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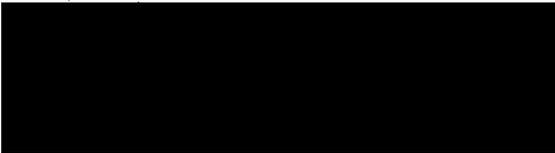
FILE: SRC 03 070 50926 Office: TEXAS SERVICE CENTER Date: FEB 07 2005

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 extend the employment of its president-chief executive officer as a 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 corporation organized in the State of Florida that offers tax and financial services. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Curacao, Netherlands Antilles. The petitioner now seeks to employ the beneficiary for two years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel claims that Citizenship and Immigration Services (CIS) erred in concluding the beneficiary would not be employed in the United States in a primarily managerial or executive capacity. Counsel states that as the president and chief executive officer of the petitioning organization, the beneficiary meets the regulatory requirements for employment in an executive capacity. 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the present 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 January 9, 2003 stating that the beneficiary would be employed under the extended petition as the corporation's president and chief executive officer and would make all executive decisions related to the petitioner's operations. In an attached letter from the petitioner, dated December 18, 2002, the petitioner's treasurer stated that the beneficiary was appointed to the position of president and chief executive officer as a result of his knowledge of the foreign entity's operations and client base and because of his networking abilities. The petitioner provided the following description of the beneficiary's position:

In the position of President and Chief Executive Officer of [the petitioning organization], [the beneficiary] oversees and makes all executive decision[s] concerning the financial planning/tax firm. He conducts general administration affairs of the company, acts as the liaison and representative for [the foreign entity] in the U.S., markets the services of [the foreign entity], engages in long-range planning and identifying business opportunities in the U.S., and directs the business activities.

The petitioner stated that the beneficiary would receive an annual salary of \$60,000.

The petitioner explained that the beneficiary was needed in the United States in order to carry out the petitioner's "ambitious expansion plans" which include expanding the company's services through marketing activities and by hiring a marketing company. The petitioner also explained that it is presently interviewing a candidate for employment in the petitioning organization, and stated "we out-source our work to Bateman & Company, whose practice we will purchase within the next two to three years."

The petitioner provided its organizational chart, which identified the beneficiary as president and chief executive officer. The chart reflected that work was outsourced to Bateman and Company, and indicated that the beneficiary oversees the management of this business. The petitioner also noted the existence of the company's treasurer as subordinate to the beneficiary, and indicated that it was an unpaid and voluntary position. The petitioner further noted on the organizational chart the position of the petitioner's proposed employee, whose primary task, the petitioner indicated, would be to develop the petitioner's local market.

The petitioner also noted on the organizational chart that the beneficiary's time would be allocated in the following manner: business development, 20-30%; education and instructions, 10%; and management of Bateman and Company, 60%. The petitioner noted that the beneficiary's management duties included instructing employees on preparing tax returns and performing audits, and managing the day-to-day operations of the organization, including bill payment and payroll.

The director issued a request for evidence on March 18, 2003 asking that the petitioner submit its employer's quarterly tax returns for the years 2002 and 2003 and quarterly wage reports for all employees during this time. The director also requested Internal Revenue Service (IRS) Tax Form 1099 for the petitioner's contract employees and any evidence demonstrating the hours worked by the contract employees and payment made by the petitioner to each contractor.

Counsel responded in a letter dated May 2, 2003, and noted that the petitioner did not employ any workers or utilize any contract employees. Counsel explained that rather, Bateman and Company charges the petitioner for the time spent by two certified public accountants on its work. Counsel stated that the petitioner pays an average of \$150.00 per hour for their services and utilizes approximately 10 hours per month. Counsel provided the petitioner's balance sheet and profit and loss statement for April 2003, the petitioner's 2001 corporate income tax return, and employer's quarterly reports for the periods ending September and December 2002 and March 2003. Counsel also submitted an invoice from Bateman and Company, dated December 31, 2002, for work performed for the petitioner's clients.

