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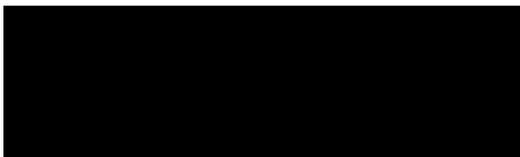
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File: LIN 06 106 52444 Office: NEBRASKA SERVICE CENTER Date: DEC 04 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 THE BENEFICIARY:



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 Acting Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. An untimely appeal to this decision was filed, and the acting director treated the appeal as a motion without first forwarding it to the Administrative Appeals Office (AAO). On November 8, 2006, the acting director affirmed his previous decision. The petitioner subsequently filed a second appeal, which the acting director forwarded to the AAO. The matter is now before the AAO on appeal. However, the AAO will withdraw the director's decision on the untimely appeal, which was treated as a motion, and reject it pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I) and 8 C.F.R. § 103.3(a)(2)(v)(B)(I).

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its 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 under the laws of the State of Colorado and is allegedly a ski and car valet service. The beneficiary was 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 acting director denied the petition on August 30, 2006 concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the petitioner has secured sufficient physical premises to house the enterprise.

Counsel to the beneficiary subsequently filed an appeal on October 25, 2006, 56 days after the date of the acting director's decision.¹ Without forwarding the appeal to the AAO, the acting director treated the appeal as a motion and affirmed his previous decision on November 8, 2006. The petitioner filed an appeal on December 7, 2006. The acting director declined to treat the second appeal as a motion and forwarded the appeal to the AAO for review.²

As a threshold matter, the AAO concludes that the acting director's consideration of the appeal filed on October 25, 2006 as a motion without first forwarding the matter to AAO was contrary to the regulations and shall be withdrawn. After the entry of the decision denying the petition on August 30, 2006 and the subsequent filing of an appeal, the regulations permitted the acting director to treat the appeal as a motion only if "favorable action" was warranted. 8 C.F.R. § 103.3(a)(2)(iii). If the acting director was not inclined to

¹It is noted that counsel's first attempt to file an appeal with the Nebraska Service Center on September 29, 2006 was rejected because the remittance was not made payable to the proper payee. As a filing which does not include the proper filing fee must be rejected and will not retain a filing date, the Nebraska Service Center's receipt of the Form I-290B will not establish a receipt date of September 29, 2006.

²It is noted that the petitioner requests oral argument before the AAO. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant one only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, not only is the underlying appeal being rejected, the petitioner identified no unique factors or issues of law to be resolved at oral argument. Consequently, the request for oral argument is denied.

take favorable action, the regulations state that the acting director "shall promptly forward the appeal and related record of proceeding to the [AAO]." 8 C.F.R. § 103.3(a)(2)(iv). It must be emphasized that the acting director is obligated to forward *all such appeals to the AAO*, including those that the acting director believes may have been untimely. The requirement at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) that untimely appeals meeting the requirements of motions must be treated as motions only applies after the appeal has been forwarded to the AAO and rejected by this office as untimely pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1). Therefore, where favorable action was not taken, the acting director lacked the authority to consider the untimely appeal as a motion, and the decision dated November 8, 2006 affirming the prior denial shall be withdrawn.

In view of the above, the matter now before the AAO is the appeal filed on October 25, 2006, which should have been promptly forwarded by the Nebraska Service Center to the AAO. The AAO will reject this appeal pursuant to both 8 C.F.R. § 103.3(a)(2)(v)(A)(1) and 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

The Form G-28, Entry of Appearance as Attorney or Representative, dated September 28, 2006 and which was submitted with the appeal filed on October 25, 2006, was signed by the beneficiary, not by an authorized representative of the petitioner and not on behalf of the petitioner. Therefore, the attorney identified in the Form G-28 is counsel to the beneficiary, not counsel to the petitioner. The Form I-290B that was submitted in response to the August 30, 2006 decision was signed and filed by the attorney identified in the above Form G-28. CIS regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a petition; the beneficiary of a visa petition is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3). As the beneficiary and his representative are not recognized parties, counsel is not authorized to file an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B).

