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U.S. Citizenship
and Immigration
Services

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File: EAC 08 068 51762

Office: VERMONT SERVICE CENTER

Date:

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend its employment of the beneficiary as its general 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 limited partnership that was organized in the State of Florida. The petitioner states that it is engaged in importing, exporting, and selling safety modules for diesel engines.

The director denied the petition after concluding that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity in his proposed position with the U.S. entity.

On appeal, counsel disputes the director's findings and provides a brief that explains the petitioner's basis for the current appeal.

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.

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 primary issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

In support of the Form I-129, the petitioner provided an organizational chart, which depicted the beneficiary as the middle tier of a three-tiered organization, where the beneficiary oversees an operations secretary, a sales engineer, and a logistics engineer and is subordinate to the company's vice president. The organizational chart was accompanied by the following description of the beneficiary's proposed position:

[The beneficiary's] main duties [are] to first set up a unique communications and network system between the principal in Germany and the new base in the United States. The manager has further responsibilities in order to expedite the workings of the expanding operation in Florida. Through the transfer of this most valuable staff member, the company is able to deal with technical start-up problems and the constant changing need for overseas software development. All of these activities involve the import/export, sales and service of newly developed safety system applications on board ships and power generation stations.

The director reviewed the documents submitted and determined that additional evidence and information was required. Accordingly, the director issued a request for additional evidence (RFE) in a notice dated February 27, 2008. The RFE focused in large part on the beneficiary's proposed employment with the U.S. entity as well as the duties of other employees. More specifically, the petitioner was instructed to provide a comprehensive description of the beneficiary's job duties, explaining how the proposed duties fit the definitions of managerial or executive capacity. In an effort to determine who relieves the beneficiary from having to primarily perform the company's non-qualifying tasks, the petitioner was asked to provide job descriptions and educational credentials for the beneficiary's support staff.

In response, the petitioner provided another organizational chart illustrating a similar hierarchy as was shown in the previously submitted chart. Key distinctions include the company president, whose position was omitted from the prior organizational chart, and the changed position titles of the beneficiary's subordinates. Specifically, while the prior chart listed the beneficiary's subordinates as an operations secretary, a sales engineer, and a logistics engineer, the current organizational chart lists the subordinates' job titles as an application engineer, an administrator, and an accountant and indicates that the application engineer and the administrator are both in the United States on temporary assignment from the foreign entity. The petitioner also provided the following list of the beneficiary's duties and responsibilities:

- Oversees general business practices.
- Correspondence with European [h]eadquarters:
Due to [the beneficiary]'s past work experience at [the foreign entity] in Germany and his knowledge of the German language[,] he is the key contact at the U.S.[-]based company for correspondence with the German [headquarters].
- Manage duties of local staff:
This involves assigning major tasks such as import and export of goods, sales and order processing and commercial procedures and regional client support and service to staff both in the office and in the field.
- Logistics management:
Oversee product procurement, major logistics decisions and relationships with freight companies/carriers.
- Manage I.T. [n]etwork:

Due to past experience working at company headquarters in Germany and extensive knowledge of I.T. and communication systems[, the beneficiary] oversees the local network at [the petitioning entity] in Florida, making sure it remains operational at all times and coordinating with German I.T. staff in regards to inter-company data communications and video conferencing needs.

- Reseller [r]elations:
Oversee relations with resellers; establish pricing agreements, payment terms, logistics and shipping[-]related tasks and addressing any concerns that may arise.
- Trade shows and [e]xhibitions:
Visit trade shows and exhibitions, both to visit existing clients and resellers and also to participate in show[s] as an exhibitor answering business and product[-]related questions.
- Repair [h]andling:
Currently processes repairs of products until such time as dedicated electronics technician is recruited and a local repair center is established

As pointed out in the director's decision, the petitioner's quarterly tax returns show that the petitioner currently employs two people—the beneficiary and his superior. No evidence was submitted to establish that the petitioner employs any of the individuals who were identified as the beneficiary's subordinates.

On May 6, 2008, the director issued a decision denying the petitioner's Form I-129 on the basis that the petitioner failed to establish that it would employ the beneficiary in a position where the primary portion of the duties performed would be within a qualifying managerial or executive capacity. In support of his conclusion, the director discussed the amount of the beneficiary's compensation and questioned his educational credentials, finding that the beneficiary's salary is not commensurate with that of a manager or executive and that his apparent lack of sufficient education suggests that the beneficiary does not and would not occupy a professional position with the U.S. entity. The AAO notes, however, that there is no statute, regulation, or precedent decision that allows Citizenship and Immigration Services to consider the beneficiary's salary or level of education in determining whether his job capacity is that of a manager or executive. As such, the AAO withdraws the director's erroneous consideration of this information.¹

That being said, the director properly focused on the petitioner's broad description of the beneficiary's prospective employment and the petitioner's staff, which consists of only two employees, one of whom is the beneficiary himself. The director questioned the ability of the petitioner's two-person staff to relieve the beneficiary from having to primarily perform non-qualifying tasks. More specifically, the petitioner questioned who, if not the beneficiary, would provide the services or deliver the products offered by the

¹ It is noted that, while salary is irrelevant in determining the beneficiary's managerial or executive capacity, it is relevant in determining admissibility. See § 212(a)(4) of the Act, 8 U.S.C. § 1182(a)(4). Similarly, although neither the statute nor the regulations require that the beneficiary be a professional to qualify as a manager or executive under the Act, the beneficiary's education is relevant in determining whether he is qualified "to perform the intended services in the United States." 8 C.F.R. § 212.2(l)(3)(iv).

petitioner.

