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FEB 7 2005

FILE: SRC 03 119 50068 Office: TEXAS 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, Texas Service Center, denied the petition for a nonimmigrant visa. 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 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 is a company organized in the State of Tennessee that is operating as a distributor of automotive leather upholstery. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Penang, Malaysia. The petitioner seeks to employ the beneficiary as its business development manager for three years.

On August 19, 2003, the petitioner submitted an amended form, without fee, requesting that the beneficiary be classified as an L-1B intracompany transferee with specialized knowledge. According to Citizenship and Immigration Services (CIS) records, the petition was rejected. Counsel, however submitted a copy of the second nonimmigrant petition for the director's consideration in the instant matter.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a specialized knowledge capacity. The director specifically noted that the beneficiary's knowledge is not distinguished by an "unusual qualification" that would qualify him for the L-1B classification.

On appeal, counsel claims that the beneficiary has specialized knowledge of the parent company's product, processes and procedures that is needed to aid in the development of the new United States office. Counsel submits a letter in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 issue in the instant proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the nonimmigrant petition on March 21, 2003 requesting employment of the beneficiary as its business development manager. On April 1, 2003 the director issued a request for evidence asking that the petitioner specifically describe the beneficiary's proposed executive or managerial employment in the

United States, including a description of job titles and job duties performed by all workers in the petitioning organization, the percentage of time spent on each task, and the employees directly supervised by the beneficiary. In response, the petitioner submitted an affidavit from the beneficiary outlining his responsibilities as the foreign entity's vice-president of business development and summarizing the employees supervised by the beneficiary. The petitioner did not specifically address the responsibilities to be performed by the beneficiary during his employment in the United States organization.

On July 22, 2003, the director issued a notice of intent to deny noting that the present record did not demonstrate that the beneficiary would be employed by the petitioner in a qualifying capacity. The director requested that the petitioner explain how the beneficiary would meet the qualifications of an executive, and would not be performing the daily operations of the business.

Counsel subsequently submitted a letter from the petitioner dated August 18, 2003, in which it stated that "[the beneficiary] may not meet [Citizenship and Immigration Services' (CIS)] guidelines for an executive position," but contended that the beneficiary instead qualifies as possessing specialized knowledge. The petitioner further stated that the beneficiary's proposed assignment in the United States company is due to his knowledge of the foreign organization's product, procedures and business operations, and notes that the beneficiary would train the petitioner's personnel in these areas.

In a decision dated September 10, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed in the United States in a specialized knowledge capacity. The director stated that the petitioner did not establish that the beneficiary's knowledge "is distinguished by some unusual qualification and not generally known by practitioners in the alien's industry." The director also stated that the petitioner failed to provide evidence "describing and setting apart the knowledge [of the beneficiary] from elementary knowledge possessed by others." Consequently, the director denied the petition.

Counsel asserts in an appeal filed on October 14, 2003, that the beneficiary has specialized knowledge of the foreign entity's product research and development, its manufacturing processes, and quality control standards which is necessary for the success of the United States entity.

On review, counsel has conceded in both his response to the director's notice of intent to deny and on appeal that the beneficiary would not be employed by the United States entity as a manager or executive. The petitioner has therefore failed to demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). For this reason, the appeal will be dismissed.

Counsel claims in response to the director's notice of intent to deny and on appeal that the beneficiary would be employed in a specialized knowledge capacity. The AAO notes that following the filing of the nonimmigrant petition a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In the present matter, the petitioner did not file a new petition, but rather submitted a new form without a fee. Although the director incorrectly reviewed the petitioner's amended claim, this error is not critical. 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Even if CIS regulations allowed the consideration of counsel's subsequent claim, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a specialized knowledge capacity.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the following:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines "specialized knowledge" as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

Although the petitioner asserts that the beneficiary possesses specialized knowledge that would aid in the development of the petitioning organization, the petitioner has not articulated any basis to the claim that the beneficiary would be employed in a capacity requiring specialized knowledge. Other than submitting a general description of the beneficiary's knowledge of the foreign entity's products, processes and procedures, the petitioner has not provided any evidence of the knowledge and expertise required for the beneficiary's position that would differentiate his knowledge from others employed in the foreign or United States entities, or the knowledge of business development managers at other employers within the industry. Moreover, the petitioner has not specifically identified the proposed job duties to be performed by the beneficiary while employed in the claimed specialized knowledge capacity. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Based on the petitioner's representations, the AAO cannot conclude that the beneficiary would be employed in a specialized knowledge capacity. For this additional reason, the appeal will be dismissed.

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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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.