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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **MAR 07 2012** OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiaries:

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Texas Service Center revoked the previously approved nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be revoked.

The petitioner, a Texas corporation, states that it is engaged in retail sales and services. The petitioner states that it is a branch office of [REDACTED] located in India. The United States entity petitioned United States Citizenship and Immigration Services (USCIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 was initially granted a one-year period of stay to open a new office and was subsequently granted an extension of L-1A status for two years. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of Executive Director for a two-year period.

On April 8, 2009, the director revoked the petition concluding that the petitioner did not submit sufficient evidence in rebuttal to the United States Citizenship and Immigration Services' ("USCIS") Notice of Intent to Revoke ("NOIR") and has not overcome the grounds for revocation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation, dated December 12, 2005; (2) the director's NOIR, dated August 10, 2006; (3) the petitioner's response to the NOIR; (4) the director's April 8, 2009 notice of revocation; and, (5) the Form I-1290B, filed on April 27, 2009. The AAO reviewed the record in its entirety before issuing its decision.

On December 12, 2005, the petitioner filed the Form I-129 (Petition for Nonimmigrant Worker) to continue to employ the beneficiary in L-1A classification for the period from December 16, 2005 until December 16, 2008. The director approved the petition. On August 10, 2006, the director notified the petitioner of his intent to revoke approval of the L-1A petition. In the notice of intent to revoke, the director stated the reason for revocation as follows:

Information obtained from our Fraud Detection Unit here in Dallas, Texas revealed certain facts that were not available to the Officer at the time of adjudication of this petition and the initial petition filed on behalf of the beneficiary, [the beneficiary]. Had these facts been available at the time of adjudication the petitions would not have been granted.

The director specifically noted that the beneficiary stated on the Form I-129 that he was employed with the foreign entity and the petitioner from July 20, 1995 to the present "without interruption," however, on the Texas Alcoholic Beverage Commission (TABC) application, the beneficiary indicated that he was unemployed from December 2002 to April 2003 and from June 2003 to August 2003.

The director also noted that the evidence submitted by the petitioner provides inconsistent information of the ownership of the foreign entity and the U.S. company; thus, the petitioner did not submit sufficient evidence to establish a qualifying relationship.

The AAO will first examine whether the application for an alcohol license submitted by the petitioner provides evidence regarding the beneficiary's employment history that is inconsistent with statements made on the Form I-129. In the petitioner's response to the notice of revocation, dated September 11, 2006, counsel for the petitioner stated that the beneficiary changed his status to an L-1A nonimmigrant to open a new office in the United States for the petitioner. The new office L-1A approval was from December 2002 until December 2003. Counsel stated that "from December 2002 through April 2003, [the beneficiary] was actively engaged in searching for existing retail sales business to purchase." On appeal, counsel also states that the second period of unemployment that was listed on the TABC application occurred when the petitioner "sold one business for the purpose of acquiring a more lucrative, larger one."

In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. In addition, if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence doing business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. See generally, 8 C.F.R. § 214.2(l)(3)(v).

Counsel contends that the beneficiary was looking for a business venture during the one year that the petitioner was in L-1A status to open a new office. However, the new office regulations require that the petitioner be ready to commence doing business immediately upon approval. The beneficiary did not start receiving a salary from the petitioner until April 2003, over one year after the beneficiary obtained L-1A status. Thus, the approval of the petition should be revoked as the petitioner did not meet the regulatory requirements for L-1A status.

Moreover, in the notice of revocation, the director noted that the beneficiary stated in the TABC application that he was unemployed from June 2003 until August 2003. On appeal, counsel states that the "second period of 'unemployment' listed on the application occurred when the petitioner sold one business for the purpose of acquiring a more lucrative, larger one." On appeal, a petitioner cannot materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. In this matter, the petitioner completely closed down a business and opened a new one which would materially change the facts of the case and must be reevaluated under the L-1 regulations. The petitioner should have filed an amended L-1A petition to seek approval of the

new business venture. The petitioner cannot completely change its business without filing an amended petition.

