

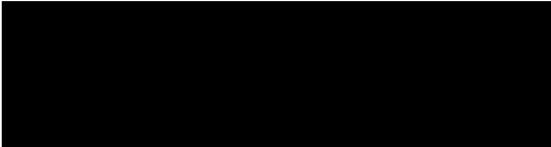
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3000
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U.S. Citizenship
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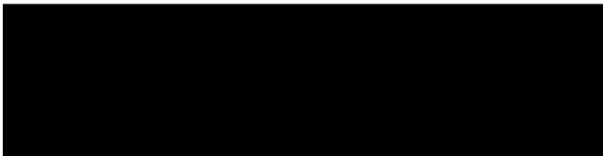
APR 05 2007

IN RE: Petitioner:
Beneficiary:



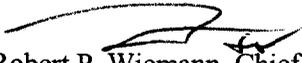
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Georgia corporation, claims to be the subsidiary of [REDACTED] VE Ticaret Ltd. STI, located in Istanbul, Turkey. The petitioner claims to be engaged in the real estate and construction business, while simultaneously operating boutique clothing stores. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, which was extended for an additional two years. 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 the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous and that, contrary to the director's findings, the petitioner is qualified for the benefit sought. In support of this contention, 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)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive

capacity; and

- (e) Evidence of the financial status of the United States operation.

The primary 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.

In a letter dated May 9, 2005, the petitioner stated that it currently employed two persons, including the beneficiary. With regard to the need for the beneficiary's services and the duties he would perform, the petitioner provided the following description:

[The beneficiary] will continue to plan, develop, and establish policies and objectives of the company. He will continue to be responsible for the development and management of real estate projects to generate growth and achieve business objectives relating to market share and volume results. He will continue to establish financial objectives and goals to maximize returns on investments and to increase productivity. He will continue to purchase, sell, or lease various immovable assets partially or wholly to achieve goals and objectives of the company. He will also continue to establish rights of various immovable assets in its possession.

On July 6, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit an organizational chart for the petitioner; a more detailed description of the beneficiary's duties; and a list of all subordinates of the beneficiary, with a description of each person's position title, duties and educational backgrounds, and documentation such as quarterly tax returns pertaining to their employment with the petitioner.

In a response dated July 13, 2005, counsel provided an organizational chart, which demonstrated that the beneficiary directly supervised Inci Ozcan, the petitioner's general manager. The petitioner also submitted the beneficiary's W-2 form for the previous year, indicating that he had earned a salary of \$40,000 during that period. The petitioner's Corporation Income Tax Return for 2004 indicated that \$40,000 had been paid as "compensation of officers" and \$13,200 in wages had been paid. Finally, the petitioner submitted unsigned copies of its quarterly tax returns for the quarters ending September 30, 2004, June 30, 2004, March 31, 2004, and September 30, 2003. These returns, as stated above, were unsigned and included no attachments identifying to whom the wages were paid. Although a copy of its state quarterly return was submitted for the first quarter of 2005, this document also fails to indicate the amount of wages paid or to whom they were paid. The document merely indicates the amount of tax withheld during that period. Finally, the Georgia annual return for the year 2004 indicates that the total amount of wages paid that year was \$14,600, which directly contradicts the petitioner's statement on its federal return that \$13,200 was paid.

On August 1, 2005, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would function at a senior level within the organization or that the beneficiary had sufficient subordinate staff to relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner reasserts that the beneficiary, by virtue of his position as president, is by definition functioning in a managerial and/or executive capacity. Counsel resubmits and relies upon the same position description of the beneficiary submitted with the initial petition and in response to the request for evidence. Counsel further contends that the director's conclusion that the beneficiary was the petitioner's sole employee was erroneous, and in support of this contention, updated quarterly tax returns and W-2C forms

were submitted for the years 2003 and 2004 as evidence of the general manager's employment with the petitioner.

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 initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties; namely, that he would function as president and oversee virtually all aspects of the business, from the sales and marketing to human resources. Consequently, the director requested more specific information, including an overview of the petitioner's structure in order to better comprehend the work environment of the beneficiary. The petitioner responded to this request, yet did not expand on the beneficiary's day-to-day duties. Instead, the newly submitted documentation pertaining to the organizational structure and the number of workers on the petitioner's payroll created additional questions and discrepancies in the record.

Based on the evidence of record, the AAO is not convinced that the description of the duties of the beneficiary is an accurate portrayal of a typical workday. In sum, the description in the record claims that the beneficiary has the general responsibility of running and overseeing the entire operation of the petitioner. In addition to its claimed real estate acquisition and construction business, evidence that it also operates small family-owned boutiques, specifically one doing business as "It's You," has been submitted. Although the petitioner briefly supplements the beneficiary's position description on appeal, these statements are not adequate to clearly establish the exact day-to-day nature of the beneficiary's position.

