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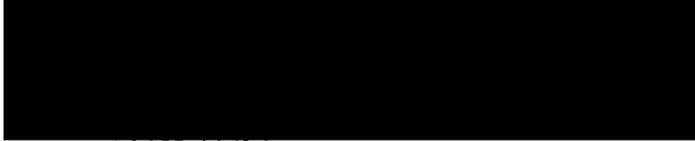
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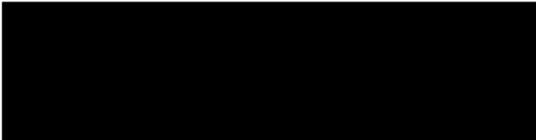
File: SRC 04 063 50355 Office: TEXAS SERVICE CENTER Date: DEC 03 2007

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 employ the beneficiary as a lead applications engineer 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 limited liability company organized under the laws of the State of Texas and is allegedly an engineering, design, and manufacturing business.¹

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, counsel to the petitioner asserts that the director erred and that the beneficiary's duties will be primarily those of an executive or a function manager.

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

¹It should be noted that, according to Texas state corporate records, the petitioner's corporate status in Texas is not in good standing. Therefore, as the State of Texas has forfeited the petitioner's corporate privileges, the company can no longer be considered a legal entity in the United States. Therefore, this would call into question the continued eligibility of the petitioner for the benefit sought if the appeal were not being dismissed for the reasons set forth herein.

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 in the initial petition whether the beneficiary will primarily perform 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 petitioner may not claim that a beneficiary will 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 describes the beneficiary's proposed duties in a letter dated December 10, 2003 as follows:

[The beneficiary] will be employed by the Petitioner in the United States as the Production Manager, and will be responsible for performing the following duties for the Petitioner; such duties to include: coordinate between U.S. office and Indian team to collect complete product information required for development phase; coordination with design team for new product development; core team member of product development think tank; preparation of concept drawings using advanced CAD software like AutoCAD and Pro-E; coordinate with suppliers throughout the product development phase; on-site inspection and approval of tools, jigs and fixtures required for prototype development and production of components; and supervise and guide the manufacture of specialty Low Speed Application Tires. In the performance of his duties, the Beneficiary will receive minimum supervision from the Board of Directors, and the Beneficiary will exercise wide discretion and latitude in the performance of his duties.

The petitioner also submitted wage reports indicating that the petitioner employed three people in the quarter immediately preceding the filing of the instant petition.

On January 6, 2004, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the United States operation including employee names, position titles, and job descriptions.

In response, the petitioner submitted an organizational chart and list of employees for the United States operation. The list and chart indicate that the petitioner currently employs a vice president of international marketing, a custom engineer, and a laminated tire construction specialist. The remaining positions on the organizational chart, including those subordinate to the beneficiary in the "application engineering group," appear to be vacant. None of the existing employees is portrayed as being subordinate to the beneficiary. The petitioner indicates in a letter dated January 22, 2004 that it intends on hiring additional employees.

On February 13, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's duties are primarily those of an executive or a function manager.

Upon review, counsel's assertions are not persuasive.

As a threshold issue, it must be noted that the petitioner's future hiring and business expansion plans are not relevant to the instant petition. The petitioner must establish eligibility at the time of filing the nonimmigrant

visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See id.*; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner must establish that it is prepared to employ the beneficiary in a primarily managerial or executive employee at the time of filing the petition and not at some later date.

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.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, a petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will primarily act in a "managerial" or "executive" capacity. To the contrary, the duties ascribed to the beneficiary appear to be primarily non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will coordinate with the design team "for new product development," prepare "concept drawings using advanced CAD software like AutoCAD and Pro-E," work with suppliers, perform on-site inspections, and approve "tools, jigs and fixtures required for prototype development and production of components." However, these duties appear to be non-qualifying administrative or operational tasks, and the petitioner has not established that the beneficiary will be relieved from the need to perform such tasks by a subordinate staff. As the petitioner has not explained how much time the beneficiary will devote to these non-qualifying tasks, it has not been established that he will be "primarily" employed as a manager or an executive. 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).