The director also revoked the petition because the petitioner did not submit sufficient evidence to establish that a qualifying relationship exists between the foreign company and the United States entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer is 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 indicated that the petitioner is owned by two individuals. However, the petitioner's Form 1120 for 2003 and 2004 indicate that the petitioner is 100% owned by the beneficiary only. The petitioner stated this was an error by the accountant when filing the petitioner's tax return but the director noted that "no corrected documents or forms were provided from the accountant," and that "there was no letter from the accountant to provide verification" of this claim.

The AAO agrees that the petitioner did not provide sufficient evidence to overcome the director's concerns regarding the inconsistent evidence of ownership stated in the tax documents for 2003 and 2004 and the petitioner's claim that it is owned by two individuals. The petitioner did not provide a statement from the accountant explaining the error, or a copy of an amended return that was properly filed with the IRS to correct the tax returns. 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).

The director also noted discrepancies between the evidence submitted and the petitioner's claim of ownership of the foreign company and the petitioner. In regard to establishing a qualifying relationship between the petitioner and the beneficiary's foreign employer, the petitioner's response letter stated that when the U.S. company was formed it had 500 units of membership, half of which went to the beneficiary and the other half to [REDACTED]. On November 16, 2002, [REDACTED] signed a proxy agreement with the beneficiary that gave the beneficiary the power to vote on behalf of [REDACTED] 500 units. Thus, the beneficiary had control of the U.S. office. In regard to the foreign entity, [REDACTED] owned 100 percent of that entity. However, in June 2002, [REDACTED] executed a power of attorney that provided her two sons, [REDACTED] and the beneficiary, control over the company. In addition, the power of attorney stated that the beneficiary has the ultimate decision making power in the event of a dispute of disagreement between the two brothers in operating the foreign entity. Thus, it appears from the documentation that the beneficiary has control over the foreign entity and the petitioner.

In the revocation notice, the director noted that the two documents that gave control to the beneficiary of the foreign company and the petitioner were not reliable documentation. The AAO agrees that the proxy agreement and the general power of attorney submitted by the petitioner do not appear to be reliable sources to corroborate the qualifying relationship claim

made by the petitioner. These documents were not submitted with the initial filing and were submitted only after the notice of intent to revoke. The petitioner failed to provide any explanation as to why these documents were not submitted with the initial filing. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The director noted that the Agreement of Proxy for the petitioner is not notarized or signed by the beneficiary. On appeal, counsel for the petitioner states that the Texas Limited Liability Company Act does not require a document to be notarized in order to make it legal. However, this does not explain why this important document was not part of the initial petition and was provided only after the notice of intent to revoke. 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). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The petitioner did not provide sufficient evidence to overcome the director's concerns in the notice of revocation and thus, the petition's approval will be revoked.

Beyond the decision of the director, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

On the Form I-129, the petitioner stated that the beneficiary will "direct, control, and oversee the day to day affairs of the limited liability company." The petitioner provided one sentence to describe the duties to be performed by the beneficiary which is too vague to establish that the preponderance of his duties is managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

The petitioner submitted an organizational chart of the U.S. company that shows the beneficiary as the President who supervises the Manager who in turn supervises the Cashier, Assistant Manager and Cashier. In addition, the Assistant Manager supervises the Grounds and Store Maintenance employee and the Store Merchandise Stock employee. However, the employees listed in the organizational chart are not confirmed to be actually employed by the U.S. entity. The petitioner submitted employer quarterly wage reports without the names of the employees

and submitted Forms W-2 for 2003 but none of the employees listed in the organizational chart, except for the beneficiary, were listed in the W-2 Form. Thus, the petitioner did not provide any evidence to establish that the employees listed in the organizational chart are actually employed by the petitioner. Again, 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 at 165. Based upon the lack of a comprehensive job description, and the lack of evidence of the company's staffing levels, it cannot be concluded that the beneficiary will be employed by the U.S. company in a managerial or executive capacity. For this additional reason, the petition will be revoked.

The prior approval of two nonimmigrant petitions filed by the petitioner on behalf of this beneficiary does not preclude USCIS from denying an extension of the original visa based on a reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals 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 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). Based upon the lack of persuasive, credible, and consistent evidence in the current record, the AAO finds that the director was justified in departing from the previous petition approvals and denying the instant request for an extension of the beneficiary's status.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is revoked.