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File: SRC 04 172 51420 Office: TEXAS SERVICE CENTER Date: JUN 02 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: SELF-REPRESENTED

**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 petition seeking to extend the employment of its chief executive officer 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 in the State of Wyoming that is engaged in both construction and the importation of clothing and gifts, and claims to have recently expanded its business to include the distribution of medical equipment. The petitioner claims that it is the subsidiary of [REDACTED] located in Budapest, Hungary.

The director denied the petition concluding that (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) the petitioner and the claimed foreign parent do not appear to be qualifying organizations as required by the regulations.

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 beneficiary is in fact employed in a primarily executive capacity, and submits evidence in support of this contention. No evidence or attempt to address the qualifying relationship between the petitioner and the foreign entity was provided.

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 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.

With the petition, only minimal information regarding the petitioner's business and the beneficiary's duties therein was provided. The evidence submitted claimed that the petitioner was established in 1997, currently employed 28 employees, and recently acquired the new business address of [REDACTED]

Florida, which simultaneously serves as the beneficiary's residence. A statement from the petitioner claims that five executives, including the beneficiary, were currently employed by the U.S. petitioner. Quarterly tax returns for 2003, however, indicated that only two employees, namely, [REDACTED], identified as the vice president for marketing, and [REDACTED], manager of the construction division, were on the payroll. With regard to the beneficiary's duties, no details were provided except for the claims that the beneficiary shared a seat on the board of directors and that the beneficiary divided his time between the U.S. and the foreign entities during his periods of stay in the United States.

On August 10, 2004, the director denied the petition. The director determined that, based on the petitioner's claim that it was involved in a variety of business ventures, the fact that it only employed two full-time employees raised questions with regard to the validity of the petitioner's business venture. More specifically, the director found that, with only two other employees on the petitioner's payroll and at least three distinct business ventures, it appeared unlikely that the beneficiary would be relieved from performing day-to-day operational tasks essential to the petitioner's ongoing survival. The director concluded by noting that despite being in business for over five years, the petitioner still had not established a subordinate team of employees who would relieve the beneficiary from performing non-qualifying duties. Although the petitioner indicated its plans to hire approximately 10 employees in the coming year, the director noted that the petitioner's future plans were not pertinent to the examination of the current position of the beneficiary.

On appeal, the petitioner reasserts its claim that the beneficiary is in fact primarily an executive within the U.S. company. The petitioner states that the beneficiary has sole power in decision-making and is further qualified by way of his majority ownership interest in the foreign entity and his position on the boards of directors of both companies.

Upon review, the AAO concurs with the director's determination. While the petitioner's assertions prior to adjudication and on appeal certainly suggest that the petitioner is actively pursuing expansion and a variety of business opportunities, there is nothing concrete in the record of proceeding, other than the petitioner's assertions, to clearly show that the beneficiary functions in a primarily executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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). In this matter, however, a detailed description of the beneficiary's duties has been omitted. The petitioner seems to rely on the executive title of the beneficiary as evidence that he is primarily an executive as contemplated by the regulations. The petitioner's assertion that the beneficiary makes all decisions and holds a seat on the board of directors is insufficient to establish that his average workday requires him to perform only executive duties. The petitioner's omission of a detailed description of duties has prohibited further analysis into this matter. 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). In this case, the petitioner has failed to answer a critical question in this case: What does the

beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.*

Without a definitive statement of duties to assist in clarifying the actual role of the beneficiary in the U.S. organization, the director examined the evidence submitted with regard to the staffing levels of the petitioner. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. At the time of filing, the petitioner was a 5-year-old company that claimed to engage in international trade, construction, and distribution of medical equipment. It claimed to have a gross annual income of \$93,603 and claimed on the Form I-129 that it employed 28 persons. The evidence contained in the record shows that only two employees were on the petitioner's payroll in 2003, both of whom allegedly held managerial or executive positions within the company. However, total wages paid to these persons for 2003 amounted to \$4,800, and there is no record of the petitioner paying any wages to the beneficiary during this period. While it is noted that the petitioner acknowledged that the foreign entity still provided financial assistance, there are no records evidencing what role, if any, the beneficiary actually occupied within the petitioner's organizational hierarchy since its incorporation in 1997. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as chief executive officer plus two managerial employees. Regardless, 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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner's assertions on appeal provide no new evidence with regard to the beneficiary's duties. Instead, the petitioner merely reiterates its unsupported claim that the beneficiary is an executive by way of his position title. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. As previously stated, 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. The petitioner has failed to provide such a description in the instant matter. Although the petitioner indicates that it plans to hire additional managers and employees in the future, 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).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

The second issue in this proceeding is whether the petitioner and the foreign organization are qualified organizations. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) defines the term “qualifying organization” as a United States or foreign firm, corporation, or other legal entity which:

- (1) 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;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

- (I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.
- (J) "Branch" means an operating division or office of the same organization housed in a different location.
- (K) “Subsidiary” means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) “Affiliate” means
  - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
  - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or
  - (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its

accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner claims that the petitioner is a wholly owned subsidiary of [REDACTED]. In support of this contention, the petitioner submitted a copy of the Minutes of the Meeting of Shareholders for the petitioner dated December 4, 1998, where it states that 1,000,000 shares of stock in the petitioner were issued to [REDACTED]. A stock certificate dated December 15, 1998 further corroborated this claim.

Based on this information, the petitioner and foreign entity would appear to have a parent-subsidary relationship as defined by 8 C.F.R. § 214.2(l)(1)(ii)(I) and (K). However, the petitioner has submitted documentation evidencing that the U.S. petitioner is an S-corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See Internal Revenue Code, § 1361(b)(1999)*. A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part.

The petitioner submitted a copy of the petitioner's election to become a subchapter S-Corporation, dated June 6, 2000, as well as the petitioner's Form 1120S, U.S. Income Tax Return for S Corporation for the year 2003. These documents indicate that the beneficiary is the sole owner of the U.S. petitioner. No documentation of this ownership, or the transfer of ownership from the foreign parent to the beneficiary, is contained in the record.

Accordingly, since the petitioner would not be eligible to elect S corporation status with a foreign parent corporation, it appears that the U.S. entity is in fact owned by one or more individuals residing within the United States rather than by a foreign entity. 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). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Since the petitioner is clearly an S Corporation and the petitioner would not be eligible to elect S corporation status with a foreign parent corporation, it does not appear that the petitioner and [REDACTED] are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason, the petition must be denied.

Beyond the decision of the director, the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's authorized L-1A status expired on May 1, 2004. However, the petition for an

extension of the beneficiary's L-1A status was filed on June 3, 2004, almost one month following the expiration of the beneficiary's status. As the extension petition was not timely filed, it must be denied.<sup>1</sup>

Additionally, the conflicting evidence with regard to the ownership of the petitioner, though unresolved, suggests that the beneficiary may be the sole owner of the U.S. entity. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

The petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The 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).

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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<sup>1</sup> It is noted that a denial on this basis does not preclude a petitioner from refile as a petition for new employment.

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.

**ORDER:** The appeal is dismissed.