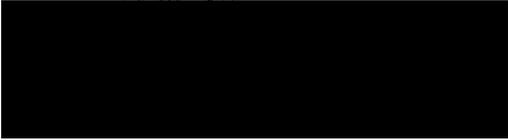




U.S. Citizenship
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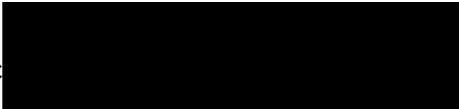
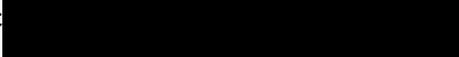
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File: WAC 04 060 53132 Office: CALIFORNIA SERVICE CENTER Date: **OCT 27 2005**

IN RE: Petitioner: 
Beneficiary: 

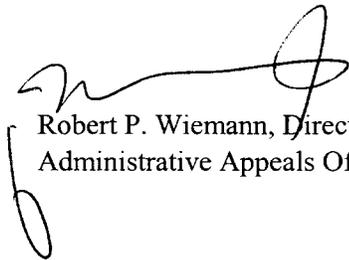
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 filed this nonimmigrant petition seeking to extend the employment of its branch manager 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 claims to be a branch office of [REDACTED], located in Nairobi, Kenya, and is qualified to do business in the State of California. It operates a travel agency specializing in the coordination of luxury African safaris. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity, or (2) the petitioner did not establish that it had secured sufficient physical premises to house its office.

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 decision was arbitrary, capricious and contradicted by facts in the record. Counsel contends that the director failed to give deference to or justify his departure from the earlier approval of an L-1A visa petition submitted by the petitioner on behalf of this beneficiary. Finally, counsel contends that the director relied on assumptions rather than on the facts and regulations in determining that the beneficiary is not qualified for the benefit sought. Counsel submits a brief and additional documentation in support of the appeal.

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 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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first 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 an unsigned statement submitted with the initial petition on December 29, 2003, the petitioner provided the following description of the beneficiary's duties:

As the Branch Manager for [the petitioner], [the beneficiary] is responsible for the administration and supervision of the branch office and staff. He has the authority to hire and fire staff as well as the power to grant promotions and leave authorizations for staff at his discretion. He controls all marketing and promotion decisions. Under his managerial capacity he also oversees sales growth and directs the employees under him to achieve company goals and sales targets. He directly supervises the staff in the branch office. He is also responsible for establishing goals and policies of the company. Other managerial duties include coordination with the local bank and managing the client trust fund. He also monitors the collection of payments from clients, oversees the renewal of necessary lease, licenses and insurances, consults the company attorney and follows accordingly over controversial issues, coordinates with auditors on accounts and returns to the IRS, and reviews financial and business records. He keeps the board of directors in Kenya informed of the progress of the American branch and receives general supervisory advice from them.

The petitioner went on to provide a description of the duties the beneficiary performs in eleven distinct areas and indicated the approximate percentage of time the beneficiary devotes to each of the listed duties. As the

list of job duties is part of the record of proceeding, it will not be repeated in its entirety here. The petitioner divided the beneficiary's responsibilities into the following areas:

1. Administration and supervision of office and staff – 20%
2. Establishing goals and policies of the company – 20%
3. Coordination with the local bank and managing the client trust fund – 10%
4. Monitoring the collection of payments from clients – 5%
5. Renewal of lease, licenses and insurances – 1%
6. Coordinate with auditors on accounts and returns to the IRS – 5%
7. Review financial and business records – 5%
8. Oversee sales – 20%
9. Supervise marketing and promotions – 5%
10. Keep the board informed on progress – 2%
11. Networking with suppliers and USA sub-agents - 7%

The petitioner indicated that it employed one other employee as a "safari specialist" who is responsible for handling reservations for each safari booking. The petitioner submitted evidence that the safari specialist is employed in L-1B classification with an expiration date of December 30, 2003. With respect to her duties, the petitioner stated:

Some of her duties involve designing, marketing and selling safari itineraries and coordinating with our African suppliers while the client is on-safari.

Under supervision of the branch manager, she is directed to perform tasks in the research and development of new products and services both offline and online, based on the interests and expectations of the American traveler through her specialized knowledge and safari experience in Africa.

