



U.S. Citizenship
and Immigration
Services

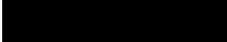
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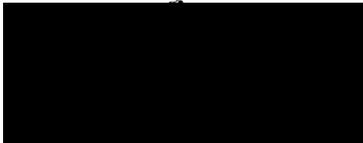
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FILE: WAC 04 070 50422 Office: CALIFORNIA SERVICE CENTER Date: **NOV 08 2005**

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, California 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 seeks to continue to employ its branch office manager/technology consulting manager temporarily in the United States 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 California corporation that claims to be engaged in import and export of fuel cell technology and raw materials, and provision of technology consulting services. It claims to be a subsidiary of CNL, located in South Korea. The beneficiary was initially granted a one-year period of stay in L-1A status in order to open a new office in the United States and subsequently received a two-year extension of stay. The petitioner filed the instant petition in order to advise Citizenship and Immigration Services (CIS) of a change in the beneficiary's previously approved employment, and to request an amendment of his current L-1A status.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director overlooked the fact that the beneficiary was already granted an extension of his L-1A status, and states that the instant petition was filed for the purpose of requesting approval for "job scope broadening." Counsel suggests that the director misunderstood the nature of the beneficiary's duties, provides further justification for the expansion of the beneficiary's role, and explains that "[the beneficiary's] duties have never left the scope of being an effective manager." Counsel also claims that the petitioner recently hired two additional employees and provides a new organizational chart and job descriptions for the petitioner's current staff in support of the appeal.

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.

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 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.

The petition was submitted on January 13, 2004. The petitioner indicated on Form I-129 that it was seeking approval of a change in previously approved L-1A employment, and submitted evidence that the beneficiary had been granted an extension of L-1A status for a two-year period commencing on June 19, 2003. The petitioner indicated that the beneficiary would serve as "Branch Office Manager and Technology Consulting Manager."

In a January 12, 2004 letter, counsel for the petitioner explained that the beneficiary was transferred to the United States in order to open a branch office to purchase raw materials needed for fuel cell manufacturing and export them to the parent company in Korea. Counsel described the beneficiary's duties in this regard as follows:

As the manager of [the petitioner], [the beneficiary] utilized his discretion and authority based on his experience and knowledge for exploring the niche market in the emerging substitution Energy Source. . . . It requires [the beneficiary]; a) develop local customer's volume and profit in the United States in accordance with [policies] and guidelines set by the company, including overall marketing plan and philosophies of the corporation; b) identify niche market for penetration and establish a confident [relationship] with the customers; c) develop marketing strategy to reach out [to] the potential customer; d) develop local raw material suppliers for purchasing and exporting them to Korea; e) protect [the foreign entity's] fuel cell technology from infringement with other U.S. Patented technologies; f) manage [the petitioner] financially profitable; and g) maintain regular communication with the parent company regarding ongoing activities.

To perform these specific duties, he communicated with major fuel-cell companies and raw material suppliers. He hired two employees to assist him for maintaining the office and penetrating the niche market.

Counsel further explained that since January 21, 2003, the petitioner had also been engaged in preparing and prosecuting U.S. patent applications through an agreement with counsel's law office. Counsel stated that since that time, the beneficiary has performed preparation and prosecution of over 60 U.S. Patent Applications, resulting in income of \$36,000 for the petitioner. Counsel indicated that the beneficiary would continue to manage the fuel cell technology and U.S. Patent business units for the petitioner. Counsel stated that the beneficiary had hired two employees since September 2003 "due to the successful result from U.S. Patent Application preparation business," and that two more employees would be hired "after the contract agreement of importing raw materials."

In support of the petition, the petitioner submitted a copy of the "Technology Service Providing Agreement" made between the petitioner and Eugene Oak Law Office, whereby the petitioner agrees to provide services including preparation and prosecution of U.S. Patent and Trademark Applications, and related technology license agreements and technology transfer agreements. Article III of the agreement provides that all services outlined and all technological issues related with the services shall be prepared, reviewed and authorized by the beneficiary. The services include:

