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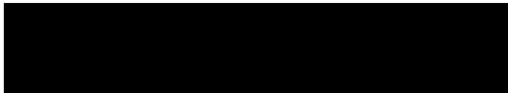
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D7

File: SRC 04 100 52669 Office: TEXAS SERVICE CENTER Date: OCT 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)

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 F. 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 is a Florida corporation allegedly engaged in the Italian ceramic business. The petitioner seeks to employ the beneficiary as its sales 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 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 this previously approved employment.

The director denied the petition after concluding that the petitioner failed to establish that the beneficiary will be employed in a 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 both an executive and manager. Counsel also submits a brief and additional evidence.

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.

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.

As a threshold issue and beyond the decision of the director, it is noted that the petitioner sought in its petition the "[c]ontinuation of previously approved employment without change." However, the instant petition was filed on February 23, 2004, almost four months after the expiration of the initial "new office" petition on November 1, 2003. As the regulation at 8 C.F.R. § 214.2(l)(14)(i) requires petition extensions to be filed before the expiration of the original petition, the petition must be denied for this additional reason. The petitioner should have characterized this petition as a petition for "new employment." However, regardless of whether the instant petition has been filed as a petition for "new employment" or as a timely filed extension petition seeking the "continuation of previously approved employment," the "new office" extension criteria in 8 C.F.R. § 214.2(l)(14)(ii) should be applied.

In view of the above, 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, and states on appeal that the beneficiary will be employed as both a manager and an executive. A petitioner may not claim that a beneficiary will 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 February 12, 2004 as follows:

[The beneficiary] in the position of Sales Manager will manage all sales activities of the establishment: he will direct staffing, training, and performance evaluations to develop and control sales program. He will coordinate sales distribution by establishing sales territories, quotas and goals and advises dealers, distributors and clients, concerning sales and advertising techniques. He has full discretion to make all decisions in that capacity.

The petitioner indicated in the Form I-129 that it has four employees. It also submitted an organizational chart for the United States operation. The chart shows the beneficiary and the "president" both supervising an "administrative secretary," who, in turn, is shown to supervise two sales persons and one secretary. The

beneficiary, described as the "vice president" in the chart, is not portrayed as reporting to the "president."

Finally, the petitioner submitted a list of its employees as of October 15, 2003. The list includes a part-time "administration" employee [redacted] and two sales representatives described as "independent workers" [redacted]. The "president" and the "secretary" are not listed.

On March 5, 2004, the director requested additional evidence. The director requested, *inter alia*, evidence of the payment of wages to employees and a description of the job duties of each employee.

In response, counsel to the petitioner submitted a letter dated April 23, 2004 which explains the petitioner's employment status as follows:

Please be informed that the petitioner at the present time has only one employee, [redacted]. [redacted] The other two employees that were working for the company at the time the petitioner sent the above referenced application [on or about February 21, 2004], [redacted] [redacted] are no longer employed by the company, having been terminated recently.

At the present time, the only employee is [redacted] and she works as a Sales Representative, as an independent worker. She has been employed by the company since January 1, 2004 and she receives weekly payments, pursuant to the letter of the President and owner of the company enclosed herewith.

* * *

[redacted] is the President, Shareholder and Director of the company. He has worked for this company since its establishment, but he does not receive any weekly salary as shareholder of the company, but he maintains a regular daily work schedule at the office.

The company now is planning to [employ the beneficiary] as its New Sales Manager to manage all sales activities of the establishment, which must include the hiring of new sales persons and product delivery coordinators. [The beneficiary] is required to again develop the business as [it] was before his unforeseen absence during the first year of the company's start in the U.S. He had already gained much experience with the American marketing programs and is prepared to hit the ground running to grow the company again.

The counsel also described the current "sales representative" as an independent contractor who performs sales tasks for the petitioner. The petitioner asserts that she is paid on a weekly basis and submitted evidence that, between January 16, 2004 and March 31, 2004, she was paid a total of \$1,720.00.

On May 6, 2004, 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 an executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of both 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 even if the beneficiary was not present in the United States during the entire initial one-year period. 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.

As a threshold matter, it must be noted that the petitioner appears to rely heavily on its future expansion and hiring plans to qualify the beneficiary as an L-1A nonimmigrant intracompany transferee. However, the petitioner's potential for expansion may not be used to establish that the beneficiary will perform primarily qualifying duties immediately upon petition approval. 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).

