

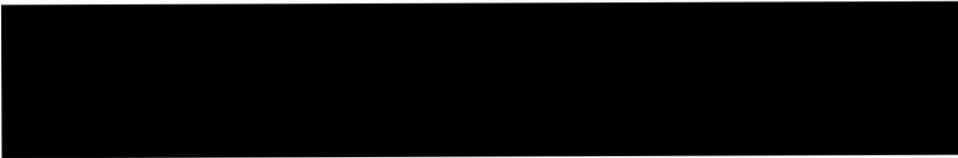
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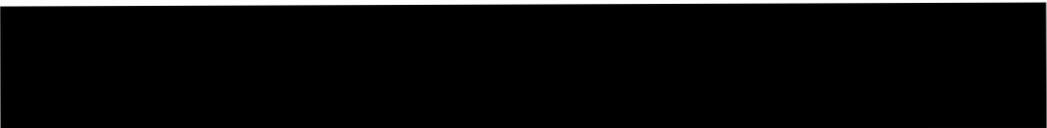


D7

File: WAC 04 201 53363 Office: CALIFORNIA SERVICE CENTER

Date: NOV 03 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, 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 visa petition seeking to extend the employment of its general 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 is a corporation organized under the laws of the State of California and is allegedly engaged in the business of providing residential and commercial cleaning services. The petitioner claims a qualifying relationship with Confites, Inc., located in the Philippines. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted a two-year extension. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary has been or will be employed in the United States in a primarily managerial or executive capacity.

The petitioner 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 that the record establishes that the beneficiary performs executive and managerial duties by managing the organization and by supervising and controlling the work performed by subordinates. The petitioner also asserts that the beneficiary is not a first-line supervisor, because the beneficiary's subordinates are professionals.

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 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 petitioner does not clarify 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, and implies in its appeals that the beneficiary is acting as both. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In a letter dated July 2, 2004 appended to the initial I-129 petition, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] will continue to fill the position of General Manager for the U.S. entity. In this senior managerial capacity she will be in control of the overall operations of the business and arrange the strategy and conduct of the business.

[The beneficiary] currently heads a team of 7 workers who are managed by [REDACTED], [REDACTED], the Operations Manager[,] and [REDACTED], [REDACTED], the Housecleaning Supervisor and Operations Assistant. All day-to-day duties are organized and completed by Mr. [REDACTED] and [REDACTED] staff. [The beneficiary] is the key senior manager in charge of managing the functions of the business that deal with expansion and marketing of [the petitioner].

The petitioner also supplied an organizational chart showing the beneficiary at the top of the organization and supervising the operations manager who, in turn, manages the housecleaning supervisor who, in turn, supervises several housecleaners.

On October 12, 2004, the director requested additional evidence. The director requested that the petitioner provide evidence establishing that the beneficiary will be performing managerial or executive duties including, *inter alia*, a detailed description of the beneficiary's duties; a description of the duties of the subordinate employees; and evidence that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization.

In response, the petitioner provided a more detailed list of job duties for the beneficiary:

- Financial Forecasting[.]
- Financial Statement Analysis[.]
- Oversee the overall financial health of the business and is the only person who is able to make decisions regarding the commitment of capital, assumption of credit, expansion and final marketing issues.
- Develop both short and long term plans and programs together with supporting budget requests and financial estimates.

- Develop marketing strategies for the year[.]
- Spearheaded the launch of company website, which few competitors have [(]www.neatandtidy.net[)].
- Corporate branding; implemented uniforms for company recognition, launched website in 2002, joined trade fairs for the San Fran Apartment Association to promote company name. Revised company logo, all marketing materials reflect new company logo and name recognition.
- Conceptualized business policies and procedures (human resources, customer guidelines and policies[)].
- Re-negotiate pricing contracts with various suppliers such as liability insurance, workers compensation, yellow page advertising.
- To oversee operations and coordinate with the foreign owners on issues of finance, banking, marketing and expansion. [The beneficiary] as part of management duties communicates directly with foreign owners on updates on business plan, capitalization, financial health status and management issues.
- Monitor the effectivity [sic] of marketing programs in meeting objectives and recommend corrective measures/alternative programs when necessary.
- Through the Operations Manager; enforces the hiring of new personnel, promotion and salary increases as well as any disciplinary action necessary for employees that fail to follow company policies and procedures.

The petitioner also provided a more detailed description of the duties of the "operations manager" and the "housecleaning supervisor and operations assistant." The "operations manager," a part-time employee at the time the petition was filed, was described as having the following duties:

- Enforce company policies on operations, human resources.
- Recruit new employees.
- Train new employees according to company policy and procedures and the code of guidelines.
- Prepare target sales figures for each month[.]
- Handle employee issues such as performance appraisals.
- Talk to decision makers of large corporate accounts to solicit janitorial contracts.
- Prepare marketing programs[.]
- Prepare sales reports to General Manager[.]

The "operations manager" is also described as having a college degree.