It appears, therefore, upon review of the limited position description in the record and the simultaneous expansion of the petitioner's business in different directions, it appears that the beneficiary is directly responsible for all aspects of running the business, including personnel, premises, and inventory, in addition to handling all financial aspects of the business. Finally, in addition to these tasks, it appears that the beneficiary must directly handle all sales, marketing, and acquisitions for the businesses, including the payment of domestic and foreign taxes and the performance of administrative duties. These generalized duties do not appear to fall directly under traditional managerial or executive duties as defined in the statute. While some of these areas would generally be recognized as the responsibilities of a manager or executive, the vague descriptions provided and the lack of sufficient subordinate staff at the time of filing suggest that the beneficiary directly handles most aspects of the business himself, instead of managing these operations. For example, the description emphasizes the beneficiary's responsibility to purchase, sell, or lease "various immovable assets" for the company. This task is clearly a necessary and non-qualifying duty normally not contained in the duties of a true manager or executive. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

More importantly, however, the petitioner claims that the beneficiary manages one other person, a general manager, who relieves him of non-qualifying 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.

There is no evidence in the record that at the time of filing the petitioner employed anyone other than the beneficiary. Although quarterly tax returns were submitted, and corrected and updated quarterly returns and W-2 forms were submitted on appeal, these documents pertain solely to the years 2003 and 2004. The petitioner was requested, in the request for evidence, to provide evidence of its organizational structure through copies of its quarterly returns or payroll summaries *for the past four quarters*. Clearly, since the director's request was issued on July 6, 2005, the petitioner should have been able to provide this information for the first two quarters of 2005, specifically since the second quarter had ended prior to the director's request. Despite this request, insufficient evidence was submitted. The only document which slightly addresses the director's query was a partial copy of the state quarterly return for the first quarter of 2005 which merely showed the amount of tax withheld for that quarter (\$259.35). Since it does not list who it employed during this period, it cannot be determined that the person from whom the tax was withheld was someone other than the beneficiary.

The record is devoid of evidence, therefore, that the petitioner employed anyone other than the beneficiary at the time of filing, which in this case was May 13, 2005. The petitioner was afforded the opportunity to respond to the director's specific request for recent payroll summaries, yet elected to provide documentation from 2003 and 2004 and not 2005. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Despite the submission of the organizational chart, which indicates the beneficiary oversees a general manager, there is no documentation establishing that the general manager was on the petitioner's payroll at the time of filing. While the evidence submitted does indicate that she worked for the petitioner in 2003 and 2004, the minimal documentation contained in the record is simply insufficient to corroborate the petitioner's claims. The petitioner, therefore, has not shown that the beneficiary supervises subordinate staff members who themselves are supervisory or who manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Additionally, since the petitioner failed to provide additional information on the alleged subordinate employee, including her duties and educational background, it cannot be concluded that this position, if staffed, requires an employee who possesses a bachelor's degree or higher to perform its duties, such that she could be classified as a professional. There is no documentary evidence to establish that [REDACTED] was actually on the petitioner's payroll at the time of the petition's filing. 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)). Thus, the petitioner has not shown that the beneficiary's alleged subordinate employee is supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. Most troubling to the AAO is the fact that no explanation has been provided with regard to who performs the clerical and administrative duties of the company, who performs sales functions for the boutique "It's You," or who researches and acquires new real estate interests for the other aspect of the petitioner's business while the beneficiary allegedly refrains from non-qualifying duties. With regard to the petitioner's size, the reasonable needs of the organization in relation to its overall purpose and stage of development must be considered and addressed when staffing levels are used as a determining factor in denying an L-1A petition. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, there is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act.

It is important 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 the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(I)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(I)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. Despite counsel's contentions on appeal, if the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, despite the previous two-year petition extension, which appears to have been approved in error, it does not appear that the petitioner has yet reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

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

In this matter, the petitioner claims that it is the affiliate of the foreign entity by way of the beneficiary's majority ownership and control of both entities. Although the petitioner has submitted stock certificates,

meeting minutes, and a resolution attesting to the ownership of both entities, the record contains conflicting information. Specifically, the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2004, indicates on Schedule K, Line 5 that no individual owns 50% or more of the petitioner's voting stock. In addition, the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2003, indicates that the beneficiary owns 100% of the petitioner's stock, in direct contrast to the stock certificates contained in the record that show he only owns 99% of the petitioner's outstanding stock. Finally, it is noted that on both returns, Schedule L, Line 22 indicates that no value was attributed to the outstanding capital stock, when in fact the line should have shown a figure of \$500.00. 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). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Without clarification of this conflicting information, CIS is unable to accurately determine the elements of ownership and control. For this additional reason, the petition may not be approved.

In addition, the petitioner indicates that the beneficiary is the majority owner of both companies. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions filed on behalf of the beneficiary. 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).

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). 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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.