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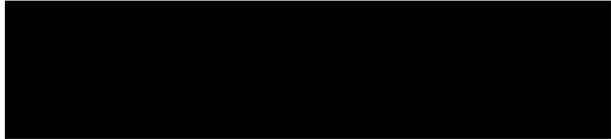
U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File: WAC 06 090 51393 Office: CALIFORNIA SERVICE CENTER Date: **JUL 23 2007**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

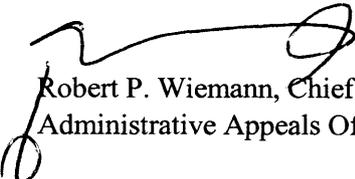
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 seeks to change the beneficiary's classification from specialized knowledge worker (L-1B) to manager or executive (L-1A) and extend his period of stay as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L). The petitioner states that the beneficiary was first admitted to the United States in L-1 status on March 19, 2001 as an intracompany transferee having specialized knowledge. The beneficiary's current L-1 classification as a specialized knowledge worker (L-1B) expired on February 4, 2006 (WAC 04 083 53594). The petitioner filed the instant petition seeking the change of status and extension of stay on February 3, 2006, or one day before the expiration of the L-1B petition's validity. The petitioner identified the beneficiary's intended period of employment on the Form I-129 as February 4, 2006 until February 4, 2008.

The director concluded that because the petitioner did not file the petition at least six months prior to the expiration of the beneficiary's stay as an L-1B nonimmigrant, the petitioner had not filed timely. Accordingly, the director denied the petition to change classification to L-1A status, and the application for an extension of stay, pursuant to 8 C.F.R. § 214.2(l)(15)(ii).

On appeal, counsel for the petitioner asserts that the beneficiary was promoted to his current managerial position on August 1, 2005, and had thus been employed in a qualifying capacity for more than six months at the time the petition was filed. Counsel asserts that the regulation at 8 C.F.R. § 214.2(l)(15)(ii) is unclear as to when the request for a change of status may be filed, and notes that United States Citizenship and Immigration Service (USCIS) guidance provided during a liaison meeting between the American Immigration Lawyers Association (AILA) and USCIS headquarters indicated that "[service] centers should not deny an extension request simply because it was FILED during the final six months of the five-year stay." Counsel therefore asserts that the director improperly inferred from the regulations a requirement that such petitions be filed six months prior to the expiration of the beneficiary's L-1B status.

Alternatively, counsel asserts that the petitioner was excused in this case from filing an amended, new, or extended petition within six months of the expiration of the beneficiary's L-1B five-year period of stay because the petitioner can establish that the beneficiary has been employed as a manager since first entering the United States in L-1 status and that the petition is based on the beneficiary's pre-existing qualifications and not on a "promotion."

The regulation at 8 C.F.R. § 214.2(l)(15)(ii) states the following, in pertinent part:

The total period of stay may not exceed five years for aliens employed in a specialized knowledge capacity. The total period of stay for an alien employed in a managerial or executive capacity may not exceed seven years. No further extensions may be granted. When an alien was initially admitted to the United States in a specialized knowledge capacity and is later promoted to a managerial or executive position, he or she must have been employed in the managerial or executive position for at least six months to be eligible for the total period of stay of seven years. The change to managerial or executive capacity must

have been approved by [Citizenship and Immigration Services] in an amended, new, or extended petition at the time that the change occurred.

In the denial, the director determined that the beneficiary is not eligible for the total period of stay of seven years because the petitioner did not file, and USCIS did not approve an amended, new, or extended petition changing the beneficiary's classification to L-1A status within six months of the expiration of the beneficiary's total permissible period of stay of five years. Specifically, the director determined that the beneficiary, whose initial admission in L-1 status is stated to be March 19, 2001, would reach his limit on L-1B status on March 19, 2006. Therefore, the director found that a petition requesting a change of classification from L-1B to L-1A should have been filed on or before September 19, 2005. The instant petition was filed on February 3, 2006.

It is noted that 8 C.F.R. § 214.1(c)(5) states that there is no appeal from the denial of an application for extension of stay, whether filed on a Form I-129 or Form I-539. However, the AAO will review the matter as it pertains to the underlying L-1A petition and change of status request that were not addressed by the director, which are a proper bases for the appeal.¹

As noted above, the petitioner states that the beneficiary was initially admitted to the United States in L-1B status on March 19, 2001. The beneficiary's L-1B status was subsequently extended from February 4, 2004 until February 4, 2006. Due to his initial admission to the United States on March 19, 2001, the petitioner could have potentially extended the beneficiary's stay until March 19, 2006, 43 days subsequent to February 4, 2006, the expiration of the current petition extension, before the beneficiary would have reached his five-year period of stay limitation.

