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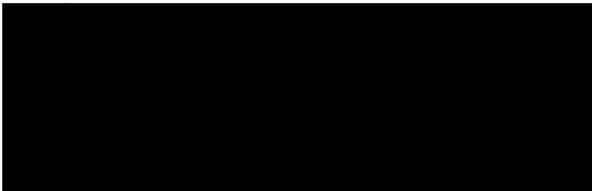


FILE: LIN 03 079 52861 Office: NEBRASKA SERVICE CENTER Date:

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

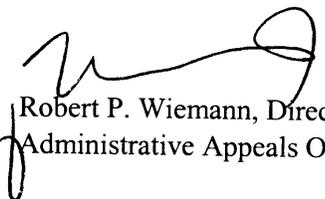
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was incorporated in Georgia in 2001 and claims to operate a gas station and a minimart. The petitioner claims to be a subsidiary of Golden Oil industries, Ltd., located in India. It claims \$875,566.00 in gross annual income and \$19,567.00 in net annual income for 2002. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its vice president and chief executive officer for three years, at an annual salary of \$35,000.00. The director determined that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the evidence is sufficient to demonstrate that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity.

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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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 regulation at 8 C.F.R. § 214.2(l)(7)(i)(C) states in part:

Amendments. The petitioner shall file an amended petition, with fee, at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity or employment (i.e., from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The petitioner initially stated that the entity located in Topeka, Kansas was petitioning for an extension of stay on behalf of the beneficiary. The petitioner submitted copies of the beneficiary's I-94, which indicated that he entered the United States on a B-2 visa on July 2, 2001, and was to be classified as such until January 1, 2002. The petitioner also submitted a copy of the original Form I-797A.

The director, in his Notice of Request For Evidence, specifically requested:

The evidence provided indicated that the beneficiary was initially granted L-1A status to set up a new office in Texas. However, this extension petition is for an entity in Kansas. Therefore, it does not appear that the beneficiary was performing the duties for which the petition was granted.

You must submit evidence regarding the purpose of the initial petition and whether the beneficiary performed the duties described in that petition. Also provide evidence that the beneficiary was authorized by the Service to conduct business in a state other than that specified in the approved petition.

In response to the director's request for additional evidence on the subject, counsel stated in part:

Initially, the company set up its offices in Texas to explore business opportunities in the United States. The beneficiary was performing his duties of establishing the United States operations i.e. meeting with sellers, brokers, and bankers. Also, the beneficiary was planning, budgeting and performing administrative duties. The beneficiary is performing the same duties that were listed in the initial L-1A petition except at a different location.

We are not aware of any regulation or a process by which a U.S. Company seeks the approval of the INS to conduct business in a specific state. The L-1A company is authorized by the Service to do business in the United States. The U.S. Company can domesticate itself in any state to do business.

The director subsequently denied the petition. The director stated that although counsel claimed that it was unaware of any regulations or processes used to seek approval to do business in a specific state, with the first petition the petitioner was required to provide "evidence of the entity and indicate where the beneficiary would be working and what his duties would be." See 8 C.F.R. § 214.2(l)(7)(i)(C). The director noted: "[f]orming a new entity in a different state and transferring the beneficiary to such entity is clearly a change in the approved relationship and a change to the original petition." The director concluded by stating that the petitioner

had failed to submit an amended petition at the time the beneficiary began employment in Kansas; therefore, he had not received authorization by the Service for employment. Hence, the director concluded that it did not appear that the beneficiary maintained his initially authorized status and subsequently denied the petition.

On appeal, counsel fails to address the director's decision in denying the petition on grounds that the beneficiary, by transferring to another state to begin employment without first filing an amended petition with the Service, was out of status at the time the instant petition was filed. In the instant case, the I-797A submitted by the petitioner in reference to the beneficiary's initial status in the United States read in part:

The above petition and change of status have been approved. The status of the named foreign worker(s) in this classification is valid as indicated above. The foreign worker(s) can work for the petitioner, but only as detailed in the petition and for the period authorized. Any change in employment requires a new petition.