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.* As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner may not claim that a beneficiary will 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 manage all sales activities; coordinate sales distribution; establish sales territories, quotas, and goals; and advise dealers, distributors, and clients concerning sales and advertising. However, the petitioner does not explain what, exactly, the beneficiary will do on a day-to-day basis to "manage" and "coordinate" these duties. This is especially important considering the petitioner appears to employ only one part-time independent contractor/sales representative. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does 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 the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, establishing sales territories and communicating with dealers, distributors, and clients are administrative or operational tasks. Equally important, the record fails to identify any workers who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent in the day-to-day operation of the business generally, e.g., answering the telephone, processing accounts payable, and invoicing customers. As the petitioner has not established how much time the beneficiary will devote to non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager. 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). To the contrary, the record indicates that it is more likely than not that the beneficiary will primarily perform the non-qualifying tasks inherent in the petitioner's business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. According to the record, it appears that the beneficiary will supervise one part-time independent contractor engaged in performing sales related tasks, i.e., the tasks necessary to produce a product or to provide a service. 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 professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Regardless, the supervision or management of independent contractors, even professionals, will not qualify a beneficiary to be classified as a managerial employee as a matter of law. *See* section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Act is quite clear that only the management of *employees* may be considered qualifying managerial duties for purposes of this visa classification. 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. Moreover, as the petitioner did not reveal the skill level or educational background of the independent contractor, the petitioner has not established that the beneficiary will manage a professional employee.¹ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

¹In evaluating whether the beneficiary manages a professional employee, the AAO must also evaluate whether the subordinate position requires 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

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 act 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, it appears that the beneficiary will primarily be a first-line supervisor of a part-time independent contractor and/or will primarily perform the 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.

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).

²While the petitioner has not 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 will primarily supervise a single non-professional independent contractor and/or will perform 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 will 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).

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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the petition is rife with inconsistencies and questionable evidentiary gaps concerning the petitioner's employment of workers. For example, counsel to the petitioner states in response to the Request for Evidence that the independent contractor [REDACTED] began working for the petitioner on January 1, 2004. However, the list of employees submitted with the initial petition indicates that this contractor began working for the petitioner in October 2003. The petitioner offers no explanation for this serious 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 petitioner asserts in the Form I-129 filed on February 23, 2004 that it has four employees. However, when asked by the director on March 5, 2004 to provide proof of the payment of wages to these employees for the past three months, counsel responded in his letter dated April 23, 2004 that two of these employees had been "terminated recently." Counsel, however, did not indicate when these employees were terminated and did not provide evidence of any wages ever having been paid to them. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Furthermore, the financial data provided by the petitioner in response to the Request for Evidence as evidence that it has been paying its sole part-time independent contractor does not contain similar notations evidencing the payment of wages to the "terminated recently" employees after the filing of the instant petition. Therefore, based on the record, it is more likely than not the "terminated recently" employees were not employed at the time the instant petition was filed and that the petitioner's averment in the Form I-129 that it employed four people was false.

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.

Beyond the decision of the director, the petitioner also failed to establish that the beneficiary was employed abroad for one continuous year within the three years preceding the filing of the petition and, even if it had, the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

Once again, 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) and (iv). In support of its petition, the petitioner has failed to provide a detailed description of the beneficiary's duties that demonstrates what the beneficiary did abroad on a day-to-day basis. The fact that the petitioner gave the beneficiary a lofty

title and was appointed to the board of directors does not establish that the beneficiary actually performed qualifying 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. [REDACTED] 1103, *aff'd*, 905 F.2d 41. 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.

Furthermore, the organizational chart submitted for the foreign entity indicates that the beneficiary did not have any supervisory or managerial authority over subordinate employees. In fact, his position appears entirely outside of the organizational hierarchy, and it is unclear whether he was ever a bona fide employee of the foreign entity. Regardless, it has not been established that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. It also has not been established that the beneficiary had the ability to direct the management and to establish the goals and policies of the foreign entity.

Accordingly, it has not been established that the beneficiary was employed abroad in a primarily managerial or executive capacity, and the petition may not be approved for this reason. 8 C.F.R. §§ 214.2(l)(3)(iii)-(iv).

If the previous nonimmigrant petition was approved based on the same unsupported and contradictory 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 an application or petition 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 Eng. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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

Finally, based on the reasons for the denial of the instant petition, a review of the prior L-1 nonimmigrant petition approved on behalf of the beneficiary is warranted to determine if it was also approved in error.

Therefore, the director shall review the prior L-1 nonimmigrant petition approved on behalf of the beneficiary for possible revocation in accordance with 8 C.F.R. § 214.2(l)(9).

ORDER: The appeal is dismissed.

FURTHER ORDERED: The director shall review the prior L-1 nonimmigrant petition approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(l)(9).