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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 121 50077 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

AUG 1 0 2004

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)

ON BEHALF OF PETITIONER:

[redacted]

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, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director, California 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 is a California corporation that was established in the year 2000 and claims to be engaged in the business of manufacturing and exporting Styrofoam containers. The initial petition for authorized employment was valid from February 2001 to February 2002. The petitioner now seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for an additional two years at an annual salary of $48,000. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. On appeal, counsel disputes the director's decision and submits a brief in support of his assertions.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) 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 issue in this proceeding is whether the petitioner has established that the beneficiary would be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means 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), provides:

> The term "executive capacity" means 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;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner submitted a number of documents establishing its legal existence and the distribution of its stock shares. The petitioner also provided the following description of the beneficiary's U.S. job duties:

> [The beneficiary] will continue serving as Vice President of [the petitioner]. As such he is responsible for setting and implementing company policies-[sic] including broad economic as well as specific technical protocol-dealing with, for instance, pricing, purchasing and labor costs, product development and manufacturing standards; developing marketing strategies, policies and practices and supervising their implementations; making personnel decisions regarding hiring and firing of professionals; reviewing, negotiating, and signing contracts on behalf of the company's management. This position is executive in nature and involves a wide latitude of discretionary decision making, with minimal supervision. . . .

On April 16, 2002, CIS issued a request for additional evidence. The petitioner was asked to provide a number of documents, including a more detailed description of the beneficiary's duties. The petitioner was also asked to submit a copy of its organizational chart, as well as several of its quarterly wage reports.

In response, the petitioner stated that it has completed the initial phase of its plans and states that it has hired a production manager to oversee production; a molding supervisor to oversee machine operators; a tool room contractor to manage the tool makers; and an engineer to handle engineering and design needs. The beneficiary also provided the following statement regarding his duties:

> At present, much of my energy is devoted to directing a strong marketing campaign, setting clear economic goals and policies, and supervising and directing their implementation. In that respect, I have retained two sales associates . . . . Our goal is to acquire large national accounts, which allow most effective use of our resources. I still make final determinations regarding economic variables such as pricing, timelines, and other applicable costs on a daily basis, but hope to hire a manager/financial officer to assist me with such duties. I have been in close contact with our parent company regarding our progress. . . .

The petitioner also submitted several service invoices showing the employment of three temporary workers in January 2002, as well as a quarterly wage statement from the fourth quarter of 2001 indicating that the petitioner had two employees aside from the beneficiary. It is noted that in support of the petition, the petitioner submitted a Form I-9 for each of the two employees, showing that both were hired in 2001 prior to the filing of the petition. Although the petitioner also submitted its first quarter 2002 quarterly wage statement showing two additional employees, there is no evidence that either of the two employees were hired prior to the filing of the petition, particularly since the petitioner did not submit a Form I-9 for the two most recent hires.

On September 4, 2002, the director denied the petition concluding that the petitioner's current stage of development and staffing level would not allow the beneficiary to primarily focus on performing executive duties, as claimed.

On appeal, counsel objects procedurally to the director denying the petition without issuing a notice of intent to deny pursuant to the regulations at 8 C.F.R. § 214.2(l)(8)(i). While counsel is correct in noting that the director did not issue a Notice of Intent to Deny, the director promptly issued a notice requesting additional information, which served the same purpose as a notice of intent. By requesting additional evidence the director effectively informed the petitioner that the record, as it appeared at the time the request was issued, did not have sufficient evidence to warrant approval of the petition. The purpose of an intent to deny notice is to give the petitioner fair warning of reasons for the intended denial. In the instant case, this was adequately accomplished with a notice requesting additional evidence that was missing from the record.

Counsel also asserts that the director erroneously denied the petition because the beneficiary initially served in the position of vice president and later switched to the position of president. Contrary to counsel's interpretation, the denial merely shows that the director reviewed the contents of the petitioner's July 3, 2002 letter to CIS in which the beneficiary's change of position from vice president to president was discussed. There is no indication that the director objected to such a change or that he focused on this change as a basis for denial.

Furthermore, counsel is mistaken in asserting that the director pointed to "a dispute regarding the number of employees employed by [the petitioner]." As with the above contention over the beneficiary's position titles, the director merely reviewed the documentation regarding the petitioner's hiring of personnel. There is no indication that the director viewed the petitioner's hiring of additional employees over time as an issue of the petitioner's credibility. The director merely reviewed the number of new hires, apparently in an effort to establish how many employees were actually working at the time the petition was filed. This information is relevant in light of the fact that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). As such, the only employees that can be considered as part of the petitioner's structural hierarchy are those individuals that had already been hired as of the filing date of this petition. According to the documentation submitted, the petitioner employed two permanent employees, aside from the beneficiary, and three temporary employees who were provided by a temporary employment agency.

