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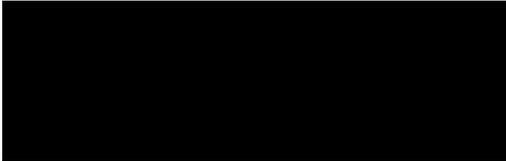
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File: LIN 04 055 50335 Office: NEBRASKA SERVICE CENTER Date: **DEC 22 2005**

IN RE: Petitioner: 
Beneficiary:

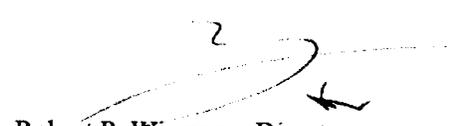
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 filed this nonimmigrant petition seeking to extend the employment of its vice 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 is a corporation organized in the State of Washington that is engaged in the export of aircraft and civil aviation parts and machineries. The petitioner claims that it is the subsidiary of [REDACTED] located in Kowloon, Hong Kong. The beneficiary was initially granted a six month period of stay in the United States which was subsequently extended for an additional one year period. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition, concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) the petitioner was doing business at the time of the petition's filing.

The matter is now before the AAO on appeal. On appeal, counsel for the petitioner contends that the director failed to consider evidence submitted, and incorrectly interpreted the laws and regulations as applicable to this petition. In support of these contentions, counsel 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 first issue in this 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.

With the initial petition, the petitioner submitted a letter dated December 16, 2003 which provided an overview of the beneficiary's position in the United States. The letter explained that the beneficiary held a Bachelor's and a Master's degree in Engineering from the Beijing University of Aeronautics and Astronautics. With regard to his specific duties as vice president of the U.S. entity, the petitioner stated:

As vice president, [the beneficiary] will continue to supervise Petitioner's operation. He will direct policy and develop strategies to implement directives from the overseas parent. He will actively participate in making strategic decisions and take charge in the execution of such decisions relating to the business of the U.S. branch. The best example is the strategic relocation of Petitioner from California to Seattle. [The beneficiary] will have immediate supervisory power over managers of various departments. He will have supervisory authority over sales representatives and office staff. Furthermore, he will direct the development, and make business plans for Petitioner. He will make critical decisions based on Petitioner's financial performance and market conditions. He is responsible for supervising Petitioner's business, and act on its behalf, while taking into consideration the recommendations and suggestions of those who work under him.

The petitioner also submitted an organizational chart for the U.S. entity which was current as of October 12, 2003. The organizational chart demonstrated that the beneficiary reported to the president, and oversaw the sales department, the office, and the project department. The chart, however, indicated that the only employee working under the beneficiary's direction was the office secretary, whose duties were to tend to office matters. The sales department and project department noted potential positions which were vacant at the date of the chart's certification.

The director found this initial evidence to be insufficient, and consequently issued a request for evidence on February 6, 2004. The director specifically noted the lack of subordinate employees under the beneficiary as indicated on the organizational chart. The director's request required the petitioner to submit additional information that established that as of the filing date of the petition, the beneficiary was functioning in either a managerial or executive capacity by demonstrating that the duties of his position satisfied all four regulatory criteria of one or both capacities. Additionally, the director required evidence demonstrating that the petitioner employed a support staff to relieve the beneficiary from performing non-qualifying duties, and requested employment verification in the form of quarterly tax returns and W-2 forms.

In a response dated April 19, 2004, the petitioner, through counsel, submitted the requested information. Counsel explained the vacancies on the organizational chart by stating that due to the petitioner's move from California to Washington, the company experienced a temporary fluctuation in its number of employees. Counsel stated that as of April 2004, the petitioner currently employed five persons, namely, the president, the beneficiary as vice president, a sales manager, a project manager, and an office secretary. Counsel further stated that the beneficiary was in the process of interviewing additional persons in order to staff the corporate offices. A revised organizational chart was submitted to corroborate these claims.

With regard to the beneficiary's employment in a qualifying capacity, counsel stated:

[The beneficiary's] duties and responsibilities include: (1) overseeing the management and operation of the company and making significant decisions; (2) setting goals and policies for the company and making plans to achieve the goals; (3) hiring and firing employees; (4) directing and giving orders to front-line managers; (5) signing and executing contracts on behalf of the company; and (6) periodically reporting to the parent company.

