

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

FILE: EAC 06 169 54323 Office: VERMONT SERVICE CENTER Date: **AUG 03 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)

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, 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 summarily dismissed.

The petitioner states that it is a supplier of fire protection systems. It seeks to employ the beneficiary as a nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L) in the position of fire protection specialist. The director denied the petition based on the conclusion that the petitioner failed to establish that the beneficiary has been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner indicated on the Notice of Appeal (Form I-290B) that she would submit a brief and/or additional evidence to address the director's denial within thirty days. Although counsel submitted an explanatory statement on Form I-290B, she failed to address the director's conclusions. In this brief statement, counsel stated:

The Service Center opinion is wrong on the law, gives no weight or credence to valid, uncontroverted evidence, and does not include a meaningful analysis of the facts and evidence presented, specifically with respect to the beneficiary's duties as a functional manager as required in EAC-99-189-51397 (AAO, Jan. 18, 2001).

Counsel's general statement on the Form I-290B did not address or specifically identify any errors on the part of the director, and is simply insufficient to overcome the well-founded and logical conclusions the director reached based on the evidence submitted by the petitioner. 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)).

On the Form I-290B received on July 21, 2006, counsel for the petitioner clearly indicated that she would send a brief with the necessary evidence to the AAO within thirty days. According to 8 C.F.R. § 103.3(a)(2)(i), the petitioner "shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision," which in the case at hand would be no later than Monday, July 24, 2006. Although the petitioner requested additional time to submit its arguments on appeal, to date there is no indication or evidence that the petitioner ever submitted a brief and/or evidence in support of the appeal with the Service or with the AAO.

On March 27, 2007, the AAO sent a fax to counsel. The fax advised counsel that no evidence or brief had ever been received in this matter and requested that counsel submit a copy of the originally submitted brief and/or additional evidence, if in fact such evidence had been submitted, within five business days. On that same day, the AAO received a fax from counsel's office, in which counsel affirmed that no brief had been submitted within the allotted time period.

Despite the lack of argument or additional evidence submitted on appeal, the AAO notes that counsel specifically objects to the director's findings with regard to the function manager analysis. A review of the record, however, indicates that the director's decision was warranted. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). In this matter, the fact that the beneficiary is not managing and will not manage a subordinate staff is not disputed. Although the petitioner claims that subcontractors are retained to perform the fire installation services, the record is insufficient to demonstrate that the beneficiary is elevated to a primarily managerial position by virtue of the presence of subcontractors. In light of this factor, the director properly evaluated the beneficiary's eligibility as a function manager, since the petitioner claims that the beneficiary manages this aspect of the petitioner's business.

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, 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. 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. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Instead, it appears upon review of the record that the beneficiary is engaged in the actual installation and design of the petitioner's fire protection services, thereby negating the claim that he is a function manager. Upon review, the AAO concurs with the director's analysis and conclusions on this issue.

Nevertheless, as stated above, absent a timely filed and clear statement, brief and/or evidence to the contrary, the petitioner does not identify, specifically, an erroneous conclusion of law or statement of fact. Hence, the appeal must be summarily dismissed. See 8 C.F.R. § 103.3(a)(1)(v).

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

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. Inasmuch as counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the petitioner has not sustained that burden. Therefore, the appeal will be summarily dismissed.

EAC 06 169 54323

Page 4

ORDER: The appeal is summarily dismissed.