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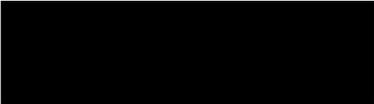
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File: WAC 04 179 53217 Office: CALIFORNIA SERVICE CENTER Date: NOV 01 2007

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. On March 7, 2006, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter for further review and entry of a new decision. On September 30, 2006, after considering further evidence, the director denied the petition. The matter is again before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa 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 is a corporation organized under the laws of the State of California and is allegedly an importer, wholesaler, and retailer of clothing and fashion accessories. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. This "new office" petition was subsequently extended for a period of two years, and the petitioner now seeks to extend the beneficiary's stay.

Upon remand from the AAO, the director denied the petition on September 30, 2006 concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily 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, the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or a function manager. In support, the petitioner submits a brief.

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 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 will primarily perform managerial

duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. On appeal, the petitioner asserts that the beneficiary will perform either executive duties *or* the duties of a functional manager. It must be noted that 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.

In the initial petition, the petitioner failed to specifically describe the beneficiary's proposed duties in the United States. The petitioner simply restated the regulations. Furthermore, the petitioner stated the following in a letter dated June 1, 2004:

[The b]eneficiary presently controls the operations of the company and the primary functions of the company through the use of management teams, joint ventures and independent contractors. As the company grows, it is projected that within the year, the company will employ 6 individuals in the capacities mentioned in the business plan. Presently, the staffing is being handled by independent contractors at each outlet working on a commission only basis.

However, the petitioner did not specifically describe the beneficiary's control or supervision of these third parties or explain how the third parties will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to the operation of the petitioner's business.

After the AAO remanded the matter to the director for a new decision, the director requested additional evidence on May 8, 2006. The director requested an organizational chart for the United States operation, job descriptions for all subordinate employees, state and federal quarterly wage reports, payroll summaries including Forms W-2, W-3, and 1099, and a more detailed description of the beneficiary's duties in the United States including a breakdown of the how much time he will devote to each duty. The director also requested clarification of the number of offices and/or retail stores operated by the petitioner and copies of all lease agreements.

In response, the petitioner submitted an organizational chart which shows the beneficiary at the top of the petitioner's organization supervising a variety of functions, retail locations, a wholesale operation, and online businesses. The chart also states that the beneficiary is responsible for placing orders from abroad and for "managing" the retail location in the Del Amo Mall and the petitioner's "wholesale business." The petitioner also submitted quarterly wage reports which reveal that the beneficiary is, and has been, the petitioner's sole employee. The petitioner did not submit Forms 1099 or other documentary evidence establishing that it has employed independent contractors.

As requested by the director, the petitioner submitted leases and/or license agreements for the three retail locations identified in the organizational chart. While the petitioner is listed as the licensee for the retail location managed by the beneficiary in the Del Amo Mall, the petitioner is not listed as the lessee or licensee for the other two locations, i.e., the Inglewood Store and the kiosks in the South Bay Mall. The tenants of the Inglewood location are [REDACTED] and the beneficiary doing business as the petitioner. The licensee at the South Bay Mall is the beneficiary trading as "Taj of India" and as "Pure Essence." The Inglewood location is operated by a third party, [REDACTED] under a profit sharing agreement dated May 19, 2002. The South Bay Mall location appears to be operated by Ravi Khosla under a similar profit sharing agreement. The

petitioner also submitted agreements concerning the purchase and sale of its products by third parties.

Finally, the petitioner submitted two letters dated July 24, 2006 in which it describes the beneficiary's job duties in the United States. As both of these letters are in the record, their contents will not be repeated *verbatim* here. In general, the letter titled "Description of Duties in the US as President" describes the beneficiary as managing the petitioner's finances, managing the retail operations through "management companies," controlling the "wholesale operations" by interacting with customers, making marketing decisions, working with web hosting companies regarding the petitioner's website, and communicating with the "overseas company." The letter titled "Typical Day's Job Description, President" describes the beneficiary as arriving at the retail location in the Del Amo Mall, reviewing sales data, communicating with the "managing companies" of the other two retail locations, calling customers and service providers, guiding the website development and hosting service providers regarding the marketing of the petitioner's products, and engaging in "executive phone meetings" with Indian contacts regarding shipments and allotments. The letters, however, do not address some of the duties ascribed to the beneficiary elsewhere in the petition. For example, the letters do not address the beneficiary's "management" of the Del Amo Mall retail location.

On September 30, 2006, the director once again denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive or a function manager.

Upon review, the petitioner's assertions are not persuasive.

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 will be either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary will primarily be employed in a managerial or executive capacity. 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" the retail operations, including the Del Amo Mall location and will "control" the petitioner's wholesale operation. However, the petitioner does not explain how, exactly, he will manage or control these duties without a subordinate staff to relieve him of the need to perform the tasks necessary to produce a product or to provide a service. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated 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).

