

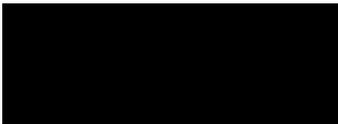
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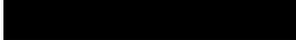
U.S. Citizenship
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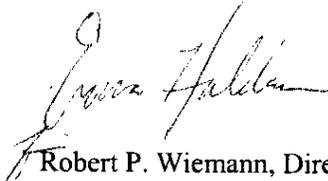
IN RE: Petitioner: 
Beneficiary: 

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)

IN 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, Nebraska 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 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 limited liability company organized in the State of Washington that is engaged in real estate development and international trade. The petitioner claims that it is the subsidiary of Dalian International Economic and Technical Cooperation Corp., located in Dalian, China. The beneficiary was initially granted a one-year period of stay in the United States in order to open a new office and was subsequently granted two extensions of stay. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had been and would continue to be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner submits additional evidence and descriptions with regard to the beneficiary's duties, and contends that this newly-submitted evidence establishes the beneficiary's eligibility for the benefit sought. Counsel notes that three previous I-129 petitions granting the beneficiary's L-1A status have been approved, and claims that there have been no significant changes in the beneficiary's duties or the petitioner's business.

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 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 primary issue in this matter is whether the beneficiary will 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), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 initial petition, the petitioner's former counsel submitted a letter dated May 9, 2002 detailing the nature of the beneficiary's duties. Specifically, counsel described his duties as follows:

- Exercises discretion over business operation, including strategic development plan, sales and marketing, deal negotiations, corporate finance and personnel management. He works closely with outside professionals such as CPA, attorney, architecture and business agents retained by the company;
- Supervises and controls the work of [the petitioner's] employees; he is responsible for hiring, firing, and determining compensation level and bonuses for employees; and
- Reports directly and be accountable to the President of [the foreign entity].

In addition, counsel stated that the beneficiary had three employees under his direct supervision; namely, a real estate development manager, an international trade manager, and an office assistant.

On July 8, 2002, the director requested additional evidence. Specifically, with regard to the beneficiary's claimed managerial position, the director requested a description of the beneficiary's duties as well as the duties and position titles of all the petitioner's employees. Additionally, the director requested clarification and documentation that the petitioner in fact employed three persons in addition to the petitioner, and further requested a breakdown of the amount of time each employee devoted to each of the identified duties.

In a response dated August 5, 2002, the petitioner, through counsel, submitted a brief response to the director's request. Counsel stated that the petitioner currently employed a total of three employees, and stated that the real estate manager's employment with the petitioner ended on April 30, 2002. Counsel failed to address the director's query with regard to the beneficiary's duties and the percentage of time devoted to each duty. With respect to the duties of the other employees, counsel provided the following descriptions:

As a manager of international trade at [the petitioner], Mr. [REDACTED] is vested with discretion and responsibility on the company's international business operation. Mr. [REDACTED] duties cover import and export transactions (60% of his time), marketing, business promotion, and maintaining good relationships with existing and potential customers (25%). Mr. [REDACTED] spends the remaining 15% of his time for business travel mainly within the United States.

* * *

Ms. [REDACTED] is a part time office assistant and is responsible for bookkeeping and files and record keeping of the company.

On October 7, 2002, the director denied the petition. The director, found that the evidence in the record was insufficient to warrant a finding that the beneficiary had been and would continue to be functioning in a

capacity that was primarily executive or managerial. Specifically, the director found that the description of the beneficiary's duties was too vague to ascertain the exact nature of the beneficiary's daily tasks, and further noted that the petitioner failed to submit further details despite the request for evidence issued on July 8, 2002. Furthermore, the director found that the beneficiary was not supervising a subordinate staff of professionals or managers, since the limited information provided indicated that he supervised only one full-time and one part-time employee.

On appeal, counsel acknowledges the inadequacy of the petitioner's and former counsel's response to the request for evidence, and submits a detailed description of the beneficiary's actual day-to-day duties in an effort to prove that the beneficiary does in fact meet the requirements for managerial and/or executive capacity.

Upon review, counsel's assertions are not persuasive. 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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The burden is on the petitioner to specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

As previously stated, the initial description of the beneficiary's duties was insufficient. Consequently, the director requested additional details regarding the beneficiary's duties, the number of hours worked per week, and a breakdown of a typical week in the beneficiary's job. The petitioner's response failed to address the beneficiary's duties, and the director consequently based his decision on the initial description submitted with the petition.

The petitioner failed to provide a sufficient description of the beneficiary's duties despite the director's specific request. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Although counsel has submitted a thorough description of the beneficiary's duties on appeal, this evidence is unacceptable. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The AAO, consequently, has reviewed the initial description of duties and concurs with the director's conclusions. The petitioner has used vague terms such as "exercises discretion" and "directs," which, as stated by the director, do not sufficiently describe the exact nature of the beneficiary's duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.*

Consequently, it is impossible to determine, based on the current record, what the beneficiary actually does in the course of his employment, and how much time the beneficiary will actually allocate to executive/managerial duties. Although the record establishes that the beneficiary oversees two other employees, this fact alone is not enough to establish that the beneficiary qualifies as a manager, since the petitioner has failed to present a thorough description of the beneficiary's role in the organization.

The petitioner has failed to establish that the beneficiary's duties are primarily managerial or executive in nature, and has submitted no information to establish the percentage of time the beneficiary actually performs or will perform the claimed managerial or executive duties. It appears from the record that there are only two other employees working for the petitioner, and that the beneficiary maintains a full-time position. One of these employees works a part-time schedule. Collectively, in addition to the inadequate description of the beneficiary's duties, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary will be acting in a primarily managerial or executive capacity.

Counsel noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. 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 material and gross error on the part of the director. The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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. 593, 597 (Comm. 1988). 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).

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.