

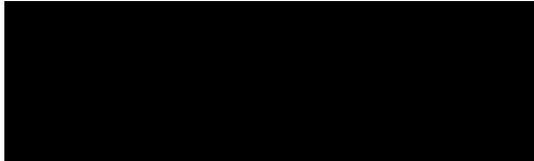
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



FILE: WAC 02 050 53034

Office: CALIFORNIA SERVICE CENTER Date:

NOV 20 2003

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:



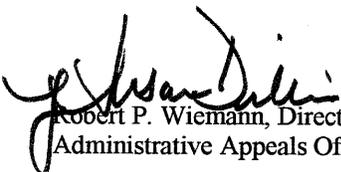
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a banking and financial software development company. It seeks to continue the employment of the beneficiary temporarily in the United States as the engineering manager. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary's U.S. employment had been and would be in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(1)(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 (1)(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 with 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 serves 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)(14)(i) states, in part:

Individual petition. The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1995 as a banking and financial software development business. The petitioner states that the U.S. entity is an affiliate of AdNovum Informatik AG, located in Zurich, Switzerland. The petitioner declares three employees and \$116,633 in gross annual income. The petitioner seeks to extend the beneficiary's services as an engineering manager for a period of two years, at a yearly salary of \$80,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in a primarily managerial or executive capacity with the U.S. entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily—

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;

- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives,

the board of directors, or stockholders of the organization.

In the petition, the petitioner describes the beneficiary's past job duties at the U.S. entity as "[m]anaged professional engineers." The beneficiary's proposed job duties are described as "manage daily activities of Engineers working on middleware software projects; hire, fire, and promote Engineers; assign specific projects; review work; negotiate binding contracts; prepare and administer budgets; manage technology transfer between AdNovum's U.S. and foreign offices; set policy; use specialized knowledge of AdNovum products and operations."

In a letter of support dated November 14, 2001, the president of AdNovum Software describes the beneficiary's job duties as follows:

[The beneficiary] will have total authority to hire, fire, and promote all Engineers working at Adnovum Software, Inc. [The beneficiary] will be responsible for assigning specific projects to specific Engineers. He will need to match the skill sets of a particular Engineer to that of a particular project. [The beneficiary] will review the work performed by all AdNovum Engineers.

[The beneficiary's] team will be responsible for working on "middleware software projects." [The beneficiary] will have authority to negotiate and sign contracts which bind both AdNovum, U.S. and AdNovum, Switzerland with vendors and clients based in North America. [The beneficiary] will be responsible for preparing and administering annual budgets, as well as specific project budgets. [The beneficiary] will need to analyze a client's technological needs in order to submit bids. [The beneficiary] will organize strategic partners made up of vendors and customers residing in the Bay Area and in Europe. [The beneficiary] will manage technology transfer not only between AdNovum, U.S. and AdNovum, Switzerland, but also between AdNovum and international/domestic vendors and clients. [The beneficiary] will have the responsibility of setting policy used to determine not only AdNovum's growth, but also our direction within the industry.

The director determined that the evidence initially submitted in support of the petition was insufficient to establish

eligibility for the benefit sought, and thereafter requested that the petitioner submit additional evidence. The director continued by specifically requesting the following:

- Employees in the U.S.: Indicate the total number of employees at U.S. location where the beneficiary will be employed.
- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid commission.
- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the U.S.. Be specific. Indicate exactly whom the beneficiary directs including their job title and position description. List all employees under the beneficiary's direction. Also, indicate percentage of time spent in each of the listed duties.

In response to the director's request for additional evidence, the petitioner submitted an organizational chart of the U.S. entity. It demonstrates that the U.S. entity has three employees, the beneficiary as CEO and two additional employees identified as engineers. Counsel also referred to statements contained in the support letter, dated November 14, 2001, to establish the beneficiary's position as a manager or executive.

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary will be employed primarily in a managerial or executive capacity. The director further maintained that the record indicated that a preponderance of the beneficiary's duties would be directly

providing the services of the business including sales and office administrative duties.

On appeal, counsel asserts his disagreement with the director's decision, and submits a brief and evidence in support of his assertion. Counsel challenges the director's decision because of the previous decisions approving L-1A status for the beneficiary. Counsel also challenges the director's use of company size as a determining factor in denying the petitioner's request for an extension of the beneficiary's authorized stay.

Counsel's challenges are not persuasive. The director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petitions. The record of proceeding does not contain copies of the visa petitions that were claimed to have been previously approved. If, however, the previous nonimmigrant petitions were approved based on the same facts that are contained in the current record, the approval would constitute clear and gross error on the part of Citizenship and Immigration Services (CIS). As established in numerous decisions, (CIS) is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See *Sussex Engg. Ltd. V. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (BIA 1988). The Administrative Appeals Office (AAO) is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Although counsel accurately concludes that company size cannot be the sole basis for denying a petition, that element can nevertheless be considered. This is particularly true in light of other pertinent factors, such as the nature of the petitioner's business, which help to determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant case, the latter more accurately describes the beneficiary's role. At the time of filing the petition in 2001, the petitioner had been established since 1995 and claimed to have employed the beneficiary as engineering manager, and two engineers. The petitioner did not submit evidence that it employed any subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company.

Based upon the evidence submitted it does not appear that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as engineering manager.

Furthermore, counsel contends that the beneficiary manages all technical engineers and manages all aspects of engineering projects. Counsel maintains that the beneficiary has been and will continue to be responsible for preparing and administering annual budgets, as well as specific project budgets. Counsel also avers that the beneficiary's responsibilities include analysis of client technological needs in order to submit bids; organizing strategic partners; managing technology transfers; and setting policy used to determine company growth and direction within the industry. Counsel concludes by asserting that the duties described allow for the classification of the beneficiary as a functional manager.

Counsel's argument is not persuasive. The petitioner has not provided sufficient evidence to establish that the beneficiary has been or will be employed primarily in a managerial or executive capacity as a functional manager. The beneficiary's title on the organizational chart reads "CEO," indicating an individual in charge of the day-to-day services of the organization, not a functional manager. When managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must demonstrate that the executive or manager does not directly perform the function. Although counsel argues that the beneficiary manages all technical engineers and all aspects of engineering projects, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The petitioner has failed to provide a detailed position description specifying exactly what the management of engineers and engineer projects entails. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing non-qualifying duties. In the instant case, the petitioner submitted documentation that only lists the subordinates' names and job titles. This evidence is insufficient to establish that they are qualified employees to relieve the beneficiary from performing the function. Absent details concerning the beneficiary and his subordinates position descriptions, daily activities, and percentage of time spent performing each duty, the record is insufficient to establish

that the beneficiary will be managing rather than performing the function.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. While it is apparent that the beneficiary's considerable credentials and experience are tremendous assets to furthering the petitioner's business objectives, it does not appear at this time that the petitioner is prepared to sustain the beneficiary in a strictly managerial or executive capacity. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record does not establish that the beneficiary has been or will be primarily managing the organization, or a department, subdivision, function, or component of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G). The petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that that the foreign entity is and will continue doing business during the alien's stay in the United States pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(H). As the appeal will be dismissed, however, these issues need not be examined further.

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; *Republic of Transkei v. INS*, 923 F.2d 175,178 (D.C. Cir. 1991) (holding burden is on the petitioner to provide documentation); *Ikea US, Inc. v. U.S. Dept. of Justice*, 48 F.Supp.2nd 22, 24 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.