In addition, a separate statement of the beneficiary's duties was included in the response. This statement, prepared and signed by the beneficiary on April 15, 2004, certified that his duties included the following:

1. Oversee the management and operation of the company and make decisions significantly impact[ing] the company's business. For example, I decided to move the company's corporate headquarters from California to Seattle, Washington because I see a better match between the company's business and the economic strength of the [g]reater Seattle areas.
2. Set goals and policies for the company and [devise] plans to achieve such goals. For example, I made the decision to diversify the company's business. We successfully entered into an agreement to provide computer software to a buyer in USA. This is in addition to our regular business of aviation parts and supplies.
3. Hire and fire employees. I let go a couple of employees after the company moved to Seattle, and hired a Sales Manager and Project Manager and a Secretary for the Seattle offices. I continue to interview and recruit additional employees to satisfy the company's personnel needs.
4. Direct and give orders to the Sales Manager, Project Manager, and other employees in carrying out company's business. I also engage and work with professionals such as attorneys, accountants and auditors to ensure smooth operation of the business.
5. Enter into contracts and agreements which are effective and binding upon the company. I have the authority to sign contracts and other business agreements with any other parties and/or entities.
6. Periodic report to parent company in Hong Kong about major development, issues and achievements of the company.

On May 10, 2004, the director denied the petition. The director concluded that the petitioner had failed to establish that the beneficiary was functioning in a managerial or executive capacity at the time of the petition's filing. On appeal, counsel for the petitioner asserts that the director's decision is erroneous, and that contrary to the director's decision, the beneficiary does in fact supervise subordinate managers. As a result, counsel asserts that the beneficiary is qualified for the benefit sought.¹

Upon review, counsel's assertions are not persuasive. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a qualifying manager or executive by virtue of his position title, experience, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of

¹ The AAO notes that counsel also argues that the director erred by relying on the regulation at 8 C.F.R. § 103.2(b)(12) by rejecting evidence submitted by the petitioner in support of the beneficiary's qualifications. This argument is also applied by counsel with regard to the evidence submitted in support of the petitioner's business dealings. However, this assertion does not pertain to the key question of whether the petitioner has satisfied the regulatory requirements at issue in this matter, and deals with a separate and distinct procedural issue. Consequently, counsel's assertion regarding the director's rejection of evidence will be addressed separately later in this decision.

the claimed managerial and/or executive 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).

The description of the beneficiary's duties, provided in the initial letter of support as well as in response to the director's request for evidence, is vague and seems to merely paraphrase the regulatory definitions. Specifically, the identification of duties such as "setting goals and policies," "hiring and firing employees," and "overseeing the management and operation of the company" did little to clarify what the beneficiary does on an average workday. In fact, these duties are extremely similar to the managerial and executive duties set forth in § 101(a)(44)(A)-(B) of the Act, 8 U.S.C. § 1101(a)(44)(A)-(B). Although the director advised the petitioner in the request for evidence that the petitioner must show that the beneficiary satisfied each of the four distinct regulatory requirements in one or both of the regulatory definitions of managerial and executive capacity, the petitioner here claims that the beneficiary's duties are a combination of both capacities. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. As stated above, the petitioner states that the beneficiary's duties include "hiring and firing employees," a managerial duty, and "setting goals and policies," which is executive in nature. If the petitioner chooses to represent 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 has failed to satisfy this requirement with its vague and unspecific list of duties.

After the director noted a discrepancy between the petitioner's initial description of the beneficiary's duties and the organizational chart submitted (namely, its claim that the beneficiary supervised managerial employees yet the only subordinate employee listed as of the date of filing was a secretary), clarification was requested in the request for evidence issued on February 6, 2004. In response to the request, a more detailed discussion of the petitioner's organizational structure was submitted, which indicated that the beneficiary now oversaw a sales manager and a project manager in addition to the secretary. The petitioner corroborated this claim with copies of its Employer's Quarterly Report for the quarter ending March 31, 2004. However, the petitioner also submitted a copy of its quarterly return for the previous quarter ending December 31, 2003, which verified that the secretary was the only other employee of the petitioner during that period.

The petitioner's claim, in response to the request for evidence and on appeal, is that it has established that the beneficiary oversees a subordinate staff of managers and thus is operating in a primarily managerial capacity by way of this organizational structure. This claim is not persuasive.

The petition to extend the beneficiary's stay was filed on December 18, 2003. At that time, the petitioner had been incorporated for more than three years, and the beneficiary had been in the United States in L-1 status for seventeen months. However, the evidence clearly shows that at the time of filing, the only employee subordinate to the beneficiary was the office secretary who, according to the petitioner, handles "office matters." No further information was provided with regard to her duties.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory,

professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner did not provide the level of education required to perform the duties of the office secretary. By virtue of her title alone, it is presumed that her position is non-professional as the brief description of her duties suggests that she performs administrative and supportive functions. Thus, the petitioner has not established that this employee requires or possesses an advanced degree, such that she could be classified as professional. Nor has the petitioner shown that she supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that she could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employee at the time of filing was supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel for the petitioner fiercely contests this conclusion and asserts that the evidence clearly indicates that the petitioner subsequently hired two managerial employees whom the beneficiary supervises. Counsel also asserts that the beneficiary previously supervised similar employees prior to the corporate move to Seattle, yet no corroborating evidence to support this statement was submitted. Nevertheless, the regulations require the petitioner to establish eligibility **at the time the petition is filed**. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978)(emphasis added). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Id.* A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Id.*; see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

As of the petition's filing on December 18, 2003, the petitioner employed a president who oversaw the beneficiary and an office secretary who was subordinate to the beneficiary. No other employees were employed at the time, as clearly evidenced by the quarterly tax return for the quarter ending December 31, 2004. The fact that the petitioner hired two managers in the first quarter of 2004 is therefore irrelevant.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary will function in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

In this matter, the petitioner claims that it is engaged in the export of aircraft and civil aviation parts and equipment. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business.