Furthermore, the petitioner has submitted a vague and non-specific job description which fails to specifically describe the beneficiary as performing qualifying duties. For example, the petitioner states that the beneficiary will "coordinate" various activities, will be a "core team member of product development think tank," and will "supervise and guide the manufacture of specialty Low Speed Application Tires." However, the petitioner does not specifically explain what, exactly, the beneficiary will do in coordinating, supervising, and guiding these activities. This is particularly important given that the petitioner does not employ any subordinate staff members who could relieve the beneficiary from performing the non-qualifying duties inherent to the activities he will supposedly coordinate, supervise, and guide. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties will be 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). 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained above, it appears that the beneficiary will not supervise any employees. Moreover, the record does not establish that the beneficiary will manage an essential function of the organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

In this matter, the petitioner has not established that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. As explained above, the record establishes that it is more likely than not that the beneficiary will primarily perform non-qualifying operational or administrative tasks. Given that the petitioner does not employ any subordinate staff members dedicated to relieving the beneficiary of performing the tasks inherent to his duties, it is therefore likely that the beneficiary will perform the duties related to the function rather than "manage" the function. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Therefore, the petitioner has not established that the beneficiary will be employed primarily 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 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the

beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will primarily perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, 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). Finally, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).²

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.³

²Counsel cited the Foreign Affairs Manual (FAM) in his brief as authority. It must be noted that the FAM is not binding upon CIS. See *Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

³It is noted that counsel to the petitioner cited the unpublished opinion in *Matter of Irish Dairy Board*, A28-845-42 (AAO Nov. 16, 1989), in support of his contention that the beneficiary is primarily employed as an executive or manager. In that decision, the AAO recognized that the sole employee of the petitioner could be employed primarily as a manager or executive provided he or she is primarily performing executive or managerial duties. However, counsel's reliance on this decision is misplaced. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Second, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Third, as explained above, the petitioner has not established that the beneficiary will primarily be employed in an executive or managerial capacity. This is paramount to the analysis, and a beneficiary may not be classified as a manager or an executive if he or she will not primarily perform managerial or executive duties regardless of the number of people employed by the petitioner. Therefore, as the petitioner has not established this essential element, the decision in *Matter of Irish Dairy Board* would be irrelevant even if it were binding or analogous.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

The petitioner described the beneficiary's duties abroad in a letter dated December 10, 2003 as follows:

[The beneficiary's] duties include: coordinate between U.S. office and Indian team to collect complete product information required for development phase; coordination with design team for new product development; core team member of product development think tank; preparation of concept drawings using advanced CAD software like AutoCAD and Pro-E; coordinate with suppliers throughout the product development phase; on-site inspection and approval of tools, jigs and fixtures required for prototype development and production of components; and supervise and guide the manufacture of specialty Low Speed Application Tires.

The petitioner also submitted an organizational chart for the foreign employer indicating that the beneficiary supervised two "systems" employees.

Upon review, and for the same reasons explained above, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner failed to specifically describe the beneficiary as performing primarily managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties were 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, *aff'd*, 905 F.2d 41. Furthermore, the beneficiary's duties abroad, which are similar to his proposed duties in the United States, appear to be primarily non-qualifying operational or administrative tasks. Finally, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. To the contrary, it appears that the beneficiary was, at most, a first-line supervisor of non-professional employees. A managerial 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. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity abroad for one continuous year in the three years preceding the filing of the petition, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has failed to establish that it and the foreign employer are qualifying organizations.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying

organizations." 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." "Subsidiary" is defined in pertinent part as a legal entity "of which a parent owns, directly or indirectly, more than half of the entity and controls the 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.

In this matter, the petitioner describes its relationship to the foreign employer, [REDACTED] in the letter dated December 10, 2003 as follows:

The Petitioner, [REDACTED], is a Texas [Limited] Liability Company and along with [REDACTED] is owned by [REDACTED]

The petitioner also submitted its 2002 tax return (Form 1065). Schedule K to the Form 1065 indicates that an entity called [REDACTED] owns a 100% interest in the petitioner. The record is devoid of evidence connecting [REDACTED] to the foreign employer. Furthermore, the petitioner does not attempt to explain why the 2002 Schedule K is fundamentally inconsistent with the ownership scheme described in the letter dated December 10, 2003. 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).

Accordingly, the petitioner has not established that it and the foreign entity are qualifying organizations. For this additional reason, the petition may not be approved.

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, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.⁴

Finally, in view of petitioner's failure to establish that it has a qualifying relationship with the foreign employer, a review of other L-1 nonimmigrant petitions (EAC 07 157 52855, SRC 06 099 50616, and SRC 06 222 51140) approved on behalf of other beneficiaries, and which are currently valid, is warranted to determine if they were approved in error. Therefore, the director shall review these prior petitions approved for possible revocation in accordance with 8 C.F.R. § 214.2(l)(9).

ORDER: The appeal is dismissed.

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

⁴It is noted that, on appeal, counsel requests in the alternative "that if the district director cannot approve this application as an L-1A, that it be approved as an L-1B." However, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. Furthermore, the regulations clearly define an intracompany transferee as one coming to the United States in a capacity that is managerial, executive, or involves specialized knowledge. 8 C.F.R. § 214.2(l)(1)(ii)(A); see also 8 C.F.R. § 214.2(l)(3)(ii). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Regardless, upon review, the record is devoid of evidence that the beneficiary will be employed in a capacity involving specialized knowledge or that he possesses specialized knowledge.