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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FEB 28 2003

File: WAC 99 206 51826 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER: [redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

for Myra L. Rosenberg
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen/reconsider. The motion will be granted. The previous decision of the AAO will be affirmed.

The petitioner is described as an electrical contractor. The petitioner seeks to continue the beneficiary's employment as its owner and president. The director and the AAO had both determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On motion, counsel submits a brief.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and seeks to enter the United States temporarily to continue to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

To obtain an extension of a visa petition's validity, 8 C.F.R. § 214.2(l)(4)(i) states, in pertinent part:

> *Individual petition.* The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

The issue to be addressed in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> "Managerial capacity" means 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), provides:

"Executive capacity" means 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 Form I-129, Petition for a Nonimmigrant Worker, for an extension, was filed on July 21, 1999. Included in the record is a Form I-797B, Notice of Action, dated May 11, 1998, indicating approval of an L-1A petition for the petitioner, [redacted] on behalf of the beneficiary, with validity

through September 2, 1999. The beneficiary's spouse and three children also are included on the petition.

The petitioner has indicated that the beneficiary will be paid $24,000.00 a year. While evidence of the actual date of creation of the petitioner within the State of California is not included in the record, at the time that the petitioner filed the initial petition upon which this extension is based, the petitioner was considered a "new office." Therefore, the following provisions at 8 C.F.R. § 214.2(l)(14)(ii) also apply:

> *New offices.* A visa petition under section 101(a)(15)(L) 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)(iii)(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 petitioner described the nontechnical description of the beneficiary's position as: "design, develop and install electrical projects, including all conduit and cable systems, HVAC, etc.," and indicated the beneficiary's job duties as:

> [redacted] will continue all start-up work for the company, and continue his duties in the following way: policy and goal setting; client development; contract negotiations; legal and fiscal compliance; hiring/firing supervision; all managerial duties and responsibilities commensurate with the position.

In a letter dated July 9, 1999, counsel stated that the beneficiary continues to serve as the petitioner's president and manager, that the company was established in California in 1998,

and that the beneficiary also served as the president and manager of the foreign entity since its inception in 1993.

Counsel stated that the beneficiary began his employment with the foreign entity in 1993 and that in that role he was responsible for all management activities. Counsel also stated that the petitioner wishes to expand the operations of the foreign entity in the United States to ensure that the foreign entity's business ventures are successful. Counsel stated that the petitioner has become one of Southern California's most well-known and respected electrical contracting companies, and that it performs electrical installation, maintenance and repair for both individuals and large corporations. Counsel stated that the beneficiary is "[A]n outstanding manager and electrical contractor, leading the company to its current state of success." Counsel asserted:

> In Joint Venture with [redacted] the Canadian parent company, Cal-Sun Electric has entered into a subcontracting agreement with Johnson Controls, a Fortune-500 company which specializes in construction and project contracting. This recent project involves the construction of the J. Paul Getty Trust, a project which will bring hundreds of thousands of dollars to Cal-Sun Electric, and which will allow Cal-Sun to continue its praiseworthy expansion. In addition, this new project will require Cal-Sun Electric to hire an additional full-time electrical worker, thereby creating new jobs for United States citizen [sic] and Legal Permanent Residents. Finally, Johnson Controls has certified Cal-Sun Electric as a preferred subcontractor, thereby paving the way for additional large contracts and projects for both companies. Finally, the expansion of Cal-Sun Electric has necessitated the hiring of a part-time administrative worker, thus creating another United States-based job.

Counsel also stated that the petitioner has grossed nearly $100,000.00 in a nine-month period. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1990).

The beneficiary stated that he was responsible for all initial start-up operations of the petitioner and restated the duties as previously stated by the petitioner and counsel. The beneficiary submitted several letters of recommendation attesting to his abilities and service in performing necessary electrical work, maintenance, improvements, upgrading and trouble-shooting for customers. In letters written to prospective customers in early 1999, the beneficiary (under letterhead of the petitioner) stated:

> I have 20 years experience as an [sic] journeyman electrician. In that time I have had a great deal of experience with new residential wiring, and rewiring of existing homes, commercial experience involvement in new construction, retro-fits of commercial office and retail outlets, and institutional work consisting of Hospitals, Schools and Universities. I have also spent a number of years involved in the installation of Computerized and Automatic Temperature Control of HVAC Systems for the same type of facilities.
>
> I am specifically service-oriented and take pride in my ability to deal with customers in a timely and efficient manner...I am available for work at either time and material or contract pricing.

In other solicitation letters, the beneficiary indicated his own personal capabilities as an electrician to perform the actual work and states:

> Cal-Sun Electric is a State licensed, liability insured company available for projects to price in the Metropolitan Los Angeles and Los Angeles County areas. I have had nine years of experience installing Johnson Controls products as an IBEW Canadian contractor in Vancouver, B.C.
>
> At the present time I am not a member of the IBEW in California and am seeking fast track projects to price. I have extensive experience in retrofits, additions and new installations of controls in hospitals, schools, and commercial buildings, also have experience in pneumatic controls and have worked closely with Johnson Controls service department.