With the initial petition, the petitioner submitted copies of invoices and transactions evidencing its apparently exclusive relationship with China National Aero-Technology. No additional documentation of sales or export to other clients or prospective customers was submitted. Consequently, in the request for evidence issued on February 6, 2004, the director requested clarification of whether the petitioner had done business with any other entity. In order to demonstrate that the petitioner was not merely acting as an agent or separate office

for China National Aero-Technology, the director asked the petitioner to provide additional documentation establishing that the petitioner had been doing business during the previous year as required by the regulations. In the response dated April 19, 2004, the petitioner stated that although it conducted large amounts of business with China National Aero-Technology, it was not their sole client. In support of this contention, the petitioner submitted copies of two air consignment notes and two invoices for equipment purchased by the petitioner as well as a contract dated December 20, 2003 (two days after the petition was filed), which apparently evidenced the petitioner's agreement to assist [REDACTED] with a demonstration at a technology convention in 2004. The relevant invoices and air consignment notes were for the months of January through March 2003. No additional evidence was submitted to evidence business transactions in the export field from March to December 2003.

On appeal, counsel for the petitioner asserts that it is vigorously expanding and has begun undertaking different tasks in addition to its originally stated services. Counsel submits additional evidence in support of this contention, including advertising for the petitioner's "wire and cable solutions." Based on this documentary evidence, as well as its reliance on the documents submitted in response to the request for evidence, the petitioner asserts that it has sustained its burden.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. As previously stated, the petitioner has been incorporated for over three years. The fact that the petitioner moved offices to a different state does not excuse the petitioner from its obligation to conduct regular and systematic business under the regulations.

The record further indicates that the petitioner would engage in the export of aircraft and civil aviation parts and equipment. However, there is no indication of continuous exports during the previous year. In addition, in the course of examining whether a petitioning company has been doing business as an export firm, it is reasonable to request that the company produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation and exportation may reasonably be expected to submit copies of the various customs forms required to permit its activities. However, no such documents were submitted.

Based on this limited information, it is clear that the petitioner was not doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claim that business may have been hindered by its move from California to Washington. However, the record is devoid of an explanation as to what the petitioner did on its own behalf, not on behalf of China National Aero-Technology, between March 2003 and December 2003. The record further lacks any explanation or documentation regarding other activities engaged in by the petitioner to promote its business during this period. Furthermore, aside from a brief explanation on appeal, the petitioner does not acknowledge the discrepancy in the record with regard to its business activities. Although it claimed to be engaged in the export of aviation equipment, it now appears to be engaged in cable and wireless services as well as participating in expositions for other companies. 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).

In the present matter, the evidence submitted at the time of filing confirmed that the petitioner had not been conducting business as required. The fact that the petitioner negotiated contracts after the filing of the petition does not automatically entitle the petitioner to an extension of the visa, for it fails to change the fact that the petitioner failed to conduct business on a regular and continuous basis during the previous year. For this additional reason, the petition may not be approved.

As previously discussed, counsel also argues that the director erred by relying on the regulation at 8 C.F.R. § 103.2(b)(12) by rejecting evidence submitted by the petitioner in support of the beneficiary's qualifications and of the petitioner's business dealings. As discussed above, 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). For this reason, evidence of the petitioner's subsequent hiring of managers and engagement in additional business dealings was not found to be persuasive by the director in his decision.

In addition, counsel argument based on this premise is further flawed. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, **as of the time the petition is filed**. See 8 C.F.R. §§ 103.2(b)(8) and (12)(emphasis added). The director is authorized to request additional evidence when the petitioner's eligibility is in question. Since the petitioner's organizational structure and business dealings, as set forth by the initial evidence accompanying the petition, did not appear to qualify the petitioner for the benefit sought, the director requested additional evidence to supplement the petitioner's claim and verify the petitioner's eligibility. For the reasons discussed above, the additional evidence submitted did not establish the petitioner's qualifications at the time of filing. For this additional reason, the petition may not be approved.

Finally, the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions for this beneficiary. 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 material 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). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, 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).

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 its discretion with respect to all of the AAO's enumerated grounds. 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).

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 appeal is dismissed.