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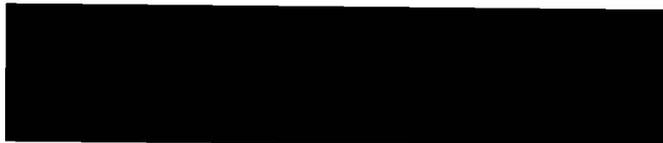
File: SRC 03 205 50421 Office: TEXAS SERVICE CENTER Date: **SEP 06 2006**

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/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 non-profit corporation organized under the laws of the State of Texas formed for religious purposes. The petitioner claims that it is “owned” by an organization in South Africa called the [REDACTED]. 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 the beneficiary will be employed in the United States in a primarily managerial or 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 and that “[i]t has been established that the position offered qualifies as a managerial or executive position.” In support of this assertion, counsel to the petitioner relies entirely on an April 23, 2004 Citizenship and Immigration Services (CIS) Interoffice Memorandum. This Memorandum provided guidance on the process by which an adjudicator, during the adjudication of a subsequent request for petition extension, may question another adjudicator's prior approval of a nonimmigrant petition where there has been no material change in the underlying facts. Counsel to the petitioner argues that the denial was improper since the circumstances justifying a change in a prior adjudication as outlined in the Memorandum were not present in this case.

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 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 appeal 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 the initial Form I-129 petition, the petitioner described the beneficiary's job duties as "direct and develop enterprise." No other information regarding the beneficiary's position was provided.

On September 16, 2003, the director requested additional evidence. The director requested, *inter alia*, evidence regarding the petitioner's staffing in the United States (including employee titles, duties, and educational background of professional employees); a definitive statement describing the beneficiary's duties, percentage of time spent on each duty, and a description of subordinate employees; the petitioner's organizational chart; and the petitioner's tax returns and wage reports. The director also requested evidence that the petitioner is owned and controlled by [REDACTED] of South Africa.

In response, the petitioner submitted evidence that its only employees are the beneficiary and a part-time secretary, and it provided a breakdown of the beneficiary's duties as follows:

1. Consultant for African missions

25%

2.	Promoter	25%
3.	Mission campaign coordinator	10%
4.	Plan Gospel Chariot travels into Africa	20%
5.	<b>Order, collect &amp; ship literature for free distribution in Africa</b>	<b>10%</b>
6.	Negotiate and coordinate distribution of donated Bibles	5%
7.	<b>Negotiate building of third gospel chariot for central Africa</b> & coordinate mission work in Namibia and Angola.	5%

On March 27, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager. In support of this appeal, the petitioner relies entirely on an April 23, 2004 CIS Interoffice Memorandum. This Memorandum provided guidance on the process by which an adjudicator, during the adjudication of a subsequent request for petition extension, may question another adjudicator's prior approval of a nonimmigrant petition where there has been no material change in the underlying facts. Counsel to the petitioner argues that the denial was improper since the circumstances justifying a change in a prior adjudication as outlined in the Memorandum were not present in this case.

Upon review, petitioner's assertions are not persuasive. As a threshold issue, the Memorandum relied upon by the petitioner is not applicable to this case. As explained in the first footnote of the Memorandum, the guidance does not apply to L-1 "new office" extension petitions. Since the current petition is a new office extension petition, the Memorandum does not apply.<sup>1</sup>

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<sup>1</sup>Given the petitioner's complete reliance on the guidance in the Memorandum in its appeal, the legal significance of the April 23, 2004 Memorandum should be addressed generally. This Memorandum, which specifically states that adjudicators are not bound to approve subsequent petitions because of erroneous prior approvals, limits its authority on Page 4 of the Memorandum:

This memorandum is intended solely for guiding USCIS personnel in performance of their professional duties. It is not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or matter.

Courts have consistently supported this position. *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that CIS memoranda merely articulate internal guidelines for INS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing an INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, 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 as defined by law.

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 petition, the petitioner supplied a job description and organizational chart indicating that the beneficiary will manage one part-time secretary and spend most of his time providing consulting services, promoting his mission, raising funds, and distributing religious literature. The record is devoid of any evidence of whom, other than the part-time secretary and the beneficiary, would be performing the tasks necessary for the petitioner to provide its services. The job description is also vague in that "promoting" and "consulting" are not defined in any way. Therefore, it appears the beneficiary is a first line supervisor and/or the provider of actual services.

Providing consulting services, coordinating campaigns, planning travel, and distributing religious literature are functions of specialists or clerical employees, not of an L-1A manager. 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

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aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law"); *Ponce-Gonzalez v. INS*, 775 F.2d 1342, 1346-47 (5th Cir. 1985) (finding that OIs are "only internal guidelines" for INS personnel, and that an apparent INS violation of an OI requiring investigation of an alien's eligibility for statutory relief from deportation was at worst "inaction not misconduct").

Therefore, the Memorandum does not create any substantive rights in the petitioner, and a failure to follow the guidance in the Memorandum, even if applicable to the current "new office extension" petition, would not be grounds for a withdrawal of the decision. The substance of the petition, being whether the beneficiary will be working in a primarily executive or managerial capacity, is of paramount importance in this appeal.

one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988). 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. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988). Since the record fails to reveal the educational or skill level of the subordinate secretary, it cannot be determined if she rises to the level of a professional employee.<sup>2</sup> Therefore, the record fails to establish that the beneficiary is acting in a managerial capacity.

Similarly, the petitioner has failed to establish 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 managerial 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 allegedly managing no more than one employee and who is apparently engaged in providing services, *i.e.*, consulting, will be acting primarily in an executive capacity. 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 employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the evidence presented does not prove that the petitioner and the foreign employer are qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G). To establish a "qualifying

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<sup>2</sup> 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).

relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (*i.e.*, one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). If a company owns a majority interest in a petitioner, then the companies will be deemed to have a parent/subsidiary relationship under the definition.

In the current case, counsel to the petitioner, a Texas non-profit corporation [REDACTED] claims in his appellate brief that the petitioner is "owned" by a South African charity also called [REDACTED]. "The beneficiary owns 100% of World Bookworm/[REDACTED], Republic of South Africa, which organization in turn owns 100% of the Petitioner's outstanding and issued shares of common stock, thereby constituting a wholly-owned subsidiary of the Company abroad." While stock certificates were not provided, the petitioner did provide two letters in which the authors state that the petitioner is owned by the South African entity. A close review of the petitioner's corporate documents, however, reveal that these claims are not supported by the evidence.

The Articles of Incorporation and Bylaws submitted by the petitioner state that the petitioner is a Texas non-profit corporation with members and that all power is vested in the Board of Directors, including the selection and expulsion of members and officers. There is no evidence that the corporation is a non-profit, stock corporation and, if it is, that the petitioner has ever issued stock. The Board is entirely independent, and the directors may fill vacancies or amend the bylaws or articles without permission. There is nothing in the Articles or the Bylaws granting the foreign entity, or any other entity, the power to control the assets of the petitioner or the selection of directors, officers, or members.

The regulations 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 Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this 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 at 595. In this case, the record is devoid of any evidence proving that the foreign entity has the direct or indirect legal right to control the assets or management of the petitioner. Therefore, the petitioner has failed to prove the existence of a qualifying relationship. For this additional reason, the petition must be denied.

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. v. Upchurch*, 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.