Therefore, the appeal filed October 25, 2006 is rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1) as having been filed by a party not entitled to file an appeal.

Furthermore, the regulation at 8 C.F.R. § 103.3(a)(2) requires an affected party to file the complete appeal within 30 days after service of the decision, or, in accordance with 8 C.F.R. § 103.5a(b), within 33 days if the decision was served by mail. As indicated above, the record indicates that the decision of the director was mailed to the petitioner on August 30, 2006. Counsel to the beneficiary filed an appeal with the Nebraska Service Center on October 25, 2006, 56 days after the decision was mailed.

Thus, the appeal was not timely filed and must be rejected on these grounds pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

As explained above, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center acting director. See 8 C.F.R. § 103.5(a)(1)(ii). However, as this appeal is also being rejected as having been improperly filed by counsel to the beneficiary, the Nebraska Service Center would lack the authority to treat the rejected appeal as a motion. Furthermore, a motion filed by an improper party does not meet the "requirements of a motion" set forth in 8 C.F.R. § 103.5. Also, upon review, the appeal filed on October 25, 2006, does not meet substantive requirements of a motion set forth in 8 C.F.R. §§ 103.5(a)(2)

and (3). Counsel to the beneficiary failed to state any "new" facts or to support the filing with any "pertinent precedent decisions." Therefore, the rejected appeal should not have been treated as a motion by the Nebraska Service Center.

Regardless, it is noted that the AAO would concur with the acting director's decision to deny the instant petition if the appeal were not being rejected as improperly filed. The petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In this matter, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. Broad, conclusory statements such as "control the fulfillment of the business plan" and "direct the management of the company" are not probative of the beneficiary actually performing qualifying duties. 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). 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).

Moreover, as properly noted by the director, 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. The petitioner has failed to establish that any of the beneficiary's subordinate employees will truly have managerial or supervisory responsibilities. To the contrary, it appears that the petitioner's subordinate employees will be primarily engaged in performing the tasks necessary to the provision of the petitioner's valet services. In view of the above, it appears that the beneficiary will be, at most, a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. 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). 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. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity.³

³It is noted that the director also denied the petition because the petitioner failed to establish that it has secured sufficient physical premises to house the new office. While the submission of evidence addressing the sufficiency of a petitioner's physical premises is a criterion specifically applicable to "new offices," the acting director's inquiry into the petitioner's maintenance of a physical place of business was also appropriate due to the petitioner's obligation to establish that it still is a qualifying organization and that it has been "doing business" for the prior year. 8 C.F.R. §§ 214.2(l)(14)(ii)(A)-(B). Upon review, the AAO would concur with the acting director's decision on this basis as well. The petitioner failed to establish that its membership in an

Finally, it must be noted that the record also contains a serious inconsistency which undermines the petitioner's claim of being a qualifying organization. In the Form I-129, the petitioner asserts that it is 100% owned by the foreign employer, Boston Investment Ltd. of Hungary. The petitioner also submitted evidence that it filed a 2005 Form 1120-A, U.S. Corporation Short-Form Income Tax Return. However, a corporation having a foreign shareholder that owns 25% or more of a corporation's stock may not file the Form 1120-A. *See* I.R.S. Form 1120-A Inst. (2005). Therefore, the petitioner's filing of a Form 1120-A casts serious doubt on the petitioner's assertion that it is 100% owned and controlled by the foreign employer. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Accordingly, if the appeal were not being rejected for those reasons set forth above, the AAO would dismiss the appeal for those reasons set forth by the director as well as for the petitioner's failure to credibly establish that it is a qualifying organization.

ORDER: The appeal is rejected.

"intelligent office" and its claimed interest in a property located at 117 Lost Creek Lane, Telluride, Colorado, are, collectively, sufficient to house the enterprise. The evidence submitted fails to sufficiently describe the size and nature of the physical premises. Once again, 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.