- 1) Search related previous technology and trademarks claimed in an [sic] U.S. Patent and Trademark Application brief provided by the Client and provides the result to the Client in a document form.
- 2) Translate the information from an inventor of an [sic] U.S. Patent Application into English.
- 3) Summarize claims requested by the investor in a format of [sic] applicable to U.S. Patent Application.
- 4) Prepare a draft of U.S. Patent Application following the related patent rules and in terminologies currently using [sic] in the field of area of the invention based on the information from the Applicant.
- 5) Provide all the result in a proper document form.
- 6) Fill up an [sic] U.S. Patent Application Forms [sic] based on the finalized form provided by the Client and mail the whole package, after authorized by the Client, to the United States Patent and Trademark Office (U.S.P.T.O.).
- 7) Prepare drafts of responses to Offices Actions from the U.S.P.T.O.
- 8) Fill up an [sic] U.S. Trademark and Servicemark Forms based on the information provided by the client and mail the whole package, after authorized by the Client, to the [U.S.P.T.O.].

The petitioner submitted a payroll chart for the fourth quarter of 2003 which shows wages paid to the beneficiary and two other employees, but the petitioner did not describe its staffing.

On January 23, 2004, the director requested additional evidence. Specifically, the director requested a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels. The director indicated that the chart should include the names of all executives, managers, and supervisor, the number of employees within each department, and a description of job duties, educational level, annual salaries/wages, and immigration status for all employees of the organization.

In a response dated February 2, 2004, the petitioner submitted an organizational chart depicting the beneficiary as branch manager over the "U.S. Patent Division" and "Fuel Cell Division." The chart also depicts the beneficiary as manager of each division. The chart shows that one employee serves as "assistant manager" of both divisions, while the petitioner's third employee serves as secretary of the fuel cell division and accountant of the U.S. patent division.

The petitioner indicated that the assistant manager is a full-time contractor and is responsible for: (1) researching fuel cell related information from the media; (2) communicating with fuel cell companies to investigate changing policies and situations; (3) preparing reports on researched data for the beneficiary's review; and (4) correcting the English of draft U.S. patent applications prepared by the beneficiary. The petitioner stated that the secretary works on a part-time basis and performs the following duties: (1) organizing documents and schedules; (2) receiving incoming calls from clients and associates; (3) arranging and administering paper work; and (4) preparing and keeping an accounting report.

The director denied the petition on February 10, 2004 concluding that the beneficiary would not be employed in a managerial or executive capacity. The director observed that the beneficiary's duties, as described by the

petitioner, reflect that he is responsible for sales, marketing, purchasing and patent application preparation and non-qualifying duties related to these functions. The director noted that the petitioner had not been able to incorporate enhancements in structural complexity and personnel that would allow it to support a managerial or executive position. The director concluded that, given the description of the company, the duties of the beneficiary's subordinates, and the description of the beneficiary's duties, the beneficiary would be engaged in all aspects of the petitioner's day-to-day operations.

On appeal, counsel for the petitioner emphasizes that the petitioner was merely seeking to amend the beneficiary's previously approved L-1A extension, and claims that the director misunderstood the reason for filing the petition. Counsel contends that the purpose of the petition was only to advise CIS of the beneficiary's additional job duties related to the petitioner's U.S. patent application business unit, and asserts that the beneficiary's role has been and will remain managerial in nature.

Counsel further explains that the petitioner filed the instant petition after the U.S. Patent Office informed the beneficiary that he would require CIS approval in order to apply for the Patent Agent Examination. Counsel claims that the beneficiary requires the patent agent license in order to legally hire and manage a qualified employee to execute patent preparation services in accordance with the petitioner's technical service agreement. Counsel states that the beneficiary "is managing the branch office of [the foreign entity] while investigating the field of patent application preparation." Counsel claims that petitioner hired an additional employee to prepare drafts of patent applications in February 2004, and would hire a sales manager for the fuel cell technology component of the business as of March 1, 2004. Counsel suggests that the director misunderstood the beneficiary's situation, and contends that his job duties "will always be limited to the effective hiring, directing and managing of [the petitioner's] employees....In order to execute his job accordingly, [the beneficiary] must first be authorized by the U.S. government in the specific business interests of [the petitioner]."