Despite the petitioner's assertions to the contrary, it appears that the duties ascribed to the beneficiary will be primarily non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. As indicated above, the record indicates that the beneficiary is, and has been, the petitioner's sole employee. Also, since the petitioner did not submit any Forms 1099 as requested by the director, it does not appear as if the petitioner employs independent contractors. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). In view of the beneficiary's singularity, the organizational chart indicates that the beneficiary is responsible for placing orders from abroad and for "managing" the retail location in the Del Amo Mall as well as the petitioner's "wholesale business." Furthermore, the July 24, 2006 letters confirm that the beneficiary "interacts with the wholesale customers and coordinates the ordering of the merchandise overseas" and "devotes a significant amount of time with the web hosting companies and makes strategic decisions about marketing the products online." However, operating a retail location as a sole employee, dealing directly with wholesale customers, marketing, sales, and ordering products are all administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the record fails to identify any employees or contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to both the ascribed duties and the management of the business in general, it must be concluded that he will perform these tasks. As the petitioner has not established how much time the beneficiary will devote to such 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).

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. As explained in the organizational chart and wage reports, the beneficiary is the petitioner's sole employee; therefore, the beneficiary will not supervise a subordinate staff of supervisors, managers, or professional employees. Also, the petitioner's plan to hire additional employees in the future is not relevant. Only the staffing in place at the time the instant petition was filed may be used to determine whether the beneficiary will be performing qualifying duties. 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 *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Furthermore, it has not been established that the beneficiary's claimed management or supervision of the operators of the other retail locations and commission-based sales agents constitutes the supervision and control of other supervisory, managerial, or professional employees. First, it has not been established that any of these third parties are primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that these employees are performing the tasks necessary to produce a product or to provide a service, e.g., staffing retail locations and selling the petitioner's products. Second, the supervision or

management of independent contractors or service providers will not permit 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 construed to be qualifying managerial duties for purposes of this visa classification. Third, the record is not persuasive in establishing that any of these service providers are truly under the beneficiary's supervision and control. As indicated in the record, the petitioner and/or the beneficiary have entered into commission or profit sharing agreements with third parties related to the sale of the petitioner's products and/or to the occupancy of previously secured retail space. These third parties appear to be sales agents, joint venturers, or partners of the petitioner and/or the beneficiary and, thus, are not under the beneficiary's control or supervision.

Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.¹

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"

¹On appeal, the petitioner asserts that the beneficiary will manage an essential function of the organization. However, the record does not support this assertion. 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 tasks 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 be primarily engaged in performing non-qualifying operational or administrative tasks. In other words, the beneficiary will be performing the tasks related to the function rather than managing the function. 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 would 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).

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 be acting 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 given that he is the petitioner's sole employee. Moreover, as explained above, it appears that the beneficiary will be primarily performing 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.

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 petitioner's descriptions of its business operation and the beneficiary's duties are not credible and contain various gaps and inconsistencies which undermine the credibility of the petition. For example, as explained above, the petitioner submitted an organizational chart in which the beneficiary is described as "managing" the retail location at the Del Amo Mall. The record does not contain any evidence that the petitioner employs, or otherwise contracts with, anyone to operate this location. Therefore, it must be concluded that the beneficiary performs all the tasks related to the staffing and operation of this retail location. However, the letters dated July 24, 2006 completely ignore this situation and fail to attribute any tasks to the beneficiary related to the operation of the store.

Also, while the petitioner is listed as the licensee in the agreement for the retail location "managed" by the beneficiary in the Del Amo Mall, the petitioner is not listed in the relevant agreements as the lessee or licensee of the other two locations, the Inglewood Store and the kiosks in the South Bay Mall. The tenants of the Inglewood location are [REDACTED] and the beneficiary doing business as the petitioner. The licensee at the South Bay Mall is the beneficiary trading as "Taj of India" and as "Pure Essence." These agreements contradict the petitioner's assertion that it has an interest in three retail locations. 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). 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. *Id.* at 591.

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 has failed to establish that it has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence 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." To establish a "qualifying relationship,"

the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The petitioner must also establish that it and the foreign employer are "doing business." 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). A "subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K). "Doing business" is defined in pertinent part as the "regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H).

In this matter, the petitioner, a corporation, asserts in both the initial petition filed in 2004 and in the instant appeal filed in 2006 that it is 51% owned by the foreign employer, [REDACTED] located in India. According to the documentation submitted with the initial petition, [REDACTED] is an Indian "proprietorship" owned by [REDACTED]. In support of the petition, the petitioner submitted organizational documents and a stock certificate indicating that 51% of its shares have been issued to [REDACTED].

The petitioner also submitted its Forms 1120, U.S. Corporation Income Tax Return, for years 2001, 2002, 2003, 2004, and 2005. In the Forms 1120 for years 2001 through 2005, the petitioner answered "no" to the query "At the end of the tax year, did any individual, partnership, corporation, estate, or trust own, directly or indirectly, 50% or more of the corporation's voting stock?" The petitioner also answered "no" to the query regarding whether a foreign person owned, directly or indirectly, at least 25% of the petitioner's stock. Moreover, in the petitioner's 2005 Form 1120, the petitioner asserts in Schedule "E" that the beneficiary owns 100% of the petitioner's stock. All of these answers are inconsistent with the petitioner's assertion that it is 51% owned by [REDACTED]. Once again, 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. at 591-92.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity, and the petition may not be approved for this additional reason.

Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361. The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Therefore, even though the petitioner was successful in the past in petitioning for the beneficiary, the director properly denied the petition in this case.

Furthermore, if the previous nonimmigrant petitions were approved based on the same contradictory assertions regarding the petitioner's ownership and control 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. at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engr. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S.

1008 (1988).

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. 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 petitions approved on behalf of the beneficiary is warranted to determine if they were approved in error. Therefore, the director shall review the prior L-1 nonimmigrant petitions 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 petitions approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(l)(9).