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Services

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File: SRC 06 067 51582 Office: TEXAS SERVICE CENTER Date: SEP 05 2007

IN RE: Petitioner:

Beneficiary:



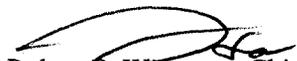
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 president 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 Tennessee and is allegedly engaged in the knife, tool, and leather business.¹ 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, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager. In support, counsel submits a brief.

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

¹It is noted that, according to Tennessee state corporate records, the petitioner was "administratively dissolved" by the State of Tennessee on August 21, 2006. Therefore, as the State of Tennessee has forfeited the petitioner's corporate privileges, the company can no longer be considered a legal entity in the United States. Therefore, if the appeal were not being dismissed for the reasons stated herein, this would call into question the petitioner's continued eligibility for the benefit sought.

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 in the initial petition 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.

The petitioner described the beneficiary's job duties in a letter dated October 22, 2004 appended to the petition as follows:

[The beneficiary] will be working as a manager in [the petitioner], while administering various decisions regarding the conduct of this establishment. He will operate sales and purchases, direct employees, maintain worker empathy, supervise inventory and assure general management in any condition. He is trusted to take on this endeavor with confidence and assure[s] progress in the company.

On January 26, 2006, the director requested additional evidence. The director requested, *inter alia*, a description of the beneficiary's job duties, a description of the duties of the petitioner's other employees, and state and federal wage reports.

In response, the petitioner submitted a letter dated April 18, 2006 describing four employees in addition to the beneficiary. These employees are described as performing sales and marketing related tasks, clerical duties, or warehousing work. The petitioner also submitted a second letter dated April 18, 2006 describing the duties

of the beneficiary as follows:

- Placing international orders
- Examining the international market for new products
- Negotiating both the price and quantity of imported items
- Managing employees and handling salary issues
- Managing the overseas office

Finally, the petitioner provided copies of its wage reports which indicate that the petitioner employed three people during the quarter in which the instant petition was filed.

On April 25, 2006, 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, the petitioner asserts that the beneficiary's duties are primarily those of an executive and a manager.

Upon review, the petitioner's assertions are not persuasive.

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 Citizenship and Immigration Services (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 the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 will be 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's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will "operate sales and purchases," "assure general management," and examine "the international market for new products." However, the petitioner does not explain what management duties he will perform, how he will "operate" sales and purchases, or what, exactly, he will do in "examining" the international markets. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated duties will not

establish that the beneficiary will actually perform managerial 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).

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary will devote to the duties ascribed to him. This is particularly important in this matter because many of the duties listed by the petitioner appear to be either non-qualifying administrative or operational tasks, which do not rise to the level of being managerial or executive in nature, or are non-qualifying services being provided to the foreign employer. For example, the petitioner states that the beneficiary will place international orders, examine the international market for new products, negotiate both the price and quantity of imported products, and manage the overseas office. However, placing orders, negotiating prices, analyzing markets, and examining new products constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the job descriptions for the subordinate employees fail to specifically identify anyone who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to these duties, it must be concluded that he will perform these tasks. Moreover, as the definition of "intracompany transferee" specifically requires beneficiaries to render executive or management services to United States business operations, the beneficiary's purported management of the foreign employer would not be a qualifying duty. See 8 C.F.R. § 214.2(l)(1)(ii)(A). As the petitioner has not established how much time the beneficiary devotes to such non-qualifying tasks or duties, it cannot be confirmed that he will be "primarily" employed as a manager in the United States. 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or that he will manage an essential function of the organization. As explained in the wage reports and job descriptions for the subordinate staff members, the petitioner appears to have employed a total of three people at the time the instant petition was filed. As a threshold issue, the record does not establish that the beneficiary supervises any of these employees. While the beneficiary's vague job description implies that he has supervisory responsibilities over the other employees, the petitioner did not submit an organizational chart and the record as a whole does not clearly establish that the other employees, particularly the "manager" and the "sales person," are truly subordinate to the beneficiary. To the contrary, the beneficiary and the other employees appear to work together in performing the tasks necessary to provide a service or to produce a product.

Regardless, even assuming that the beneficiary does supervise the other employees, the petitioner has not established that these subordinate employees are supervisory, managerial, or professional employees. Therefore, the beneficiary's supervision of these employees would not be "managerial." As explained above, the other staff members who were employed at the time the instant petition was filed (a manager, a sales person, and a part-time warehouse employee) are all described as performing the tasks necessary to produce a

product or to provide a service, i.e., sales, accounts receivable, billing, inventory, and purchasing. The petitioner has not established that any of these employees has a supervisory or managerial function. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. 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 professional. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the petitioner has not established that the beneficiary will manage professional employees.² Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

²In 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). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the duties of any of the beneficiary's subordinate employees.

³While the petitioner has not clearly argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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 will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary is primarily a first-line manager of non-professional employees and/or is engaged in performing non-qualifying operational or administrative tasks. 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 would 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).

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 be acting 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, the beneficiary appears to be primarily employed as a first-line supervisor and to be performing 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.

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, 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.⁴

Beyond the decision of the director, the petitioner has also failed to establish that it still has a qualifying

⁴It is noted that, on appeal, 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. 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. Second, as explained above, the petitioner has not established that the beneficiary will be primarily 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.

relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

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." A "subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." An "affiliate" is defined in pertinent part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual."

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 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, counsel to the petitioner asserts in the letter dated December 22, 2005 that "[the beneficiary] owns 65% of [the foreign company] and 51% of [the petitioner]." If true, this would generally establish that the two entities are affiliates since they are both owned and controlled by the same individual, i.e., the beneficiary. However, the supporting evidence is so rife with inconsistencies regarding the ownership and control of both the foreign company and the petitioner that CIS cannot confirm whom, exactly, owns and controls either entity.

For example, the Pakistani articles of association for the foreign company identifies the beneficiary as the owner of 4,000 out of 11,000 shares of stock, or 36.4%. As this establishes that the beneficiary does not own a majority of, or control, the foreign entity, the petitioner and the foreign company would not be qualifying organizations for this reason alone. The petitioner offers no explanation for this inconsistency in the record. 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).

Likewise, the copies of the stock certificates submitted by the petitioner are also inconsistent with the ownership structure described in the December 22, 2005 letter. The stock certificate copies indicate that the *foreign entity* was issued 51% of the petitioner's stock while a third party, [REDACTED] was issued 49% of the petitioner's stock. Again, the petitioner offers no explanation for this inconsistency with the petitioner's original assertion that the *beneficiary* owns 51% of its stock. Moreover, the copies of the stock certificates themselves are of questionable evidentiary value and appear to have been altered, perhaps fraudulently. The stock certificate

purporting to issue 490 shares of stock to [REDACTED] is certificate "001" and includes the number "490" in the upper right corner of the certificate. However, the stock certificate purporting to issue 510 shares of stock to the foreign entity is also certificate "001" and also includes the number "490" in the upper right corner.

Finally, the petitioner's draft 2005 Form 1120 includes averments which are inconsistent with both of the above described ownership structures. For example, the Form 1120 indicates that no single person or corporation owned 50% or more of the petitioner's stock. This averment, however, is inconsistent with both the petitioner's assertion that the beneficiary owns 51% of the petitioner's stock and the questionable stock certificate which represents the issuance of 51% of the petitioner's stock to the foreign company. Once again, the petitioner offers no explanation for these inconsistencies. The Form 1120 also indicates that the petitioner is not a subsidiary and that 25% or more of its stock is not owned by a foreign person.

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

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 the petitioner's qualifications. *Texas A&M Univ.*, 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.