The director issued a notice of intent to deny the petition on March 25, 2004. In part, the director instructed the petitioner to submit a statement addressing the beneficiary's employment in a managerial capacity including: the duties performed, whether the beneficiary has the power to hire and fire employees; the number and positions of employees working under the supervision of the beneficiary; the job title of the employee supervising the beneficiary; and a complete organizational chart specifically showing the beneficiary and all employees by name and job title. The director also requested copies of the petitioner's California Employment Development Department Forms DE-6, Employer's Quarterly Report, for the last four quarters.

In its April 15, 2004 response, the petitioner submitted a copy of the detailed job description submitted with the initial petition and confirmed that the beneficiary has one subordinate employee, the safari specialist. The petitioner noted that the beneficiary is responsible for administration and supervision of the branch office and staff and does not report to another employee within the U.S. company. The petitioner also submitted a letter from its accountant, who explained that the petitioner's two employees were not on the

payroll in 2003 due to delays in obtaining U.S. social security numbers, and therefore the requested Forms DE-6 were not available.

The director denied the petition on July 4, 2004 concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. The director noted that the petitioning company employs only the beneficiary and a safari specialist, and observed: “[T]he petitioning entity must have at least a financial department, personnel or administrative department.” The director determined that the petitioner must therefore have a need for at least three “teams of staff” to manage the three departments, but clearly lacks such staff. Accordingly, the director concluded that the beneficiary has been performing the day-to-day duties involving executing contractual agreements, issuance of invoices, monitoring the handling of each booking, and ensuring that payments are made to suppliers. The director acknowledged that some of the beneficiary’s duties involved “decision-making processes” but determined that since a significant part of the beneficiary’s duties consist of the day-to-day functions, the duties may not be considered primarily executive or managerial in nature.

On appeal, counsel for the petitioner refers to the previous approval of an L-1A petition filed on behalf of the beneficiary and asserts the director has “failed to follow Headquarters policy against readjudicating issues already decided in favor of the alien without specific explanation for the departure from the previous adjudication.” Counsel specifically contends that the director’s decision is contrary to the guidance provided in a 2004 Citizenship and Immigration Services (CIS) policy memorandum governing adjudication of requests for extensions of nonimmigrant petitions. *See* Memorandum of William R. Yates, Associate Director for Operations, USCIS, to Service Center Directors, et al, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/111.3 (April 23, 2004)(“Yates Memo”). Counsel asserts that the director erred by failing to identify a material error, substantial change in circumstances, or new material information as grounds for denial of the petition extension request.

Counsel also asserts that the director based the denial on assumptions and not on the facts of the case and the regulations. In support of the appeal, the petitioner submits a statement in which it responds to each of the points discussed in the director’s decision. The petitioner refers to the director’s comments that the U.S. company has a need for a financial department, personnel or administrative department, and a travel department, and asserts: “We do not have a need for these departments within our company since we contract their services as and when required.” The petitioner explains that it periodically utilizes the services of the foreign entity’s accounting department, a U.S.-based certified public accountant, an attorney, and a business management consulting company that “carry out [the beneficiary’s] instructions with regard to these issues.” The petitioner also objects to the director’s conclusion that the beneficiary performs the day-to-day activities of executing contractual agreements, issuing invoices, and ensuring payments are made. The petitioner contends that it did not state that the beneficiary performs these tasks himself, but rather, he oversees or directs the performance of the tasks in a decision-making capacity.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary’s duties for the petitioner will be primarily managerial or executive. 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.* Further, 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).

While the petitioner has provided a lengthy job description for the beneficiary, it does not sufficiently demonstrate that the beneficiary's tasks are the high-level responsibilities that are specified in the definitions of managerial or executive capacity. For example, the beneficiary's primary responsibilities, which account for a total of 60 percent of his time by the petitioner's estimates, are described as "administration and supervision of office and staff," "establishing goals and policies of the company," and "overseeing sales." These broadly described responsibilities suggest that the beneficiary performs some managerial or executive duties. However, the more detailed breakdown of his daily tasks shows that the beneficiary works very closely with his sole subordinate in all sales transactions, is personally involved in the company's market research and advertising activities, and performs routine financial and administrative tasks on a day-to-day basis.

