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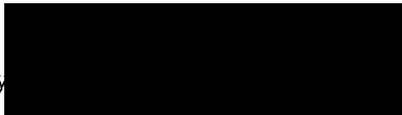
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File: SRC 05 196 50922 Office: TEXAS SERVICE CENTER Date: DEC 05 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa 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 corporation organized under the laws of the State of Florida and is engaged in the business of boat rentals and charters. The petitioner claims a qualifying relationship with Lybra, CV of Belgium. 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 for three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily 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, the petitioner asserts that the director erred in concluding that the beneficiary will not be employed primarily in an executive capacity because he will not be supervising a subordinate staff of professionals or managers. The petitioner asserts that the beneficiary will engage in executive activities and that it need not be established that an executive will manage professional employees.

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 primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily executive capacity.

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 petitioner does not clarify in the initial petition whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. However, on appeal, the petitioner clearly indicates that it is seeking to classify the beneficiary as an executive employee. Therefore,

the AAO will limit its consideration of this appeal to this classification.

The petitioner does not provide a description of the beneficiary's duties in the initial petition. The petitioner states only that the beneficiary "has commenced operations of our boat and charter business in the past year" and indicates its intention of expanding its operations.

On July 13, 2005, the director requested additional evidence. The director requested, *inter alia*, evidence establishing that the beneficiary will be employed in a managerial or executive capacity.

On July 14, 2005, the petitioner responded to the Request for Evidence. The petitioner provided a letter dated July 14, 2004 in which it describes the beneficiary's duties as follows:

[The beneficiary's] position encompasses complete management authority over all aspects of [the petitioner], including but not limited to hiring and firing of employees, equipment purchases, day to day management of employees and most recently, efforts to establish a private boat club at our facilities here in Marathon and two future locations in Key West and Islamorada, Florida.

The petitioner also explained that it employs a dive instructor, a clerical employee, and a maintenance worker, who are apparently supervised by the beneficiary.

On July 28, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in an executive capacity. The director stated:

In order to qualify for an L-1A visa after the organization becomes operational, the petitioner must establish the need for an executive. The record does not support a finding that the petitioner will be supervising a subordinate staff of professionals, or managers. It has been determined based on the totality of the evidence the beneficiary will not primarily be engaged in executive duties. The duties of the beneficiary were general in nature and did not establish the beneficiary is primarily engaged in executive duties.

On appeal, the petitioner asserts that the director erred in concluding that the beneficiary will not be employed primarily in an executive capacity because he will not be supervising a subordinate staff of professionals or managers. The petitioner asserts that the beneficiary will engage in executive activities and that it need not be established that an executive will manage professional employees.

Upon review, the petitioner's assertions are not persuasive.

Title 8 C.F.R. § 214.2(I)(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 Citizenship and Immigration Services (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 United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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(1)(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 has failed to prove that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. Individuals will not be deemed executives under the statute simply because they have executive titles or because they "direct" the enterprise as the owners or sole managerial employees. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

In this matter, the petitioner has provided a vague and nonspecific job description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, while the petitioner lists "equipment purchases" and establishing a private boat club as two of the beneficiary's duties, the petitioner does not explain what, exactly, the beneficiary must do on a day-to-day basis with regard to these duties or, equally important, who performs the non-qualifying tasks inherent in these duties. It is essential that the petitioner specifically define the beneficiary's duties and provide a breakdown of how much is spent by him performing such non-qualifying tasks; otherwise, it cannot be concluded that the beneficiary is "primarily" employed in a managerial capacity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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).

The remaining duties listed for the beneficiary involve the management of the three non-professional, non-supervisory employees. An executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See Matter of Church Scientology International*, 19 I&N Dec. at 604. Therefore, these duties may not be used to classify the beneficiary as an executive.

While the petitioner is correct that it need not establish that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees in order to classify him as an executive, the petitioner must still establish that the beneficiary will be primarily employed as an executive. While the director's decision is not entirely clear, to the extent the director determined that the petitioner failed to establish that the beneficiary will be primarily engaged in performing executive duties for failure to prove that he will manage a subordinate staff of professionals or managers, that determination is hereby withdrawn. However, as indicated above, the appeal will be dismissed as the petitioner otherwise failed to establish that the beneficiary will be primarily engaged in performing executive duties. As the supervision of non-supervisory or non-professional employees is not a duty which could qualify the beneficiary as an executive, the petitioner's listing of these duties for the beneficiary may not result in his classification as an executive unless it can be demonstrated that he is otherwise primarily performing executive duties. In this matter, the petitioner has not established that the petitioner is primarily performing executive duties since the job description lists either non-qualifying executive duties, i.e., acting as a first-line supervisor, or vaguely described duties, which may or may not be qualifying.¹

It is appropriate for CIS to consider 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).

Accordingly, the petitioner has not established that the beneficiary will be primarily engaged in performing executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, an additional issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

- (A) Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business."

The regulation 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. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also*

¹As indicated above, while the petitioner appears not to be claiming that the beneficiary may be classified as a manager, the record would nevertheless fail to support this assertion. The AAO concludes, beyond the decision of the director, that the petitioner has not established that the beneficiary will be primarily employed as a manager for the same reasons articulated above.

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.

In this matter, the petitioner has offered no evidence of a qualifying relationship with the foreign entity. Beyond an uncorroborated claim on the supplement to the Form I-129, the petitioner has not established who, exactly, owns or controls the United States operation. Accordingly, for this additional reason, the petition may not be approved.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act, 8 U.S.C. § 1361.

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.