In a decision dated July 24, 2003, the director determined that the petitioner had failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated "[t]he beneficiary evidently exercises discretion over the day-to-day operations of the activity, but it must be noted that he also performs much of the activity and does not supervise professional employees." The director also stated that the petitioner did not demonstrate that the beneficiary would be directing the management of the organization, or that the beneficiary would supervise a subordinate staff of professional, managerial or supervisory employees who would relieve him from performing non-qualifying functions of the business. Consequently, the director denied the petition.

In an appeal filed on August 25, 2003, counsel states that as the president and chief executive officer, the beneficiary has been employed and would continue to be employed by the United States entity in a primarily managerial or executive capacity. Counsel states that the beneficiary is not the sole employee of the petitioning organization as the petitioner uses contract labor. Counsel claims that the December 2002 invoice submitted with the petitioner's response to the director's request for evidence demonstrates the petitioner's use of two certified public accountants as contract workers. Counsel states "[a]s with any President and CEO, [the beneficiary] clearly meets the regulatory test of 'executive capacity' and [the] same should not be re-adjudicated on his company's request for an extension of stay." Counsel submits a letter from the beneficiary and a letter from an attorney, which counsel claims verify the beneficiary's employment in an executive capacity.

In the beneficiary's letter, dated August 15, 2003, the beneficiary states:

As part of my management of the organization, I bring in other professionals, namely CPA's, to work for our company on behalf of our U.S. clients.

As President and CEO, I do not receive any supervision from lower level executives and I exercise virtually complete discretion over major decision-making for the company. I am in charge of establishing company goals and policies and in that respect, our U.S. company has continued to grow and flourish, despite the current poor economy. As the economy begins to turn and improve, I see our company growing with the expectation that we can convert

contract workers to employees, as our small enterprise continues to make its contribution to the U.S. economy.

On review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* Moreover, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

While the petitioner's description of the beneficiary's job duties includes tasks typically considered "executive" in nature, the record does not support the claim that the beneficiary would be employed in a primarily executive capacity. The petitioner stated that the beneficiary would spend approximately 60% of his time overseeing the "financial planning/tax firm," which, although not specifically identified, the AAO assumes is Bateman and Company. The petitioner however, does not provide any documentary evidence conclusively establishing a business relationship between the petitioning organization and the accounting firm, or, more importantly, demonstrating that the beneficiary "oversees and makes all executive decision[s] concerning the financial planning/tax firm." The one invoice provided by the petitioner is not sufficient to establish anything more than the petitioner's use of Bateman and Company for services in December 2002. The petitioner's financial statements do not reflect payments made for "cost of labor," which would typically include contractual services, nor do they identify payroll expenses for anyone other than the beneficiary. The petitioner has failed to submit conclusive evidence in support of its assertion that the beneficiary would spend the majority of his time exercising executive authority over the financial planning/tax firm. 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).

Additionally, the petitioner's job description indicates that the beneficiary would be performing non-qualifying tasks of the petitioning organization. Specifically, the petitioner noted that the beneficiary performs "general administration affairs of the company" and markets the foreign entity's services in the

United States. Although the petitioner does not specifically indicate the percentage of time the beneficiary would spend performing these tasks, it is clear that the beneficiary would dedicate a portion of his time to non-managerial and non-executive operations of the business. 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).

Counsel's claim on appeal that the instant issue of executive capacity "should not be re-adjudicated on his company's request for an extension of stay" is misplaced. Counsel fails to recognize that each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). It is therefore impracticable for counsel to suggest that the instant petition should not be adjudicated based on the present record.

Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or 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. at 597. It would be absurd to suggest that CIS 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed abroad in a qualifying capacity as required in the regulation at 8 C.F.R. § 214.2(l)(3)(iv). The petitioner stated that the beneficiary was employed as a managing director of the foreign entity and was responsible for the day-to-day operations and executive decisions of the business. The petitioner did not provide any additional evidence substantiating its claim that the beneficiary was employed in a 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. at 193.

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).

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.