The evidence of record clearly demonstrates that the beneficiary was out of status at the time the petition in the instant case was filed. There is no evidence to show that an amended petition was filed on behalf of the beneficiary at the time he began working for the company located in Topeka, Kansas. Therefore, the director's decision with respect to the beneficiary being out of status at the time the instant petition was filed will be affirmed.

Section 101(a)(44)(A) of 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;
- (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 initially described the beneficiary as being in charge of planning, expansion, hiring, banking, accounting, sales, marketing, and budgeting. The petitioner also described the beneficiary’s job duties in a letter of support and in response to the director’s request for additional evidence, all of which has been made a part of the record and therefore, will not be repeated here.

The director, in denying the petition, determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed primarily in a managerial or executive capacity. The director noted that many of the beneficiary’s proposed duties such as “performing purchasing duties, attending training sessions, and performing marketing duties” were not managerial or executive in nature. The director further noted that the petitioner failed to clearly define the beneficiary’s administrative duties. The director stated that the evidence presented was insufficient to determine whether the two managers will actually be performing managerial or supervisory duties sufficient to relieve the beneficiary from performing the day-to-day duties of the organization. The director concluded by stating that because an individual oversees a small business does not necessarily establish him/her eligible as an L1A or L1B intracompany transferee. The director also stated that based on the evidence of record, it appeared that the beneficiary would be performing the day-to-day duties of the business.

On appeal, counsel disagrees with the director’s decision and asserts that the evidence overwhelmingly demonstrates that the beneficiary has been and will be employed primarily in a managerial or executive capacity. Counsel describes the beneficiary’s duties in part as:

As VP and CEO, the beneficiary spends 10% of his time on the management of the retail operations (meet with staff to implement policy, advise staff of new products of [sic] services, encourage team building, and obtain licenses related to the business); 15% of his time on administrative functions, including recruiting, hiring and training of staff; 15% of his time on planning, budgeting, banking, finance and accounting, review of financial statements, meeting bank officials, arranging loans, and providing prospectuses to banks; 40% of his time searching for, reviewing and analyzing potential new investments, analyzing zoning and legal issues, and negotiating acquisitions and; meeting with potential partners, co-investors, sellers, brokers, and

preparing due diligence, meetings with sellers, brokers, reviewing contracts, and review contracts with attorney.

Counsel further contends that similar one-person or small-staff office petitions have been granted by the AAO, and cites to unpublished decisions in support of his contentions.

Counsel's assertions are not persuasive. The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D.GA. 1988), as support for petitioner's position. *Mars Jewelers* raised the question of whether the beneficiary qualified as a manager or executive for purposes of obtaining a permanent immigration visa under the previous "Sixth Preference" category. Counsel has not established that the facts in the *Mars Jewelers* case are analogous to the facts in the instant case or that the statutory and regulatory provisions used are applicable. In the *Mars Jewelers* decision, the petitioner was requesting an extension of stay for the beneficiary. The court ruled that the size of an organization was not to be considered as a sole factor in determining the beneficiary's eligibility. However, in the current petition, the petitioner is seeking the beneficiary's services for the first time in the Topeka, Kansas office, and company size was not considered the controlling factor in determining the beneficiary's ineligibility as an intracompany transferee. Accordingly, counsel's reference to *Mars Jewelers* is not persuasive.

Counsel also asserts on appeal that the instant case is similar to other cases that have come before the AAO. Counsel contends that the AAO should follow unpublished decisions in granting an extension of stay for the beneficiary, in that the beneficiary is capable of operating the U.S. organization with the assistance of two managers. Counsel has not shown that the facts of the instant case are similar to the decisions cited. Moreover, while 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. An unpublished decision carries no precedential weight. See *Chan v. Reno*, 113 F.2d 1068, 1073 (9th Cir. 1997) (citing 8 C.F.R. § 3.1(g)). As the Ninth Circuit says, "[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference." *Id.* (citing *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)). In the instant matter, the petitioner has failed to submit sufficient evidence to demonstrate that the beneficiary will be employed primarily in a managerial or executive capacity. It appears from the record that the beneficiary will primarily be engaged in the day-to-day, non-qualifying duties of the organization.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.