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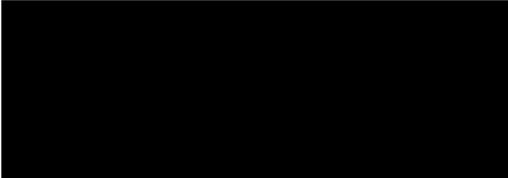


U.S. Citizenship  
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Services

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APR 19 2004



FILE: EAC 01 044 53840 Office: VERMONT SERVICE CENTER Date:

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 of the Administrative Appeals Office 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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The petitioner subsequently filed an appeal, which the director deemed untimely and, therefore, treated as a motion. The director reaffirmed the prior decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner claims to be engaged in the business of exporting computers, peripherals, and accessories. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary has been and would continue to act in a qualifying capacity and is eligible for L-1 classification.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The petitioner states that it is an affiliate of Sintese-Sociedade Comercial, Ltd. (Sintese) a company doing business in Angola. The petitioner was incorporated in August of 1999. The beneficiary was approved for L-1A visa classification on December 10, 1999 and entered the United States in March of 2000. It seeks to employ the beneficiary in the United States for an additional three years at an annual salary of \$36,400.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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 support of the petition, the petitioner provided the following description of the beneficiary's job duties:

[The beneficiary] is responsible for strategic planning and corporate financial management, including treasury functions.

As President of [the petitioner], [the beneficiary] has been and will continue to be responsible for the following: negotiate and execute corporate contracts; business acquisitions; corporate planning, banking and financial management; delegation of authority as needed; outsourcing of requisite storage and shipping to suppliers or others; creation of business support infrastructure through suppliers and buyers; and the exercise of discretionary authority over the day-today [sic] operations of the company, including business location, hiring, and firing of personnel.

The petitioner also itemized the beneficiary's prospective duties into the following categories:

- Administrative - supervision of all legal and account functions
- Financial - contacts with banks and monetary issues
- Commercial - search of prospects suppliers
- Export - supervision of documentation, shipments and Customs requirements

On March 1, 2001 the director issued a request for additional evidence. The petitioner was instructed to submit a complete job description for all of the petitioner's employees, including the beneficiary, and a breakdown of the number of hours devoted to each of the employees' job duties. The director also requested documentation of the number of contractors used by the petitioner, if any. The director further requested the petitioner's Quarterly Tax Returns and W-2 forms.

In response, the petitioner submitted the following hourly breakdown of the beneficiary's job duties:

- 4 Hours: 1) negotiate and execute corporate contracts & business acquisitions
- 4 - 12 Hours: 2) perform corporate planning; (moved company to New Jersey, negotiated and signed lease; negotiated agreement with GLOBALINK USA to perform storage, shipping and customs for products sold; negotiated contracts for sales of computer equipment to Angola)
- 8 Hours: 3) manage banking and financial matters (letters of credit, hiring and firing of accountant(s); wire transfers, business banking, representation of the company in Angola)
- 8 Hours: 4) delegate authority as needed (to Globalink USA and to Anne Tromp, Administrative and Financial Assistant, who handles clerical duties along with Karen Vaughn, clerk); outsource responsibility for storage and shipping (GLOBALINK USA handles storage, shipping and customs declarations for the products sold to Angola)
- 16 Hours: 5) Creation of business support infrastructure through suppliers and buyers (Created demand for supply of computers and computer equipment, by business negotiations in Angola; outsourced all storage, shipping and customs to GLOBALINK USA; hired CPA for tax purposes, delegated to Anne Tromp bookkeeping on software and instructs and delegates assignments to follow through for the business at hand), including ongoing and repeat orders.

- 7.5 Hours: 6) Exercises discretionary authority over the day-today [sic] operations of the company, including business location (moved company from New York to New Jersey, applying for Authority To Do Business in New Jersey), hiring, (hired [REDACTED] and [REDACTED] and [REDACTED] as Certified Public Accountant for taxes).
- .45 Hours: 7) May also evaluate, negotiate and purchase real estate as part of the long term expansion for the company.