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 job 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 in an executive or managerial capacity. *Id.*

Based on the evidence of record, it is evident that the beneficiary allocates the majority of his time to researching, drafting and preparing patent applications for an attorney, rather than performing managerial or executive duties as defined at section 101(a)(44) of the Act. According to the 2004 business plan submitted with the petition, the petitioner had not yet begun exporting raw materials for fuel cells to Korea or importing fuel cells from Korea; these activities were anticipated to begin between June and December 2004. It is apparent that the petitioner's only source of income at the time the petition was filed was from preparation of patent applications. As the beneficiary is solely responsible for preparing patent applications within the petitioner's organization, the AAO assumes, and it has not been shown otherwise, that these are his primary duties. This conclusion is supported by counsel's statement that the beneficiary personally prepared 60 U.S. patent applications in the year preceding the filing of the petition. 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).

Furthermore, as noted by the director, the beneficiary's job description includes a number of other non-qualifying duties, including market research, networking with potential suppliers of raw materials, and "developing new business." 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 show 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). Where an individual is primarily performing the tasks necessary to produce a product or to provide a service, that individual cannot also primarily perform managerial or executive duties. In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time. Although counsel claims that the beneficiary is "purely a manager," without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). Rather, when determining whether a beneficiary is employed in a primarily managerial or executive capacity, the actual duties themselves reveal the true nature of the employment. *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). It is evident from the record that any managerial duties performed by the beneficiary at the time of filing were incidental to his responsibility for providing the petitioner's patent application preparation services.

The AAO notes that counsel has presented this petition as an amendment of the beneficiary's previously approved L-1A petition, and only seeks to "broaden the scope" of the beneficiary's duties. However, the evidence of record shows that the beneficiary has been preparing patent applications since January 2003. The previous petition to extend the beneficiary's status was filed in June 2003 (*See* WAC 03 184 50895). Counsel's argument that the beneficiary's responsibility for preparing patent applications represents a "substantial change in job duties" strongly implies that the petitioner failed to provide an accurate account of the beneficiary's actual duties when it submitted the previous petition on his behalf. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On appeal, counsel attempts to mitigate the extent of the beneficiary's responsibility for providing the services of the organization, suggesting that the beneficiary is merely "investigating the field of patent application preparation" and only seeking to obtain a U.S. Patent Agent license so that he may legally hire and manage additional patent agents. This argument is not persuasive, as the evidence submitted with the initial petition clearly indicates that the beneficiary had been personally preparing patent applications, apparently without the proper license, for a year prior to the filing of this petition.

The AAO acknowledges counsels claim that the petitioner has hired a sales manager for its fuel cell division and a manager for its U.S. Patent division subsequent to the filing of the petition. However, 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). The evidence submitted on appeal is not probative of the beneficiary's eligibility at the time of filing and will not be considered in this proceeding.

The petitioner noted that CIS approved other petitions that had been previously filed on behalf of this beneficiary. Each nonimmigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, 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).

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).

Finally, as noted above, the evidence contained in the instant record suggests that the petitioner failed to provide an accurate account of the beneficiary's duties in its previous request to extend his L-1A status. The approval of the previous petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. §§ 214.2(l)(9)(iii) and (iv).

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record contains conflicting information regarding the petitioner's ownership which precludes a finding that the U.S. company maintains a qualifying relationship with the foreign entity pursuant to 8 C.F.R. § 214.2(l)(ii)(G). The petitioner claims to be a branch office of the beneficiary's foreign employer in Korea. However, the petitioner was incorporated in the State of California. If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

The petitioner submitted its stock certificate number one and stock transfer ledger, which indicate that the company issued 60,000 shares of common stock without par value to CNL (Korea) on July 23, 2002 in exchange for consideration valued at \$24,000. The petitioner submitted the minutes of the first meeting of the board of directors, which indicates that the company's directors agreed to issue all 60,000 of its authorized shares to the foreign entity for \$60,000. The petitioner's 2004 business plan refers to its president, Chon Chu,

as the owner of 67 percent of the company's stock. The petitioner's 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, indicates at Schedule K, question 4 that the petitioner is a subsidiary of CNL, but indicates at Schedule K, question five that the company is 100 percent owned by Chon Ho Chu. Schedule L of the 2002 Form 1120 indicates the initial value of the petitioner's common stock as \$10,000, rather than \$24,000 or \$60,000 as stated elsewhere in the petitioner's evidence. 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). Based on this contradictory evidence, the AAO is unable to ascertain the actual ownership and control of the petitioner and therefore cannot determine whether the petitioner has a qualifying relationship with the foreign entity. For this additional reason, the petition may not be approved.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The appeal is dismissed.