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U.S. Citizenship
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File: SRC 04 182 51294 Office: TEXAS SERVICE CENTER Date: MAR 06 2007

IN RE: Petitioner:
Beneficiary:



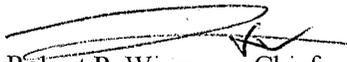
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 extend the employment of its financial 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 Georgia and is allegedly engaged in the business of antique imports and sales. The petitioner claims a qualifying relationship with [REDACTED] of the Netherlands. 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 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 denying the petition. Specifically, the petitioner argues that the record establishes that the beneficiary is employed in a managerial or executive capacity and that the director failed to follow the guidance in an April 23, 2004 Citizenship and Immigration Services (CIS) Interoffice Memorandum. Memo. From William R. Yates, Associate Director for Operations, to Service Center Directors, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (April 23, 2004). 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.

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. 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. Given the lack of clarity, the AAO will consider both classifications in its adjudication of the appeal and will assume that the petitioner is asserting that the beneficiary is employed either as an executive *or* a manager.

In the Form I-129, the petitioner described the beneficiary's job duties as follows:

Serve as financial liaison between Dutch parent company and U.S. branch in Atlanta, Georgia; also serve as liaison between banking representatives both in the U.S. and abroad, and corporate management at the U.S. branch and the Dutch parent company. As the Financial Manager of the U.S. operations, will prepare reports, financial statements, balance sheets, tax returns and reports for management in the U.S. and the parent company in Lisse, Holland, The Netherlands.

The petitioner further described the beneficiary's job duties in an unsigned letter dated May 28, 2004 as follows:

The position in the United States is that of Financial Manager. This position requires planning, developing, and directing financial activities of [the petitioner]. The Financial Manager will manage and monitor all the financial activities of U.S. operations of importing Dutch antiques from the parent company's facilities in Lisse, Holland. The Financial Manager will develop financial sources through investments, letters of credit, commercial loans, and other financial resources. She will manage the daily and monthly financial reporting to the president of the company.

The Financial Manager will also serve as a liaison between banking representatives both in the United States and abroad. The Financial Manager will coordinate financial transfers between the corporate management in the U.S. facility and the parent company in Holland. She will be responsible for inventory accounting and reconciling inventory with sales sheets.

Further, the Financial Manager will prepare operational reports, balance sheets, and tax returns for the U.S. organization. She will report directly to the President of the corporation. As noted, this position is a vitally important one for our company in Atlanta, Georgia.

On July 1, 2004, the director requested additional evidence. Specifically, the director requested a copy of the organizational chart for the United States operation.

In response, the petitioner provided an organizational chart showing the beneficiary reporting to the president. The beneficiary is not shown supervising any employees. While the petitioner employs three other persons, these employees do not report to the beneficiary and appear to be engaged primarily in managing inventory and the petitioner's retail operation.

On July 15 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 on the fact that CIS approved an L-1A petition submitted on behalf of the beneficiary in 2002 by the same petitioner for the same position. The petitioner argues that the director failed to follow the guidelines established in 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. Specifically, this memorandum states that adjudicators should give deference to prior approvals involving the same underlying facts except where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. Memo. From William R. Yates, Associate Director for Operations, to Service Center Directors, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (April 23, 2004) (the "Yates Memorandum"). The memorandum also states that the adjudicator should clearly articulate the material error, changed circumstances, or new material information in his or her decision. *Id.* The petitioner argues that, since the director did not articulate any of these three justifications for not deferring to the earlier approval, the decision was in error.

Upon review, the petitioner's assertions are not persuasive. Even though the director did not specifically determine that there was material error with regard to the previous petition, the AAO agrees with the director that, upon a review of the facts, the petitioner has not established that the beneficiary will be employed primarily in a managerial or executive capacity. Moreover, if the earlier approval were based on the same position description provided in the current petition, this would have constituted a material error.¹

¹Before further addressing the merits of the appeal, the legal significance of the Yates Memorandum should be addressed. This Memorandum, which specifically states that adjudicators are not bound to approve subsequent petitions where ineligibility has not been demonstrated 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.

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.

The petitioner has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has described the beneficiary as being primarily engaged in performing administrative or operational tasks which do not rise to the level of managerial duties. For example, the beneficiary is described as preparing financial reports, coordinating financial transfers between the petitioner and the foreign entity, and accounting for inventory. As the petitioner does not employ a subordinate staff dedicated to relieving the beneficiary of the need to perform the duties necessary to these functions, it must be concluded that these tasks are performed by the beneficiary. 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 Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner also fails to explain how much time the beneficiary dedicates to performing these operational and administrative tasks or, if these tasks are performed by others, who is being managed by the beneficiary. Going on record without supporting documentary

Id.

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 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 director's failure to follow the guidance in the Memorandum would not be grounds for a withdrawal of the decision.

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). 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).

The petitioner also failed to establish that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees, or that she will manage an essential function within the organization. While the petitioner did supply an organizational chart, this chart indicates that the beneficiary has no supervisory function within the organization. Therefore, the beneficiary is not supervising and controlling the work of subordinate employees.

Likewise, the record does not establish that the beneficiary manages 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 provided evidence that the beneficiary manages an essential function. The petitioner's job description, which includes primarily operational and administrative tasks, fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties and absent evidence that a subordinate staff exists to relieve the beneficiary of the need to perform administrative or operational tasks, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is primarily performing 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 record does not prove that the beneficiary is acting 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 managing no employees and who is apparently engaged in performing administrative or operational tasks, will be acting primarily in an executive capacity.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act; *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988). However, 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). Furthermore, 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). Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.²

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 "new office extension" petition were approved based on the materially identical job description 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. 593, 597 (Comm. 1988). 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).

Beyond the decision of the director, a related issue is whether the petitioner has established that it has a qualifying relationship with the foreign entity, [REDACTED]

²It must be noted that counsel's reliance on *Mars Jewelers, Inc. v. INS* is misplaced. In that case, the court clearly states that the error made by the legacy Immigration and Naturalization Service (INS) was applying the 1987 regulations instead of the 1983 regulations to a petition filed in 1986. *Id.* at 1575. Thus, while the court found that the beneficiary in that matter was not a first-line supervisor under the 1983 regulations, it implied that this would not have been the case had the 1987 regulations applied. Thus, as the present petition was filed in 2004, it would have been legal error for the director to apply the obsolete 1983 regulations and the holding in *Mars Jewelers, Inc. v. INS* to the present matter.

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." A "subsidiary" is defined, in part, as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

In this matter, the petitioner claims in the Form I-129 that "[REDACTED] is the parent company of the U.S. branch, [REDACTED]." However, in support of this assertion, the petitioner provides a copy of a stock certificate issuing 1,000 shares in the petitioner to [REDACTED] not to the Dutch company. The petitioner also provided a translated commercial registration for the foreign entity indicating that its sole shareholder is [REDACTED]. The petitioner offers no explanation for these serious inconsistencies and offers no evidence establishing that [REDACTED], the apparent individual owner of the petitioner, and [REDACTED], the apparent sole owner of the foreign entity, are affiliated. 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 has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

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.

ORDER: The appeal is dismissed.