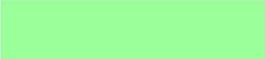
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 18 2013

Office: VERMONT SERVICE CENTER

FILE: 

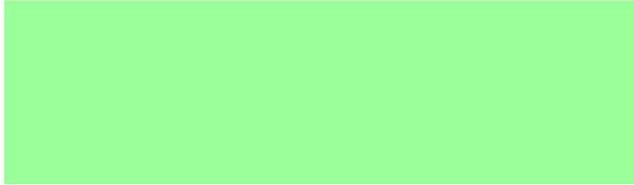
IN RE:

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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Ron Rosenberg

Acting 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 classify 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 New York corporation established on January 5, 2012, is a clothing retail company. It is a subsidiary of [REDACTED] located in Mumbai, India. The petitioner seeks to employ the beneficiary as the General Manager of its new office in the United States for a period of one year.

After initially approving the petition on July 12, 2012, the director revoked the approval of the petition on December 14, 2012. In revoking the petition, the director concluded that the petitioner failed to establish that it had secured sufficient physical premises for the new office, and that the beneficiary has worked or will continue to work for the foreign entity.

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, counsel for the petitioner asserts that the director erred in revoking the approval of the petition, and that the beneficiary meets all eligibility requirements for the L-1A nonimmigrant visa. 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 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.
- (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.

Finally, the regulation at 8 C.F.R. § 214.2(l)(9)(iii)(A) provides that the director may revoke a petition on notice at any time, even after the expiration of the petition, if he or she finds any of the following:

- (1) One or more entities are no longer qualifying organizations;
- (2) The alien is no longer eligible under section 101(a)(15)(L) of the Act;

- (3) A qualifying organization(s) violated requirements of section 101(a)(15)(L) and these regulations;
- (4) The statement of facts contained in the petition was not true and correct;
- (5) Approval of the petition involved gross error; or
- (6) None of the qualifying organizations in a blanket petition have used the blanket petition procedure for three consecutive years.

II. The Issues on Appeal

The primary issue to be addressed is whether the director properly revoked the approval of the petition. The director determined that the petitioner failed to establish that it has secured sufficient physical premises to house the new U.S. office. At the time of filing the petition to open a “new office,” a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). Accordingly, the director revoked the approval of the petition based on a finding that the approval of the petition involved gross error. *See* 8 C.F.R. § 214.2(l)(9)(iii)(A)(5).

On Form I-129, the petitioner listed the address where the beneficiary would work as [REDACTED]. In support of the initial petition, the petitioner described the nature of its business as “a ready to wear clothing (primarily designer saris) wholesale, marketing and distributing office to be located in New York State.” The petitioner stated that it has “set up an office” at the above address, “where it will perform the tasks required to set up its business including administration of customer contacts, negotiations, effecting contractual arrangements, interviewing prospective employees and reviewing locations for expansion in New York as business develops.” The petitioner further asserted that its current office is sufficient under the new office regulations, as a new office “may involve a place to have executive meetings, a base of operations for sales and marketing efforts as well as efforts to secure further facilities for growth.”

With the initial petition, the petitioner submitted its license agreement from [REDACTED] (licensor) for the address of [REDACTED]. On page one in the section entitled “Licensed Office(s),” the agreement stated that the petitioner (licensee) obtained the “Premium Corporate Identity Plan,” which includes the following services: “proprietary telephone number, voice mail, corporate address/mail reception, fax reception, and 6 hours use of a conference room per month as available.” No specific office number was listed. The license term commenced on February 1, 2012 and terminated on July 31, 2012. On the second page, the license agreement stated the following:

¹ The AAO observes that [REDACTED] is also counsel’s address of record.

1. **Standard Services:** In consideration of the Licensee's payment of the Fixed Fee and the Service Retainer . . . , 1) Licensor allows Licensee to use the office pursuant to Premium Corporate Identity Plan as outlined on page 1 of this License Agreement (hereinafter "Agreement") for the License Term (listed on front page) subject to the Rules and Regulations . . . 2) Licensor provides Licensee with Receptionist during normal business hours, 3) 6 hours a month use of a conference room (as available), 4) receipt of mail, 5) use of common areas including pantry, only when permitted, and using an office, 6) Licensor also provides heating, HVAC, electricity (subject to Building rules / limitations), 7) office cleaning, and 8) maintenance of Licensor equipment and offices due to ordinary wear and tear [*sic*].

The petitioner submitted its business plan, which stated that the beneficiary has made the decision to expand the foreign entity by establishing a new office in the United States "which will serve as the initial office for marketing, sales and distribution to high end customers, specialty apparel, and department stores." The business plan stated that the petitioner "will initially function as supplier to special order customers, and major specialty apparel and department stores." The business plan further stated: "[The beneficiary's] plan during the first year is to take orders from U.S. customers and ship directly to the customer's possession or pick up dockside, with no warehousing necessary initially." The business plan stated that the petitioner has already obtained a "virtual lease or other agreement to provide address, conference room, telephone services and office use premises to house initial startup company efforts." The business plan indicated that the petitioner plans to secure a larger site of approximately 1500-2500 square feet for staffing sales and administration desks in October 2012 through January 2013.

The director revoked the approval of the petition, concluding that the petitioner failed to secure sufficient physical premises for its new office. The director found that the petitioner is leasing a virtual office. The director also found that the documentation was insufficient to show that the petitioner would be obtaining, in the future, larger facilities or warehouse space to house all its future employees and/or the products it will be providing.

