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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D7

FILE: SRC 02 274 52301 Office: TEXAS SERVICE CENTER Date: SEP 11 2007

IN RE: Petitioner: [redacted]
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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be denied, but the motion to reconsider will be granted. The previous decision of the AAO will be affirmed. The petition will be denied.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president 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, a Texas corporation, claims to be a branch of Mondragon Joyas S.A. DE C.V., located in Mexico. The petitioner claims to be engaged in the import, export and wholesale of jewelry. 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 the beneficiary's stay for an additional three years.

The director and the AAO denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. On motion, counsel for the petitioner submits a brief and additional evidence.

Eligibility in this matter hinges on whether (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity and (2) a qualifying relationship exists between the petitioner and the foreign employer. On November 14, 2002, the director denied the petition, determining that the petitioner had not established that the beneficiary would be employed in a qualifying capacity. The director noted that the evidence suggested that he would engage primarily in non-qualifying, day-to-day duties. The petitioner appealed this decision, and on December 10, 2002, former counsel for the petitioner submitted a brief and additional evidence. The AAO reviewed the evidence submitted and found it insufficient to overturn the decision of the director. In addition, the AAO found that the petitioner had not established that the petitioner and the foreign employer maintained a qualifying relationship. Consequently, the appeal was dismissed on August 15, 2005. In response, newly-appointed counsel for the petitioner filed a Motion to Reopen and Reconsider on September 14, 2005.

The AAO will first address the petitioner's motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

On motion, counsel for the petitioner has submitted the following evidence: (1) a translated copy of the foreign entity's business registration in support of the claim that the beneficiary is the majority owner; (2) two stock certificates for the U.S. entity, dated October 25, 2000; (3) Minutes of the Annual Meeting of the Shareholders of the U.S. entity, dated July 3, 2002; (4) copies of the petitioner's Form 1120, U.S. Corporation

[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

Income Tax Return, for the years 2003 and 2004; (5) Form 1120X, Amended U.S. Corporation Income Tax Return for 2003; (6) an updated list of the beneficiary's duties; and (6) a list of all of the petitioner's employees.

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. Specifically, the corporate documentation submitted, such as the stock certificates dated October 25, 2000 and the meeting minutes dated July 3, 2002 were clearly in existence and available for submission at the time of the filing of the petition. While the corporate tax returns for 2003 and 2004 are submitted to demonstrate that the petitioner was doing business on a regular basis, these documents are not persuasive, since the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition, which in this case was September 23, 2002. 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). This premise is also applicable when reviewing the updated description of duties of the beneficiary and the list of the petitioner's current employees, since the issue in question is whether the beneficiary would have been employed in a qualifying capacity and would have been relieved from performing non-qualifying duties from the date the petition was filed.

As a result, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

With regard to the motion to reconsider, the regulation at 8 C.F.R. §103(a)(3) states:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner has satisfied the requirements for a motion to reconsider, and the AAO will consider the petitioner's arguments.

The first issue in this matter is whether the beneficiary has been employed in a 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.

On motion, counsel for the petitioner alleges that the beneficiary will in fact be performing managerial and/or executive job duties, and provided an updated list of his duties in a letter from the petitioner dated September 13, 2005. The list of duties included:

- Supervising employees and agents employed with the company (2.5%);
- Overseeing employee training; hiring and firing employees (2.5%);
- Planning, developing and implementing company policy and strategy (10%);
- Developing and implementing policies and procedures for business operations (10%);
- Determining mark-up percentages necessary to insure profit, based on estimated budget, profit goals and average rate of jewelry stock turnover (5%);
- Developing policies and procedures for procurement of jewelry markets (10%);
- Authorizing purchase of jewelry merchandise based on estimates (5%);

- Formulating pricing policies for sale of jewelry products/maintenance services (5%);
- Reviewing all marketing strategies and evaluating market developments (10%);
- Planning business objectives, developing marketing policies and establishing responsibilities and procedures for attaining objectives with the business operations of the company (10%);
- Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives and plans in accordance with current conditions (10%);
- Planning and developing public relations policies designed to improve the business image and relations with customers, the industry, the vendors, and the public (10%);
- Planning and implementing new operating procedures to improve efficiency and reduce costs (10%).

