

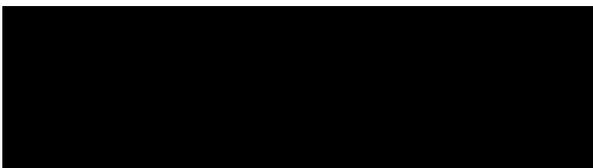
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services



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File: SRC 03 146 50992 Office: TEXAS SERVICE CENTER Date: JUN 28 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

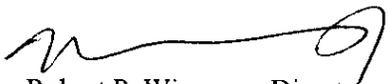
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 is a Canadian corporation located in Surrey, British Columbia, Canada, engaging in business as a contractor. The petitioner's U.S. affiliate is a corporation organized in the State of Florida, engaging in the business of providing management and consulting services within the lodging industry in Florida.¹ The petitioner filed this nonimmigrant petition seeking to extend the employment of the beneficiary in the capacity of president of its U.S. affiliate 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 director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred in her determination, and that the beneficiary has adequately demonstrated that the beneficiary's duties meet the statutory definition of "executive capacity." In support of this assertion, counsel submits additional evidence.

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.

¹ The AAO notes that the director's description of the U.S. entity as a contractor reflects the petitioner's response in Part 5 of the Citizenship and Immigration Service (CIS) Form I-129, Petition for a Nonimmigrant Worker. On appeal, counsel clarifies that the information provided in Part 5 of the petitioner's Form I-129 pertains to the petitioner, and that principal business of the U.S. entity is engaged in the business of providing management and consulting services within the lodging industry in Florida.

- (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 present 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 petition for extension, the petitioner indicated that the beneficiary's job responsibilities in the U.S. entity are to "[f]ormulate & direct operations of the company. Establish goals and policies. Interview & hire employees. Maintain corporate bank & financial accounts. Coordinate advertising." In a letter accompanying the petition, the petitioner stated only that as the president of the U.S. entity, the beneficiary's "primary responsibility shall remain to formulate and direct the operations of [the U.S. entity]."

On June 24, 2003, the director requested additional evidence. Specifically, the director requested that the petitioner provide (1) the number of workers for the U.S. entity, their titles, and whether they work part-time; (2) the gross and net annual incomes for the U.S. entity; and (3) a copy of the latest quarterly tax return for the U.S. entity.

In response to the request, the U.S. entity indicated that it has five employees, whose job titles are: chief executive officer, manager, housekeeper, receptionist, and maintenance and repair worker. The letter stated that none of these employees work part-time. The letter further specified that the gross and net annual income for the U.S. entity as reported for 2002 is \$193,194 gross and \$7,428 net. The U.S. entity also provided a copy of its Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the quarter ending June 30, 2003.

On September 25, 2003, the director denied the petition. Specifically, the director determined that the petitioner has failed to establish that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization, or that he would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the business. The director found that the majority of the beneficiary's work time would be spent in the non-executive day-to-day operations of the business. The director also found that the business has not expanded to the point where the services of a full-time, bona fide president would be required. The director noted that "it would not be the norm in the corporate world for a business to employ forty percent of its work force in a strictly managerial and/or executive capacity." Therefore, the director concluded, the petitioner has not shown that the beneficiary's duties in this position will be primarily those of a bona fide executive.

On appeal, counsel for the petitioner asserts that the primary functions of the beneficiary do not involve performance of ordinary services of the business. Counsel claims that the ordinary services of the company are performed by the other four employees of the company. Counsel again describes the duties of the beneficiary in the U.S. entity, and contends that the petitioner has adequately demonstrated that the beneficiary's duties meet the statutory definition of "executive capacity." Counsel further asserts that, in determining that the beneficiary does not manage or direct the work of other supervisory, professional or managerial employees, the director has failed to consider certain independent contractual arrangements that the U.S. entity has with other business entities. Finally, counsel asserts that the size of the staff of a company does not justify a denial of a petition, and that the growth of the U.S. entity the past three years belies the

conclusions reached by the director. Counsel submits further evidence on appeal, including an Accountant's Compilation Report; IRS Forms-491 for the quarters ending March 30, June 30, and September 30, 2003; evidence of Florida Unemployment Compensation Funds payments; an employee policy handbook; a schedule of job titles; and copies of contractor invoices and payments.

At the outset, the AAO notes counsel's assertion on appeal that the director erroneously concluded that the beneficiary was accorded an L-1A visa in order to render services involved in the opening of a new office. However, upon review of the director's decision, the AAO finds that the director's reasons for denying this petition is not based on the petitioner's failure to meet the requirements under the regulations specifically governing extensions for petitions involving the opening of a new office, at 8 C.F.R. § 214.2(I)(14)(ii), but rather, on the petitioner's failure to meet the requirements under the regulations at 8 C.F.R. § 214.2(I)(3), pertaining to petitions for L-1A visas in general. Thus, the director's recitation that the beneficiary was accorded an L-1A visa in order to render services involved in the opening of a new office does not affect the AAO's analysis of the central issue on appeal in this proceeding.

