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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

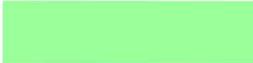


U.S. Citizenship
and Immigration
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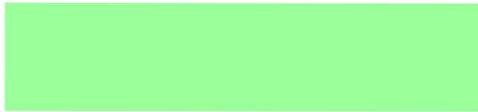


DATE: **MAY 29 2014**

Office: VERMONT SERVICE CENTER

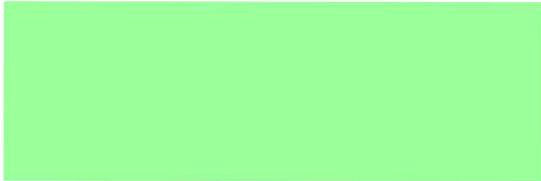
FILE: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
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 appeal will be dismissed.

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 Texas limited liability company established in January 2010, claims to be engaged in marketing, retail and distribution of automotive, gas, household products and establishing fast food chains throughout Texas. The petitioner claims to be an affiliate of [REDACTED] located in India. It seeks to employ the beneficiary as its general manager.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition. In denying the petition, the director determined that a 45-day visit to the United States during the beneficiary's claimed period of full-time employment with the foreign entity left her approximately 20 days short of meeting the one year requirement.

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 beneficiary's time spent in the United States should be included in the calculation of the beneficiary's time employed abroad since the beneficiary was paid and continued to work for the foreign company even while physically present in the United States. 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, Petition for a Nonimmigrant Worker, 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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding filing this petition. *See* 8 C.F.R. § 214.2(l)(3)(iii).

A. Facts

The petitioner filed the Form I-129 on March 11, 2013. On the Form I-129, the petitioner indicated that it was engaged in retail investments and sought to employ the beneficiary as its general manager from March 11, 2013 to March 11, 2016. According to the Form I-129, the beneficiary was employed abroad "continuously without any significant interruptions from May 2008 through March 2011." The record reflects that the beneficiary was admitted to the United States as a B-2 visitor for pleasure on March 31, 2011, and that she was in H-4 nonimmigrant status at the time the instant petition was filed.

In a letter dated February 25, 2013, the petitioner asserted that the beneficiary worked abroad for the foreign company as a part-time sales and marketing manager from May 2008 through December 2009 and "in early 2010, [the beneficiary] was promoted to a full-time Marketing/Sales Executive, working out of its corporate office in India." The petitioner stated that the beneficiary held this position until March 2011. The petitioner provided the foreign employer's wage registers to demonstrate that it paid the beneficiary's monthly wages for the position of marketing executive from April 2010 to March 2011.

The petitioner's initial evidence also included a copy of the beneficiary's Indian passport, which includes her B1/B2 visa and indicates that she was previously admitted to the United States in B-2 status on May 24, 2010 and arrived back in India on July 9, 2010.

The director issued a Request for Evidence (RFE) instructing the petitioner to submit additional documentation to corroborate the beneficiary's claimed period of employment abroad. Specifically, the director noted the petitioner's vague assertion that the beneficiary was promoted in "early 2010,"

and requested that the petitioner identify the exact date of the beneficiary's promotion and assumption of full-time employment with the foreign entity.

In response to the RFE, the petitioner stated that "[i]n March 2010, the Beneficiary was promoted to a full-time position as the Marketing/Sales Executive" and that she worked in the position from until March 2011. A May 20, 2013 letter from the foreign company also stated that the beneficiary was employed full-time from March 2010 through March 2011 in an executive/managerial position where she was "responsible for overseeing our entire Marketing and Sales Division." The petitioner provided additional documentation including the foreign company's wage register for the month of March 2010.

The director denied the petition after determining that the petitioner did not establish that the beneficiary had one year of continuous, full-time employment abroad with the foreign entity during the relevant time period. The director noted that this petition was filed on March 11, 2013 and therefore, the three years preceding this filing began on March 11, 2010. The director determined that the beneficiary was in the United States for 45 days from May to July 2010 as a B-2 nonimmigrant visitor. The director determined that the 45 days the beneficiary spent in the United States in mid-2010 did not interrupt her employment abroad but the days could not be included towards fulfillment of the beneficiary's one year of employment abroad. After subtracting the 45 days, the director found that the beneficiary worked abroad for "a little over eleven months" during the three years preceding the filing of the petition and fell short of the one year requirement.

On appeal, counsel for the petitioner asserts "[the beneficiary] physically worked as a Marketing/Sales Executive for [REDACTED] from March 1, 2010 until March 31, 2011 i.e. when she entered the U.S.A." In support of this assertion counsel refers to payroll vouchers, tax returns, financial statements and a letter from the foreign company. Counsel also asserts that the beneficiary "briefly travelled" while she was employed abroad but her job duties did not require her to be physically present in India. Thus, counsel asserts that the beneficiary worked remotely while in the United States for 45 days in 2010 and continued to draw pay for her services with the foreign company.

B. Analysis

Upon review, the petitioner has not established that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as follows:

An Alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary therefore in a capacity that is managerial, executive or involves specialized

knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

Here, the petitioner must demonstrate that the beneficiary was employed abroad with the foreign company for at least one continuous year beginning on March 11, 2010 since this petition was filed on March 11, 2013. The evidence demonstrates that although the beneficiary may have been employed by the foreign company abroad for at least one year from March 2010 to March 2011, the beneficiary traveled to the United States under a B-2 visa for 45 days during the months spanning May through July of 2010. This type of travel does not interrupt the continuous nature of the beneficiary's foreign employment; however it is time that may not be counted toward the one year requirement. *See* 8 C.F.R. § 214.2(I)(I)(ii)(A).