The petitioner also re-stated the beneficiary's duties as follows:

[The beneficiary] is responsible for envisioning the computer export business, negotiated the contracts for same, investigated, "hired" and delegated storage, shipping and customs duties to Globalink, hired staff to date, moved the company to New Jersey (fine road connections with [REDACTED] plus more suburban lifestyle and closer to her residence there); [the beneficiary] also hired a Certified Public Accountant, and stabilized the company by her presence. She has since returned to Angola, in part to exercise her continuing duties with the parent company, but also to manage the sale and distribution of goods shipped there under contract. Thus, [the beneficiary] manages an "essential function" of marketing and financial planning for the company, in her roles as **MANAGER: BUSINESS DEVELOPMENT & OPERATIONS**.

The petitioner provided the names, position titles, and hourly breakdown of duties of its two other employees, and further explained that it hired a company called "Globalink (USA)" to provide warehousing, shipping and customs brokerage services. The petitioner claimed that Globalink's fees were included in the pricing of the petitioner's products. The petitioner also complied with the director's request for certain tax documents and in a separate statement asserted that it has fully complied with the law and warranted similar treatment as that granted to larger companies. The petitioner further asserted that denying the petition at this point would deprive the petitioner of its management, therefore violating the petitioner's due process rights.

On August 28, 2001, the director denied the petition based on the determination that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. The director further determined that the record demonstrated that the beneficiary would be performing the function of the organization. The director concluded that based on the evidence submitted, the petitioner had not established that it has sufficient staff to relieve the beneficiary from performing the non-qualifying services of the corporation.

On appeal from the director's dismissal of the petitioner's motion, the petitioner asserts that the director has placed undue emphasis on the size of the petitioning entity, which contradicts congressional intent and statutory language. The petitioner's point, however, is without merit. While size cannot be the sole consideration in determining eligibility for managerial or executive status, the director can and should consider the size of the petitioner's personnel for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties. A petitioner, regardless of its size, is held to the same statutory and regulatory requirements. In the instant case, the petitioner has indicated that its primary purpose is to export computers and related equipment to the parent company in Angola. The petitioner stated that the beneficiary is responsible for negotiating and executing the contracts for the sale of computers, negotiating business deals in Angola that created the demand for the exported computers, and traveling to supervise the sale and distribution of the goods in Angola (as well as continuing

the operations of the affiliated company in Angola). These duties indicate that the beneficiary is primarily responsible for selling the petitioner's goods. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). While the beneficiary's duties are clearly key to the petitioner's overall financial success, they cannot be deemed primarily managerial or executive.

The petitioner asserts again that the director violated the petitioner's constitutional due process rights by denying the petition to extend the beneficiary's stay after previously granting the initial petition. In essence, the petitioner implies that CIS is estopped from denying a subsequent petition to extend status once it has approved the initial petition granting such status. However, the AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See Delegation of Authority*, March 1, 2003. Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim. Furthermore, the record of proceeding does not contain copies of the visa petition that is claimed to have been previously approved. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of CIS. 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, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the AAO 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). The AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), aff'd 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

On review of the complete record, the petitioner has not provided sufficient information to demonstrate that the beneficiary will be directing the management of the organization or a major component or function of the organization. The petitioner has stated that the beneficiary will carry out corporate planning, delegate authority, create a business infrastructure, and exercise discretionary authority. However, the examples provided, such as negotiating an agreement with Globalink and moving the office, do not appear to plausibly include a complete description of the beneficiary's weekly activity. There is insufficient information in the record to conclude that the beneficiary will be managing the organization or a department, subdivision, function, or component of the organization. Nor does the record establish that the beneficiary will be relieved of having to perform the operational, non-qualifying duties of the organization. The record supports a finding that the beneficiary is performing the tasks necessary for the operation of the petitioner. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. Based on these findings the instant petition cannot be approved.

Beyond the decision of the director, the petitioner has failed to submit sufficient evidence to establish that it has a qualifying relationship with a foreign entity. The record currently shows that [REDACTED] owns 55% of the petitioner. However, in regard to the foreign entity, Mr. [REDACTED] and the beneficiary each own 40%. Ownership of the remaining 20% of the foreign company is shared by two individuals named in Commercial Public Registry of Luanda. While it is clear that Mr. [REDACTED] owns a controlling interest in the

U.S. entity, the same cannot be said of his ownership in the foreign entity, as there is no evidence that he has majority ownership or otherwise controls the foreign company. As such, the AAO cannot conclude that the U.S. petitioner has a qualifying relationship with the foreign entity, as there is insufficient evidence to establish that the two entities are similarly owned and controlled. However, as the appeal will be dismissed on other grounds, this issue 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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.