Upon review, the AAO concurs with the director's conclusion that the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

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(I)(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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The AAO notes that the record contains no statement by the petitioner specifying whether the beneficiary is primarily employed in a managerial or executive capacity, and it is only on appeal that counsel appears to indicate that the beneficiary would be employed in an executive capacity. Moreover, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. In the petition, the petitioner described the beneficiary's job duties only as "[f]ormulate and direct operations of the company. Establish goals and policies. Interview and hire employees. Maintain corporate bank & financial accounts. Coordinate advertising." The petitioner failed to provide any further details regarding these duties in the petition or in any other documentation submitted prior to adjudication. In fact, the AAO notes that the petitioner failed to provide any detailed description of the nature of the business of the U.S. entity at all. Going on record without supporting documentary evidence, as the petitioner did here, 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).

Counsel contends on appeal that the petitioner has adequately established that the beneficiary's responsibilities fit within the statutory definition of "executive capacity." Specifically, counsel asserts that

"[t]he beneficiary is employed by the domestic entity in the required capacity . . . A significant portion of his time is spent on a regular basis in the performance of executive duties that directly affect the day-to-day operations of the domestic corporation." However, counsel offers no specific details, and points to no specific evidence, in support these assertions. Rather, counsel merely quotes the statutory definition of "executive capacity" as set forth in Section 101(a)(44)(b) of the Act, and states that the petitioner has "adequate established . . . through evidence submitted along with the Petition" that the beneficiary's job duties conform with each component of that definition. Such conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also claims that, contrary to the director's determination, the day-to-day operations of the company are performed by the other employees, and the beneficiary is thus able to "devote a preponderance of time to the performance of the duties required by his office." It is noted that counsel submits with his appeal brief a "Schedule of Job Titles" which sets forth the duties of each employee of the U.S. entity. However, neither this schedule nor any other evidence that might substantiate counsel's claims regarding the beneficiary's job duties were provided by the petitioner prior to the director's adjudication of this petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. As previously noted, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, *supra* at 534; *Matter of Laureano*, *supra*; *Matter of Ramirez-Sanchez*, *supra* at 506.

Counsel also asserts on appeal that the director failed to take into account the beneficiary's supervision of independent contractors when she determined that the petitioner did not establish that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the business. Counsel claims that the petitioner has provided copies of independent contractor agreements that would support such assertion. Upon review of the record, the AAO finds that the petitioner has submitted a single independent contractor agreement with one individual, which sheds no light on the scope of that individual's role and duties within the U.S. entity, or indeed, whether that individual has performed any work for the company at any time. There is no indication elsewhere in the record that the U.S. entity uses independent contractors, or that the beneficiary supervises any such person. As such, the AAO cannot find that counsel's assertion on this point is sufficiently supported by the record.

With respect to the director's finding that the business has not expanded to the point where the services of an executive would become necessary, counsel asserts that the size of the business staff of a company does not justify a denial of a petition. The AAO acknowledges that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a

multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, the AAO notes that the size of the U.S. entity is only one factor in the director's denial of the petition. It is appropriate for CIS to consider, as the director has done in this proceeding, the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The record indicates that at the time the petition was filed, the U.S. entity employed four employees in addition to the beneficiary -- a manager, a receptionist, a housekeeper, and a maintenance worker. There does not appear to be any subordinate staff members who would perform the actual day-to-day, non-managerial operations relating to the actual provision of the company's services, beyond handling phone calls and receiving clients, or maintaining the premises. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the staff of the U.S. entity as described by the petitioner, without the beneficiary's contribution to performing non-qualifying duties.

Furthermore, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a *primarily* managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not provided sufficient evidence to establish this essential element of eligibility.

Finally, 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 assertions that are contained in the current record, the approval would constitute material 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. 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).

Moreover, 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). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity by the U.S. entity, as required by 8 C.F.R. § 214.2(1)(3).

Beyond the decision of the director, the petitioner has not provided sufficient evidence that the United States and foreign entities are still qualifying organizations, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *See Matter of Church Scientology International*, 19 I&N Dec. at 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The petitioner indicated on the Form I-129 that it is a wholly-owned subsidiary of the foreign entity. In support of this claim, the petitioner provided a copy of stock certificate number 1 of the U.S. entity, indicating that the petitioner owns one hundred shares of that company. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. The petitioner has provided no evidence regarding ownership of the U.S. entity other than the copy of the stock certificate described above. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control in this instance.

In addition, the record contains contradictory information regarding the ownership of the U.S. entity. Contrary to the petitioner's representations in the petition, the U.S. entity indicated on its IRS Form 1120, U.S. Corporation Income Tax Return, for the year 2002 that it is not a subsidiary or affiliate of any other entity, and that no foreign person own, directly or indirectly, 25% of its shares. The tax return thus directly contradicts the petitioner's claim that the U.S. entity is its subsidiary. There appears to be no explanation or attempt to reconcile these inconsistencies in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, willful misrepresentation in these proceedings may render the beneficiary inadmissible to the United States. Section 212(a)(6)(C) of the Act.

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.