Therefore, even if the beneficiary was employed by the foreign entity on a full-time basis from March 1, 2010 through March 31, 2011 (the day she was admitted to the United States), she would be short of one year by over 20 days. Counsel asserts that the beneficiary's period of travel should not be excluded since the beneficiary continued to draw a salary and to work remotely while visiting or vacationing in the United States. Notwithstanding this assertion, the regulation is clear in its requirement that the beneficiary must be physically outside the United States and continuously employed abroad for at least one year. We note that technological advancements and flexible working environments have led to unique employment arrangements but this does not relieve the petitioner from meeting the petition requirements and the petitioner has not advanced sufficient support for the assertion that any part of the one year employment abroad period can be spent in the United States. *See Karmali v. United States Immigration and Naturalization Service*, 707 F.2d 408 (9th Cir. 1983).

We also note that counsel for the petitioner asserts on appeal that the beneficiary was employed for the foreign company from March 1, 2010 through March 31, 2011 but none of the documentation in the record supports this specific assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Specifically, the petitioner's letters repeatedly referred to the beneficiary's qualifying employment abroad as beginning March 2010 and ending March 2011 but the petitioner failed to state the exact date on which the beneficiary was promoted to her new position in 2010 or the specific date that she actually left the company in 2011. The wage registers provided merely indicated that the beneficiary was paid during the months of March 2010 through March 2011. Further, the director had requested that the petitioner identify the beneficiary's exact date of promotion to the position and the petitioner did not submit that information in response to the RFE. This information was material, particularly since the record shows that the beneficiary was enrolled in the [REDACTED] through April 2010, when she completed her MBA examinations. Going on record without supporting

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

For the foregoing reasons, the petitioner has not established that the foreign entity employed the beneficiary on a full-time basis for one continuous year in the three years preceding the filing of the petition. Accordingly the appeal will be dismissed.

III. Qualifying Relationship

Beyond the director's decision, the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer due to unresolved inconsistencies in the record.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

On Form I-129, the petitioner claimed an affiliate relationship with the foreign company based on [REDACTED]'s ownership of 60% of the foreign company and 51% ownership of the United States petitioner. The petitioner indicated that [REDACTED] owns the remaining 40% of the foreign company while [REDACTED] owns the remaining 49% of the United States petitioner. The petitioner submitted a letter dated February 25, 2013 and signed by its CEO, [REDACTED], in which he asserts that he owns 60% of the foreign entity and 51% of the U.S. company.

The petitioner also submitted its Certificate of Formation filed with the Texas Secretary of State on January 27, 2010 indicating that initial capital contributions were required by [REDACTED] in the amount of \$510 and by [REDACTED] in the amount of \$490. The meeting minutes for the petitioner's organizational meeting, dated January 28, 2010, approved membership interest in the company as previously noted and also noted that consideration had been received for the membership interest. The petitioner did not submit copies of its membership certificates or evidence of consideration paid by the two members.

At the same time, the petitioner submitted its 2010 and 2011 Internal Revenue Service (IRS) Forms 1065, U.S. Return of Partnership Income with Schedules K-1 indicating that [REDACTED] and not [REDACTED] owns 51% of the petitioning company.

The director noted the discrepancy and requested additional evidence in his RFE. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to the RFE, the petitioner explained that the initial organizational documents erroneously identified [REDACTED] as the majority owner of the company. The petitioner submitted an

"Amended Minutes of the Organizational Meeting" dated January 31, 2010 indicating that the company members recognized that the foreign company, rather than [REDACTED] would purchase a controlling interest in the petitioning company. The petitioner also provided a membership interest issuance/transfer ledger and membership certificates nos. 1 and 2 reflecting issuance of 51% of its membership interest to [REDACTED] and 49% to [REDACTED]. The petitioner did not submit evidence that it filed an amended certificate of formation with the Texas Secretary of State.

The petitioner provided a letter from an accountant dated June 14, 2013 stating that [REDACTED] owns 49% of the petitioning company, the foreign company owns 51% of the petitioning company, and [REDACTED] owns 60% of the foreign company. The accountant further states that the petitioning company was "created on Jan 27, 2010, and started doing business in April of 2010. We have been the CPAs for [the petitioning company] since the inception of operation. There was originally an error when the articles of incorporation were created, but will be amended through the corporate attorney." Although the accountant states that the error "will be amended," the petitioner simultaneously claims that the error was corrected in January 2010, mere days after it was allegedly made.

Addressing the discrepancies and inconsistencies above in response to the RFE, petitioner's counsel explained that the Indian businessmen were new to U.S. business laws and "through some miscommunication with their Accountant erroneously appointed Mr. [REDACTED] as the 51% partner rather than as the Managing Member in their books. However, they quickly realized that this was not the way they had intended the U.S. Company to be operating so they Amended their meeting minutes a few days later after the forming the company."

Further, the explanation that the error was a miscommunication with an accountant that was quickly resolved in 2010 directly conflicts with the claim on the initial Form I-129 and supporting letter, which were both signed by [REDACTED] and which both affirmatively claim [REDACTED]'s ownership of the company. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Finally, counsel stated that a qualifying relationship would still exist even if [REDACTED] did own 51% of the petitioning company since he is the majority owner of the foreign company. While this may be true, it is the petitioner's obligation to consistently identify the nature of the qualifying relationship and provide documentation to support the claim. The regulation at 8 C.F.R. § 214.2(i)(2)(G)(1) states that a qualifying organization is one which "meets exactly one of the qualifying relationships specified in the definitions."

Due to the unresolved inconsistencies, the petitioner has not met its burden to establish that the petitioner has a qualifying relationship with the foreign entity. For this additional reason, 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).

IV. CONCLUSION

The appeal will be dismissed for the above-stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.