Counsel correctly notes 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* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). 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, or the absence of employees who would perform the non-managerial or non-executive operations of the company. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). While counsel claims that the beneficiary is an executive who performs primarily executive duties, the petitioner failed to convey this notion in a detailed description of the beneficiary's daily job duties. 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). 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). Although the director requested a specific job description in the request for additional evidence, the petitioner's reply contained only a vague overview of the beneficiary's job and failed to convey an understanding of what the beneficiary actually does on a daily basis. 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).

Counsel disputes the director's reference to the petitioner as a "new office," claiming that the petitioner is not a new office and that it is simply requesting an extension of the beneficiary's L-1A status. However, counsel's interpretation of the law is incorrect. Although the term *new office,* as defined by the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F), applies to companies that have been doing business for less than one year, the fact that the petitioner initially applied for L-1A status as a new office indicates that when seeking an extension of the original visa petition validity it will be subject to those regulations that specifically apply to a petitioner that initially obtained its visa as a new office. As such, counsel's statements in regard to this issue are without merit.

Finally, counsel asserts that "[w]hen a Petitioner is requesting an extension of the beneficiary's L-1 status, the issue is Petitioner's [sic] business activities." Counsel cites the regulation at 8 C.F.R. § 214.2(l)(7)(i) in support of this assertion. However, the cited section of the Code of Federal Regulations does not support counsel's statement. Rather, the section cited discusses the procedures that take place in the event of an

approval of the petition. While the petitioner's business activities are clearly relevant to its overall claim, as previously stated, 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). Although the beneficiary's duties may have been previously reviewed when seeking approval of the initial L-1A visa petition, the director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear 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).

Further, 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).

Although the petitioner has submitted a number of additional Forms I-9 indicating that it has hired more personnel, such documents must be accompanied by other evidence to show that these employees have commenced work activities, as a Form I-9 indicates only whether an individual is authorized to work, not that the individual has obtained work at a certain establishment. Furthermore, since all of the new Forms I-9 submitted on appeal were signed after the petition was filed they are irrelevant in the instant proceeding. *See Matter of Michelin Tire Corp., supra.*

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The general job descriptions provided fail to establish that a majority of the beneficiary's duties would be primarily directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he would be relieved from performing non-qualifying duties. Nor has the petitioner demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence to establish that the petitioner was doing business over the course of the year prior to filing the instant petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B). As stated above, the initial petition was approved in February 2001. As such, the petitioner is expected to have been doing business since that time. However, the earliest evidence that indicates that the petitioner was doing business consists of invoices dated November 2001, nearly nine months after the initial petition was approved. Furthermore, the record contains a document titled "Fictitious Business Name Statement," dated October 22, 2001. In that document, the petitioner was asked in item No. 5 whether it had started doing business. The petitioner's response to that question was "no." Accordingly, the AAO concludes that the petitioner had not been doing business for the requisite regulatory time period.

Also beyond the decision of the director, the record does not indicate that the petitioner has maintained a qualifying relationship with a foreign entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(I) state:

> *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

> *Branch* means an operation division or office of the same organization housed in a different location.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) state:

> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

> *Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
>
> (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In the petition, the petitioner indicated that it is a subsidiary of Gujarat Packfoam Pvt., Ltd., located in India. In support of this claim, the petitioner submitted six stock certificates, three of which were dated October 23, 2000, and the other three dated November 12, 2001. The stock certificates dated October 2000 allot 520 shares to the foreign entity and 240 shares to each of two individuals. The stock certificates dated November 2001 allot an additional 682 shares to the foreign entity and 599 shares to each of two additional individuals. Thus, of the 2880 shares of stock that were issued through November of 2001, only 1202 shares (approximately 42 percent) belong to the foreign entity. The remaining 1678 shares are owned by four individuals. Thus, even though the foreign entity alone owns more shares than any of the other four individuals, the four individuals combined own 52 percent of the petitioner's issued stock. As such, the petitioner cannot be deemed a subsidiary of the foreign entity. Nor does the record suggest that the two entities are affiliates of one another. It is noted that 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). As such, due to the additional grounds discussed above, this petition cannot be approved.

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.

ORDER: The appeal is dismissed.