On appeal, counsel for the petitioner acknowledges that the petitioner's office space "is what is known as a 'virtual office,' which provides various office-related amenities that can be used as required, including physical space, telephones, conference rooms, etc." Counsel asserts that the petitioner's virtual office and business plan constitute sufficient evidence of the petitioner's physical premises. Counsel asserts that the United States Citizenship and Immigration Services (USCIS) "has consistently found that an agreement to provide office facilities and office space at a specific location through a virtual office agreement constitutes sufficient physical premises to house a new office for L-1 purposes." In addition, counsel points out that the business plan specifically stated the petitioner's intention to secure warehouse space approximately 6-9 months after commencing operations. Counsel asserts that the new office regulations require the petitioner to obtain space to "house" a new office, not to "operate the business," and thus the petitioner need only obtain "a place to have executive meetings, a base of operations for sales and marketing efforts as well as efforts to secure further facilities for growth." Counsel provides a list of petitions purportedly approved by the director involving virtual offices. In support of the appeal, counsel resubmits, *inter alia*, a copy of the petitioner's business plan.

Upon review, and for the reasons discussed herein, the petitioner failed to establish that it has secured sufficient physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The evidence in the record reflects – and counsel acknowledges - that the petitioner has obtained a “virtual office” for the address of [REDACTED]. There is no evidence in the record reflecting that the petitioner’s virtual office includes an actual, physical office space designated specifically for the petitioner. The petitioner’s license agreement states only that the virtual office includes “proprietary telephone number, voice mail, corporate address/mail reception, fax reception, and 6 hours use of a conference room per month as available.” The petitioner’s virtual office does not constitute sufficient *physical* premises under 8 C.F.R. § 214.2(l)(3)(v)(A) under the plain meaning of the word “physical.” *See also* 8 C.F.R. § 214.2(l)(1)(ii)(H) (prohibiting the mere presence of an agent or office of the qualifying organization in the United States).

On appeal, counsel provides a list of petitions and asserts that USCIS has consistently approved petitions, such as those cited, involving virtual offices. However, counsel has furnished no evidence to establish that the cited petitions were, in fact, approved by the director and involved virtual offices in circumstances similar or analogous to the instant petition. Regardless, even if the cited petitions were approved based on similar facts, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm’r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

On appeal, counsel asserts that the new office regulations require the petitioner to obtain space to “house” a new office, not to “operate the business,” and thus the petitioner need only obtain “a place to have executive meetings, a base of operations for sales and marketing efforts as well as efforts to secure further facilities for growth.” Counsel further asserts that the petitioner intends to secure warehouse space approximately 6-9 months after commencing operations. However, counsel’s assertions are unpersuasive and unsupported by any legal authority.

Contrary to counsel’s assertions, if a petition indicates that a beneficiary is coming to the United States to open a new office, it must show that it is ready to commence doing business immediately upon approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). While there is no prohibition on a new office from moving to a larger or different location during its first year of operation, the petitioner must nevertheless establish that the physical premises secured at the time of filing will sufficiently permit the petitioner to do business and to develop to the point that the beneficiary will be primarily performing qualifying duties at the end of the first year of operations. Here, not only does the petitioner’s virtual office fail to meet the threshold regulatory requirement of being a “physical” premise, but the petitioner has not shown how its virtual office space would be sufficient to permit the enterprise to immediately commence doing business in the United States. The petitioner has described its new office in the United States as “the initial office for marketing, sales and distribution” to customers, but has not explained how its virtual office would allow for the petitioner to perform these marketing, sales, and distribution services. According to the petitioner’s business plan, the new office “will initially function as [a] supplier” to U.S. customers and

that during the first year it will “take orders from U.S. customers and ship directly to the customer’s possession or pick up dockside.” The petitioner failed to explain how it could directly take orders and ship goods from within the United States if it does not have any physical space for inventory and retail activities. The petitioner’s intention to secure warehouse space in the future does not overcome the petitioner’s regulatory requirement to acquire sufficient physical premises to commence business at the time of filing. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

For the reasons discussed herein, the petitioner failed to establish that it has secured sufficient physical premises for the new office at the time of filing. Accordingly, the appeal will be dismissed.

Although the appeal will be dismissed, the AAO will withdraw the director’s finding that the petitioner has not established that the beneficiary has or will continue to work for the foreign entity. The only explanation the director provided for revoking the approval of the petition on this ground was that the record contained only evidence that the beneficiary receives a profit from the company, and contained no payroll evidence showing that the beneficiary was actually employed by the foreign entity. However, the director’s finding was based on an inappropriate standard. The fact that the beneficiary, who is the sole proprietor of the foreign entity, is paid through profits rather than regular payroll does not establish nor suggest that the beneficiary is not working for the foreign entity. Moreover, the record contained sufficient evidence, such as the foreign entity’s letter describing the beneficiary’s duties abroad and the foreign entity’s organizational chart, to establish that the beneficiary has and will continue to work for the foreign entity upon completion of her duties in the United States. Accordingly, the director’s decision will be withdrawn as it relates to the beneficiary’s employment for the foreign entity.

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. With respect to the question of whether the beneficiary has or will continue to work for the foreign entity, the petitioner has sustained its burden. Accordingly, the director’s decision is withdrawn in part. With respect to the question of whether the petitioner has secured sufficient physical premises for the new office at the time of filing, the petitioner has failed to meet its burden. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.