However, the director concluded that because the petitioner did not file the petition at least six months prior to the expiration of the beneficiary's stay as an L-1B nonimmigrant, the petitioner had not filed timely. Accordingly, the director denied the petition to change status to L-1A classification, and the application for an extension of stay, pursuant to 8 C.F.R. § 214.2(l)(15)(ii). The director acknowledged that the beneficiary would reach his five-year limit on L-1B status on March 19, 2006, but ignored the fact that the petition was filed 44 days prior to that date; and that the petitioner was potentially able to change the beneficiary's classification to L-1A status and extend his stay for the remainder of the five-year period to which he is entitled.

Upon review, the AAO disagrees with counsel's arguments regarding the interpretation and practical application of the regulation at 8 C.F.R. § 214.2(l)(15)(ii). Counsel's argument is two-fold.

¹ Although those seeking L-1A status or an extension of this status are currently permitted to file one form to request this new or extended classification, to request an extension of stay, and to request a change of status to this classification, these requests are still separate determinations. *See* 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). In addition, 8 C.F.R. § 214.2(l)(15)(i) specifically states that, "[e]ven though the requests to extend the visa petition and the alien's stay are combined on the petition, the director shall make a separate determination on each."

First, counsel argues that the director's denial "was based solely on an alleged procedural defect under an area of the regulations that are known to the United States Citizenship and Immigration Services ("USCIS") to be ambiguous and confusing." Counsel states that the preamble to the final rule implementing 8 C.F.R. § 214.2(l)(15) "does not state that a change of status petition must be filed at least 4.5 years [sic] before the end of L-1B stay." Counsel asserts that "the preamble only states that the beneficiary must have been performing managerial duties for six (6) months in order to be eligible for a sixth or seventh year."

Counsel also provides a copy of the minutes of a May 23, 2006 liaison meeting between USCIS headquarters and AILA, in which guidance was requested in regard to the steps to be taken to amend and extend an L-1B beneficiary's status in a promotion situation. The USCIS response to AILA's inquiry, which is relied upon by counsel, was as follows:

The regulation requires that USCIS has "approved" the change to managerial position at the time of the change. This is in accordance with the independent regulatory requirement that the petitioner inform us of any changes in "capacity of employment." So not only must the alien have been in the new position for six months at the time of filing the extension from 5 to 7 years, but USCIS must have approved that change when it happened. *However, the centers should not deny an extension request simply because it was FILED during the final six months of the 5-year stay. It can be filed the last day if need be, so long as the change occurred at least six months ago.* The reason for requiring the extension at the end of six months is to establish the bona fides of the promotion. This is an important fraud deterrent, an appropriate indicator of the legitimacy of the managerial position. Therefore if the filings were to be combined after the beneficiary was in the promoted position [it] would not meet the requirement that the beneficiary had been in the "position" for six months since the record would only reflect the original position.

(Emphasis added.)

First, the AAO notes that internal memoranda and the unpublished comments of CIS officials are not binding. CIS memoranda merely articulate internal guidelines for INS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

Counsel focuses only on the highlighted portion of the USCIS response, and interprets this statement as allowing the instant petitioner to simultaneously request the change of classification and two-year extension of stay. The beneficiary is claimed to have been employed in a managerial capacity since August 1, 2005, more than six months prior to the expiration of his fifth year of L-1B status, and because the instant petition was filed one day before the expiration of the beneficiary's current L-1B petition. Counsel contends that the denial of the instant petition was "in direct contravention of the USCIS directive."

Counsel has misinterpreted the regulation at 8 C.F.R. § 214.2(l)(15)(ii) and misconstrued the USCIS comments to AILA on the appropriate application of the regulation. The regulations clearly state that the

"change to managerial or executive capacity must have been approved by [Citizenship and Immigration Services] in an amended, new, or extended petition at the time that the change occurred." In this matter, the petitioner claims that the beneficiary was promoted to his current managerial position on August 1, 2005, yet it failed to file a petition to reflect this change in employment capacity as required by 8 C.F.R. § 214.2(l)(15)(ii) and 8 C.F.R. § 214.2(l)(7)(i)(C) (requiring that a petitioner file an amended petition to reflect such changes as a change in capacity of employment, i.e., "from a specialized knowledge position to a managerial position.")

The AAO acknowledges that the USCIS comment referenced above, read out of context, suggests that the petitioner may have some flexibility as to when it may file a request to change and extend an L-1B beneficiary's status to L-1A. However, the comment, when read in its entirety, reflects that USCIS strictly follows the regulatory language and requires a change of status request from L-1B to L-1A to be filed at the time the change occurs, and requires any subsequently requested extension of stay to be filed only after the beneficiary has been in the approved L-1A position for six months. It is the request for the extension of stay beyond the fifth year, not the request for the change of status, which can be filed any time before the initial five-year period in L-1 classification expires.

Therefore, the instant petitioner's simultaneous request for a change of status and a two-year extension of stay one day prior to the expiration of the beneficiary's L-1B status was contrary to the regulations. The requested two-year extension of stay was clearly not approvable.

