

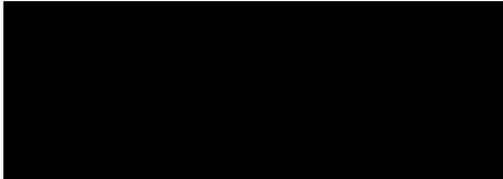
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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57.

File: WAC 08 172 51431 Office: CALIFORNIA SERVICE CENTER Date: **JUN 04 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of the beneficiary as its general 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 petitioner is a Washington corporation that seeks to employ the beneficiary from June 1, 2008 until May 31, 2011.

The director denied the petition based on the determination that the petitioner failed to establish that it has been and is currently doing business in a regular, systematic, and continuous manner.

On appeal, the beneficiary, on behalf of the petitioner, disputes the denial, claiming that the beneficiary has been employed in a qualifying capacity both abroad and in the United States and that the petitioner has been involved in the regular, systematic, and continuous provision of goods and/or services. The petitioner later submitted a brief in support of the appeal.

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 this proceeding is whether the petitioner has been and continues to do business, which 8 C.F.R. § 214.2(l)(1)(ii)(H) defines 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 the present matter, the petitioner submitted minimal evidence in support of the Form I-129, which was filed on May 30, 2008. No documentation was submitted to show the petitioner's most recent business activity. Accordingly, the director issued a request for additional evidence (RFE) on June 11, 2008, instructing the petitioner to submit, *inter alia*, its federal tax returns for 2005, 2006, and 2007 and the last four quarterly wage reports that were accepted by the State of Washington.

In response, the petitioner provided quarterly wage statements from 2004, 2005, and 2006, the most recent of which was for the second quarter of 2006. The petitioner also provided its 2004 and 2005 tax returns and numerous sales invoices, the earliest of which was from December 2005.

On July 22, 2008, the director issued two adverse decisions—one denying the petition on the basis of a lack of evidence that the petitioner is currently doing business and the other denying the petition on the basis of the beneficiary's expired status as a non-immigrant at the time the Form I-129 was filed. With regard to the latter decision, 8 C.F.R. § 214.1(c)(5) expressly states that the denial of an application for an extension of stay that is filed on Form I-129 or Form I-539 may not be appealed. As such, any of the petitioner's arguments on appeal that address the issue of the beneficiary's expired status at the time of filing cannot be addressed by the AAO.

Accordingly, this decision will focus on factors concerning the petitioner's eligibility to classify the beneficiary as a nonimmigrant intracompany transferee. With regard to this issue, the director found that the record lacks evidence to establish that the petitioner has been and currently is doing business and is therefore ineligible for the classification sought herein. Specifically, the director noted that the petitioner failed to provide tax returns from 2006 and 2007, thereby suggesting that it is not maintaining a viable business.

On appeal, the beneficiary generally repeated statutory provisions requiring that the beneficiary's proposed and past employment be within a qualifying capacity and that the petitioner continue to do business. However, the petitioner fails to address the director's specific findings regarding the U.S. entity's viability as a business, nor does the petitioner provide additional evidence showing current or recent business activity. Accordingly, the petitioner has failed to establish that it is currently doing business pursuant to the regulatory definition. Based on this conclusion, the AAO finds that the *instant petition does not warrant approval*.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 214.2(l)(3)(ii) requires evidence establishing that the beneficiary's prospective employment would be in a qualifying managerial or executive capacity. In the present matter, the petitioner provided an undated letter in support of its Form I-129, claiming that the beneficiary functions at the highest level within the petitioner's organizational hierarchy and is charged with establishing the company's goals and objectives, as well as the means by which the petitioner would meet those goals and objectives. In fact, the supporting job description described the beneficiary's role as one requiring constant interaction and collaboration with subordinate employees. However, the AAO does not only focus on the job description offered in support of the petition when assessing the beneficiary's employment capacity. While the job description is admittedly a key indicator of whether or not the beneficiary's duties meet the definition of managerial or executive capacity, the AAO cannot analyze a job description without also considering the petitioner's staffing, i.e., the manpower a petitioner has available to relieve the beneficiary from having to primarily perform non-qualifying operational tasks. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that U.S. Citizenship and Immigration Services (USCIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS 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).

In the present matter, the petitioner has failed to provide any documentation to establish whom it employed at the time the petition was filed. Therefore, even though the petitioner provided an organizational chart in an attempt to disclose information regarding its corporate hierarchy, the record lacks documentary evidence to corroborate this information. 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)). As previously noted, the petitioner failed to comply with the director's request for recent quarterly wage reports, which would identify the petitioner's employees at the time of filing and allow the AAO to compare this information with the information provided in the petitioner's organizational chart. 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). Moreover, 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). As the petitioner has failed to submit relevant requested evidence to establish that it was capable of relieving the beneficiary from having to primarily focus on daily operational tasks at the time of filing, the AAO cannot conclude that the petitioner met the requirement specified in 8 C.F.R. § 214.2(l)(3)(ii).

Second, 8 C.F.R. § 214.2(l)(3)(iii) requires evidence establishing that the beneficiary's employment abroad during the relevant time period was in a managerial or executive capacity. Accordingly, 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). Case law has established that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the undated support letter, the petitioner generally stated that the beneficiary was employed abroad "primarily as [a] manager in [an] executive capacity in both companies." In support of this claim, the petitioner provided a list of the following nine job responsibilities and their respective allotments of time: 1) marketing department strategies on new promotions; 2) supervising the export operations; 3) negotiating and signing corporate contracts; 4) making contracts with national and international suppliers; 5) coordinating the hiring of new services; 6) generating expansion plans; 7) creating and planning productivity strategies; 8) meeting with department managers; and 9) performing other functions. The petitioner provided no description of specific daily job duties, nor is there any indication that the petitioner was able to make a distinction between managerial capacity, as defined in section 101(a)(44)(A) of the Act, and executive capacity, as defined in section 101(a)(44)(B) of the Act. Rather, the petitioner's description of the beneficiary's foreign employment included generalities and broadly cast business objectives that preclude the AAO from understanding what exactly the beneficiary did on a daily basis and the means by which he actually achieved the broadly cast objectives.

Furthermore, although the petitioner referred to its previously filed petition seeking to continue employment of the beneficiary in its new office, the AAO notes that each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. Prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). In the present matter, the petitioner failed to submit sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. As such, the AAO cannot conclude that the beneficiary's employment abroad was in a qualifying capacity.

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.

ORDER: The appeal is dismissed.