Additionally, a list identifying all employees of the petitioner was submitted. The petitioner also supplies a legal argument, citing precedent decisions it finds relevant to this matter.

The petitioner first claims that the AAO erred in relying on the size of the petitioner in rendering its decision. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in approving a visa for a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (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 AAO noted that despite the petitioner's claim that it employed five other staff members, no evidence in support of this claim had been submitted for the record. Absent evidence to show that the beneficiary would be relieved from performing non-qualifying duties by a subordinate staff whose tasks were designated as such, the AAO finds that the prior decision on this issue was proper. A mere claim that the petitioner employed others is insufficient in this matter. 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)).

Counsel further refers to the unpublished decision of *Matter of Irish Dairy Board* in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel next claims that the beneficiary was managing an essential function of the petitioner, and the fact that the AAO did not consider this alternative in the regulatory definition when rendering its decision now warrants the approval of the petition. Counsel further claims that the AAO did not look at the entirety of the beneficiary's job duties, and claims that according to *Johnson v. Laird*, 537 F. Supp. 52 (D.C. Ore. 1981), the terms manager and executive also apply to those persons who supervise no subordinates and instead manage essential functions. The AAO disagrees.

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). 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.

Counsel raises the claim that the beneficiary is a function manager for the first time on motion, presumably after the director and the AAO found that the record contained no evidence that the beneficiary supervised subordinate qualifying personnel. The newly-provided description of duties of the beneficiary on motion still includes the supervision of personnel, and simultaneously includes various low-level functions such as "determining mark-up percentages" and "formulating pricing policies for sale of jewelry products/maintenance." To allow the broad application of the term "essential function" to include any minor or low-level function within a business would render the term meaningless. The term "essential" is defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, the petitioner must establish that the function is inherent and indispensable to the business rather than a low-level collateral task that is superfluous to the company's essential operations.

The second issue in this matter is whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the AAO noted that the business registration for the foreign entity was not translated; therefore, the document was of no evidentiary weight and would not be considered. Additionally, the AAO noted that one stock certificate, showing 1,000 shares of the petitioner were issued to [redacted], was in evidence. The AAO noted that this certificate alone was insufficient to establish a qualifying relationship. evidence submitted prior to adjudication was insufficient to establish the qualifying relationship. On motion, counsel contends that the beneficiary is the majority owner of both the petitioner and the foreign entity, and submits documentation in support thereof.

Upon review, the petitioner submits a translated copy of the foreign entity's business registration, demonstrating that the beneficiary is the majority owner. With regard to the U.S. entity, two stock certificates are submitted, showing that [redacted] owns 6,000 shares and that the beneficiary owns 54,000 shares. Minutes of the Annual Meeting of the Shareholders, dated July 3, 2002, are submitted in support thereof.

The AAO, however, is not convinced of the ownership of the U.S. petitioner. The initial stock certificate contained in the record, dated October 23, 2000 and displaying the number 1, indicates that [redacted] owned 1,000 shares. The certificates submitted on appeal are questionable. For example, [redacted]'s new certificate, dated October 25, 2000, is numbered as 2; however, the beneficiary's certificate has no number at all. The petitioner did not submit the stock transfer ledger to show what happened to certificate number 1, nor is there any discussion of this certificate and the issuance of the initial 1,000 shares in the meeting minutes. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The evidence submitted on appeal in support of the petitioner's ownership is questionable. In addition, there is no explanation from the petitioner as to why these certificates were not submitted with the initial petition, since they dated back to October 25, 2000. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 Motion to Reconsider is granted. The AAO's decision of August 15, 2005 is affirmed. The petition is denied.