On appeal, counsel for the petitioner argues that the petitioner's level of staffing should not outweigh the beneficiary's job duties. While counsel's comment properly suggests the significance of multiple factors in determining the beneficiary's employment capacity, the beneficiary's job duties alone, even when described in sufficient detail, will not lead to a favorable conclusion unless the petitioner can provide corroborating documentary evidence establishing the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying tasks. It is noted that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, not only must the petitioner provide statements that adequately describe the specific job duties that will comprise the beneficiary's time at work, but the petitioner must also provide documentation to establish that its organizational hierarchy is capable of supporting the beneficiary in a managerial or executive capacity given the description of the proposed employment.

In the present matter, the petitioner has not provided an adequate description of the beneficiary's job duties and has provided documentation that suggests that its staffing levels at the time the Form I-129 was filed were insufficient to relieve the beneficiary from having to primarily focus on performing non-qualifying job duties.

First, with regard to the petitioner's staffing at the time of filing, the petitioner has indicated that two of the three positions that are subordinate to the beneficiary were filled by individuals who are employed abroad. The organizational chart that was submitted in response to the RFE specifically states that [REDACTED] the application engineer, and [REDACTED], the administrator, are both employed by the foreign entity and are in the United States on temporary assignment. The petitioner has provided no documentation to establish that it actually pays either individual for the services they purportedly render to the U.S. entity. Even if the U.S. and foreign entities are affiliated through some form of common ownership, as claimed, the petitioner is still a separate entity. Therefore, it must provide documentary evidence to establish its employment of any individual, even those that may be permanent employees of the foreign entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As the petitioner has failed to establish that it employed anyone other than the beneficiary and his superior at the time the Form I-129 was filed, the AAO is left to question how the petitioner was able to relieve the beneficiary from having to primarily perform the daily operational duties. It serves to reason that if the only individuals the petitioner employed were the beneficiary and his superior, then the beneficiary would have no choice but to perform the petitioner's non-qualifying tasks in order to ensure the petitioner's continued operation. 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).

That being said, the AAO must address the other relevant issue in this discussion, which is the description of the beneficiary's proposed job duties, a key factor when determining whether the proposed employment is within a qualifying managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Precedent case law has firmly established the significance of providing a detailed description of the beneficiary's actual duties, which reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). As such, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. The AAO will then consider the job description in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

In the present matter, the description provided suggests that a considerable portion of the beneficiary's time would be spent performing non-qualifying tasks, such as overseeing the local network and addressing issues that may come up to ensure continued operation at all times; overseeing all aspects of reselling, including payment terms and shipping; attending trade shows to visit clients and resellers; and processing repairs, which the beneficiary will continue to do until a technician is hired to assume this job duty. While the petitioner did not assign a percentage of time that the beneficiary would spend on any of the named tasks, the fact that most of the tasks that were given are non-qualifying only further supports the director's finding that the beneficiary would not primarily perform duties within a qualifying capacity. While the petitioner's lack of a sufficient support staff certainly explains its need to assign the above mentioned non-qualifying tasks to the beneficiary, the idea that the petitioner has not progressed to a stage of development where it can relieve the beneficiary from primarily performing non-qualifying tasks indicates that it is unable to support the beneficiary in a qualifying managerial or executive capacity. While the petitioner indicates that the beneficiary's duties would include managing a local staff, this claim is simply inconsistent with the evidence of record, which suggests that the petitioner does not have a staff for the beneficiary to manage. As the petitioner has failed to establish that the beneficiary would be employed in a managerial or executive capacity, this petition cannot be approved.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that 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).

Furthermore, the record suggests that the petition does not warrant approval based on additional grounds that were not addressed in the director's decision. Namely, the record is silent on the issue of the beneficiary's foreign employment. As such, the AAO cannot conclude that the petitioner meets the requirements of 8 C.F.R. §§214.2(l)(3)(iii) and (iv), which require that the beneficiary has at least one year of full-time employment

with a qualifying entity abroad within three years prior to filing the petition and that such employment was within a qualifying managerial or executive capacity, respectively.

Lastly, service records show the petitioner's previously approved L-1 employment of the beneficiary. In light of this information, the AAO notes that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. CIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are 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 applications or petitions 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 Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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

ORDER: The appeal is dismissed.