The "housecleaning supervisor and operations assistant," who also allegedly has a college degree, was described as having the following duties:

- Monitors quality control in all homes and offices (regular inspections to ensure customer satisfaction)[.]
- Prepares daily schedules for all staff[.]
- Maintains inventory of all supplies[.]
- Provide in-home estimates for new clients[.]
- Assists Operations Manager with his daily duties[.]
- Handle all billing for corporate, individual accounts.
- Log customer complaints and prepare[s] a report to Operations Manager[.]

Finally, the petitioner supplied an updated organizational chart materially identical to the chart provided with the initial petition.

On March 17, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary has been or will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director erred in that the record establishes that the beneficiary performs executive and managerial duties by managing the organization and by supervising and controlling the work performed by subordinates. The petitioner also asserts that the beneficiary is not a first-line supervisor because the beneficiary's subordinates are professionals.

Upon review, petitioner's assertions are not persuasive.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner has failed to prove that the beneficiary will act in a "managerial" capacity. In support of its application, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include financial forecasting, developing plans and programs, marketing, attending

trade shows, and negotiating contracts with suppliers. The petitioner did not, however, define the beneficiary's plans or programs, her management of marketing activities (other than spearheading the establishment of a website and attending trade shows), or her financing forecasting. 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).

While counsel to the petitioner asserts that the beneficiary does not perform actual cleaning duties, it is obvious that there are non-managerial duties associated with a business of the scope described by the petitioner in addition to cleaning homes and offices. While the record may indicate that cleaning services are performed by others, the evidence submitted fails to establish who, other than the beneficiary, is performing the additional functions incidental to operating the business and, importantly, what percentage of her time is dedicated to these non-managerial duties. For example, the evidence indicates that the beneficiary attended trade fairs, spearheaded the establishment of a website, negotiated insurance and advertising contracts, and arranged for yellow pages advertising for the business. These are administrative or operational tasks, not managerial or executive duties, and it is essential that the petitioner establish what percentage of the beneficiary's time is dedicated to performing such non-qualifying duties. 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).

Likewise, the petitioner does not explain who, other than the beneficiary, performs the clerical work incidental to the management of the business, i.e., administering accounts payable. Such duties are not included in the job descriptions for the subordinate employees, who appear primarily engaged in managing the housecleaners. 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).

Overall, the petitioner's vague job description fails to realistically define the beneficiary's duties in a way that would allow one to ascertain which functions are managerial and what functions would be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be spent managing the organization, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager or primarily managing other supervisory, professional, or managerial employees. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Therefore, the record does not prove that the beneficiary is acting primarily in a managerial capacity.

Similarly, 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. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. 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.* As indicated above, the petitioner has failed to prove that the beneficiary, who is apparently engaged in a variety of non-managerial, clerical duties, will be acting primarily in an executive capacity.

It is appropriate for Citizenship and Immigration Services (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).

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the foreign entity, Confites, Inc., of the Philippines.

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.

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." An "affiliate" is defined, in part, as "[o]ne or two legal entities owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity."

In the initial Form I-129 petition, the petitioner purports that a group of five individuals in the Philippines owns and controls both the petitioner and the foreign entity and that these individuals own and control approximately the same share or proportion of each entity. In support of this allegation, the petitioner provided copies of stock certificates (#2 through #6) issuing a total of 50,000 shares to the five individuals in the Philippines; copies of the petitioner's articles of incorporation authorizing the issuance of 1,000,000 shares; wire transfer documentation establishing that the foreign entity wired the petitioner \$46,077.18 in April 2001; minutes from a meeting of the petitioner's incorporators dated January 12, 2001 authorizing the issuance of stock in the same proportion as evidenced by the proffered stock certificates; and the bylaws of the petitioner. The petitioner also provided documentation establishing that the same individuals who allegedly own stock in the petitioner own proportionate shares in the foreign entity.

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; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this case, the petitioner failed to supply copies of its stock certificate ledger or corporate minutes (other than the original incorporator minutes from January 2001). This is particularly important since the petitioner is authorized to issue 1,000,000 shares of stock, the stock certificates indicate that 50,000 shares have been issued, and the issuance of stock began with certificate #2, not certificate #1. Given the petitioner's failure to provide any corporate documents subsequent to its establishment in late 2000 and early 2001, the AAO is unable to ascertain the current ownership and control of the petitioner and, thus, the petitioner has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the petition may not be approved.

Accordingly, the petitioner has not established that the petitioner and the foreign entity are qualifying organizations as required by 8 C.F.R. § 214.2(l)(3).

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. The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Therefore, even though the petitioner was successful in the past in petitioning for the beneficiary, the director properly denied the petition in this case.

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 an application or petition 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. at 597. It would be absurd to suggest that CIS or any agency must

treat acknowledged errors as binding precedent. *Sussex Engr. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

In this case, not only was there material and gross error in determining that the beneficiary was serving in a primarily executive or managerial capacity for the reasons outlined above, but there was material and gross error in determining that a qualifying relationship exists between the petitioner and the foreign entity.

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.

Finally, based on the reasons for the denial of the instant petition, a review of the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary is warranted to determine if they were also approved in error. Therefore, the director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation in accordance with 8 C.F.R. § 214.2(1)(9).

ORDER: The appeal is dismissed.

FURTHER ORDERED: The director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(1)(9).