Counsel's secondary argument is that the regulation at 8 C.F.R. § 214.2(l)(15)(ii) should be construed to excuse the petitioner in this case from filing an amended, new, or extended petition documenting the beneficiary's "change" to managerial duties within six months of the expiration of the beneficiary's L-1B five-year period of stay because the petitioner can establish that the beneficiary has been employed as a manager since first entering the United States in L-1 status and that the petition is based on the beneficiary's pre-existing qualifications and not on a "promotion." Counsel asserts that the petitioner is entitled to extend the beneficiary's stay for the full seven years since the beneficiary has allegedly been employed primarily as a manager, initially as "Gang Wall Supervisor" and currently as "Gang Wall Manager," since 2001.

Again, counsel ignores the last sentence of 8 C.F.R. § 214.2(l)(15)(ii):

The change to managerial or executive capacity must have been approved by [CIS] in an amended, new, or extended petition at the time the change occurred.

This sentence of the regulation clearly mandates the documentation of a beneficiary's change to a managerial or executive capacity *at the time the change occurred* and not at some future time, e.g., when the petitioner decides to extend the stay of a specialized knowledge worker beyond the fifth year. In this case, the petitioner was obligated to document the beneficiary's alleged change to a managerial capacity when the change occurred, even if this occurred on his first day of his employment. While counsel asserts in the appeal that "the beneficiary has been employed as a manager since entering the United States in L-1 status," the petitioner was nevertheless obligated to document his assumption of managerial duties in an amended, new, or extended

petition at least six months before the beneficiary reached the end of his L-1B five-year period of stay if it had wanted to preserve its opportunity to extend the beneficiary's stay through the seventh year.

Counsel's argument is without merit. In this case, as the petitioner chose not to document the beneficiary's assumption of managerial duties as required by the regulations, the regulations prohibit an extension beyond the fifth year even if the beneficiary could be established to have been performing managerial duties from the beginning of his employment in 2001.

The AAO acknowledges counsel's argument that "the Decision did not challenge the managerial nature of the position" but does not concur with counsel's conclusion that "the Service Center essentially agreed that the Gang Wall Manager position qualifies as a Senior-Level Manager position." There is nothing in the director's decision that would lead to this assumption, or that would otherwise suggest that the director reviewed the petition on substantive grounds. Although the director did not discuss the beneficiary's alleged change in employment capacity from an L-1B intracompany transferee with specialized knowledge to an L-1A manager or executive, the director clearly stated his intention to deny the petition on the cover page of the decision and in the final paragraph.

The AAO notes that the evidence presently contained in the record is insufficient to establish that the beneficiary has been or will be employed in a primarily managerial position. The petitioner characterizes the beneficiary's employment as that of a "function manager."

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, 8 U.S.C. § 1101(a)(44)(A)(ii). 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 duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Notwithstanding the petitioner's claim that the beneficiary is a function manager, the majority of the beneficiary's duties relate to the first-line supervision of eight laborers and carpenters, who have not been shown to be professional workers. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Moreover, if a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). Here, none of the provided job descriptions clearly indicate that the beneficiary has such authority.

When examining the managerial or executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

The petitioner has inconsistently described the beneficiary's position. In the initial submission, the petitioner described the beneficiary's position as a "key senior level management position" that requires the beneficiary to independently oversee a "wall crew" and the "vertical wall formation process." Contrary to the claim that the beneficiary functions as a senior-level manager, the petitioner submitted an organizational chart depicting the beneficiary as supervising four carpenters and four laborers. The chart also depicted the beneficiary as subordinate to two assistant superintendents/foremen, two construction superintendents, a labor supervisor, and a site manager.

It is also noted that in 2006, the petitioner initially claimed that the beneficiary had been performing as a Gang Wall Manager for "the previous four years" but then stated in response to the director's request for evidence that the beneficiary was promoted in "July 2005" to the position of Gang Wall Manager. The petitioner submitted no evidence in support of the claimed promotion. It is also noted that the beneficiary's resume does not refer to the title of "Gang Wall Manager" but instead refers to the beneficiary as a "Gang Wall Supervisor," overseeing and directing a concrete form crew.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Simply asserting that the beneficiary was promoted in 2005, purportedly satisfying the requirements of 8 C.F.R. § 214.2(l)(15)(ii), does not satisfy the petitioner's burden of proof. 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. at 165.

Finally, the AAO notes that the petitioner initially described the beneficiary as supervising four carpenters and four laborers. After the director issued a request for evidence, the petitioner claimed that the beneficiary supervised a Crane Operator, a Rigger, a Fly Table Specialist, a Scaffolding Specialist, eight Carpenters, and seven Laborers. These claims contradict the petitioner's original claims and the submitted organizational chart. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for

evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its 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. 1978).

Upon review, the petitioner has not established that the beneficiary would be employed in a primarily managerial capacity, as defined by statute. At best, the beneficiary appears to be a first-line supervisor of non-professional employees. As proscribed by section 101(a)(44)(A)(iv) of the Act, "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."

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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.