For example, the petitioner indicates that the beneficiary's duties include "overseeing fulfillment of new enquiries for safaris," "reviewing existing client bookings," "developing new sales ideas," "interacting with staff on the implementation of new destinations and travel services," "offering advice to staff on client issues," "networking with suppliers in Africa to discuss new products and promotions," "communicat[ing] with the Safari Specialist on current bookings and monitor[ing] the handling of each booking," "promot[ing] sales growth," and "develop[ing] ideas for advertising and promotions based on current trends." The petitioner has also described its "safari specialist" as being responsible for research and development of new products and services and coordinating with suppliers, which suggests some degree of overlap between the duties of the beneficiary and his subordinate. Based on the petitioner's representations, the beneficiary spends a substantial portion of his time directly involved in day-to-day sales, marketing and customer service activities, or, at times, as a first-line supervisor of such activities. Further, the petitioner indicates that the beneficiary is responsible for paying monthly bills, "overseeing" collection of payments, monitoring exchange rates, "supervising" the issuance of invoices, confirming that deposits are paid by clients, verifying accuracy of bank statements, ensuring contracts are signed and returned, "ensuring completion and accuracy in business contracts," and overseeing client records. Again, these duties do not fall directly under traditional managerial duties as defined in the statute and suggest that the beneficiary performs, rather than manages, the day-to-day operations of the petitioner's 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).

As discussed above, the beneficiary devotes a substantial portion of his time to directly overseeing the work performed by his subordinate, the "safari specialist." A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593,

604 (Comm. 1988). In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is necessary to perform the duties of the "safari specialist," nor is there any evidence that the beneficiary's subordinate possesses such qualifications.

Although the beneficiary is the senior employee in the petitioner's two-person office and makes decisions regarding its day-to-day operations, the record indicates that he devotes the preponderance of his time to operational, administrative and first-line supervisory duties. Accordingly, the AAO cannot conclude that he is employed in a primarily managerial or executive capacity as defined at section 101(a)(44) of the Act.

The AAO will address counsel's assertion that the director erred in denying the petitioner's petition for an extension of the beneficiary's status when CIS previously approved a petition based on similar facts. Established precedent reflects that 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). Further, the petitioner's prior petition to which counsel refers was a petition to allow the beneficiary to enter the United States to open a new office. Thus, that petition was governed by the regulations pertaining to new offices. See 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status after completing a one-year period to open a new office. Thus, the present petition is governed by a different set of regulations pertaining specifically to new office extensions. See 8 C.F.R. § 214.2(l)(14)(ii). As different law and evidentiary requirements apply to the present petition, the director has a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to counsel's suggestion, the fact that a prior petition was approved on behalf of the beneficiary does not serve as prima facie evidence that eligibility has been established in the present proceeding. Furthermore, counsel's reliance on the above-cited April 23, 2004 Yates Memo is misplaced, as the memorandum clearly states that the policy of deferring to previous CIS approvals is not applicable to L-1 new office extension petitions.

Finally, the AAO acknowledges counsel's objection to the director's determination that the petitioner's organization has a reasonable need for a financial department, personnel or administrative department and travel department. The AAO concurs that the director's comment that the petitioner "has a need for at least three teams of staff to manage the three departments" was inappropriate and this comment will be

withdrawn. Although CIS must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The AAO will not hold the petitioner to the director's standard that the petitioner operate its business with three fully-staffed departments. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner has secured sufficient physical premises to house its office. The director reviewed the petitioner's lease agreement and photographs of its premises and determined that the petitioner had not established that it has sufficient physical premises to demonstrate that the company will support a managerial or executive position pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A). The director noted that the lease does not specify the size of the leased premises, and observed that the office appears to be a single room.

On appeal, the petitioner asserts that the company comfortably conducts business from its current premises and was not given notice that the size of its office was inadequate. The petitioner further explains why the location was chosen, and clarifies that it rents an office suite, and not merely a single "room" as concluded by the director.

Upon review, the AAO will withdraw the director's decision with respect to this issue only. The petitioner's lease and the submitted photographs suggest that it has sufficient space to house its current staff in a commercial location, and that it is doing business as a travel agency as stated in the petition. While the petitioner's office is clearly not large, the director had insufficient grounds to deny the petition on this 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.