The petitioner included copies of several of its business licenses, and a copy of its insurance policy. An unaudited financial "balance sheet" indicated a negative balance and net loss in 1998, as did the petitioner's Form 100, California Corporation Franchise or Income Tax Return, and Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. An unsigned note dated June 22, 1999, indicates that a potential acceptance of a $7,100.00 contract was completed. Also included in the record is a copy of a classified advertisement apparently posted in a local newspaper indicating the petitioner's electrical services for hire. The petitioner also stated that the company's invoices "to date" total $80,698.23. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In a letter dated June 22, 1999, from [redacted] to petitioner's counsel, she stated that the "intent" is to hire a part-time office worker, and that the petitioner "may" be hiring an "electrician's helper" as well. She also stated that the petitioner has some potential contractual offerings in process. [redacted] affiliation with the petitioner is not further identified.

In a "cut and paste" of a newspaper's classified advertisement dated June 1, 1999, the petitioner indicated that it had solicited an "office clerk PT" position. Also included in the record is a letter of acknowledgement dated June 15, 1999, indicating an offer of employment to [redacted] to begin part-time employment on July 28, 1999, with a minimum of 16 hours per week at a salary of $8.75 an hour. The start date is after the date of the filing of the instant petition. This evidence cannot be considered, as a petitioner must establish eligibility at the time of filing. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On the Form I-129, the petitioner indicated that it employed two individuals, including the beneficiary. On a Form 1120, U.S. Corporation Income Tax Return, no amount was stated as salaries and wages paid to employees. Contrary to assertions contained throughout the record, other than the beneficiary, the petitioner employed no other individuals at the time that the petition was filed.

The discrepancies noted call into question the petitioner's ability to document the requirements under the statute and regulations. Doubt cast on any aspect of the evidence as submitted may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582. (Comm. 1988).

Based on the evidence contained within the record, the director found that the case did not support a finding that the beneficiary operated in a managerial or executive capacity.

On appeal, counsel argued that the beneficiary does manage and "run" the entire company, and that the Service ignored this fact. Counsel stated:

> His day to day duties are specifically that of a manager, directing the company, hiring contractors to do the work, and overseeing the important jobs to

> assure that they meet with the client's demands for excellence. He has made all major decisions regarding clients, contracts, who and when to hire personnel, the execution of a joint venture, and many other managerial decisions, including legal and fiscal compliance.

Counsel indicated that the beneficiary hires independent contractors and creates jobs for United States workers. Counsel also stated that the petitioner has hired "Contractors Labor Pool." Counsel asserted that the director's denial was improper and discriminated against small businesses.

The AAO dismissed the appeal and stated that the evidence submitted by the petitioner had not shown that the beneficiary had been or would be employed in a managerial or executive capacity. In that decision, counsel's argument was discussed in detail; therefore, it will not be discussed in any greater detail in this decision.

On motion, counsel states that the petitioner's staff has now increased and that the business continues with the beneficiary serving in a managerial role in an "international organization." Counsel indicates that a brief dated February 23, 2000, was previously submitted with additional evidence. A review of the record, however, indicates that this brief was not previously submitted and/or included in the record. Counsel also submits a new brief dated January 25, 2002. Counsel is assured that the initial brief, in conjunction with the instant brief in support of the motion, and all additional or duplicate evidence submitted, shall be considered in their entirety.

In the brief dated February 23, 2000, counsel states that the petitioner is now "doing more than $12,000 a month in volume." No evidence of this assertion is included in the record. All other relevant statements made in this brief were either discussed in the submission that counsel presented when filing the appeal, or are discussed in this subsequent motion.

Counsel states that the evidence previously presented was not given proper consideration. Counsel asserts that the petitioner's use of the Contractor Labor Pool (CLP) of Vista, California, is evidence that the beneficiary does not perform the actual labor for the petitioner himself. Evidence submitted includes a letter from the CLP dated December 15, 1999, inviting the petitioner to open an account with its business. Another letter from the CLP (dated September 8, 1999, and prior to the letter of invitation to apply), indicates that the petitioner's credit application with the CLP has been approved, and again invites the petitioner to utilize the services of the corporation. Counsel also emphasizes the petitioner's use of the CLP to state that the beneficiary operates as a functional manager. No evidence of any of the contracts between the

petitioner and this company are included in the record, nor is there any indication in the record that the beneficiary paid any other individual for any services rendered either directly or indirectly. Additionally, both of these letters were written after the filing date of this petition. *Matter of Katigkak, supra.*.

Counsel asserts that the beneficiary is functioning as a manager, and states that a detailed description of the beneficiary's duties along with sufficient evidence was previously submitted. Counsel argues that a letter from Johnson Control is written in support of the beneficiary as the owner operating in an executive capacity and not to him as an "installer." Counsel states that only an executive or manager would have the authority to decide which jobs to bid. Counsel also states that the fact that the beneficiary signed as the representative of the petitioner in a contractual agreement with another company also serves to prove his capacity as an executive or manager. It is noted that the beneficiary is represented as the petitioner's owner and sole employee.

Counsel also refers to several unpublished decisions and asserts that extensive case law states that the Service may look at other issues after an organization has become operational. Counsel has furnished insufficient evidence to establish that the facts of the instant petition are in any way analogous to those in the cases cited. Furthermore, while 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel notes that extension applications (Forms I-539), filed on behalf of the beneficiary's spouse and three children, were approved, while the beneficiary's petition and extension were denied. Counsel states: "If their extensions were granted as derivatives, the Service should now be estopped to deny the validity of the extension for the L-1 for [redacted]" Included in the record are copies of approval notices for the spouse and three children extending their stays through 2002.

It is obvious that the applications for extensions filed for the beneficiary's spouse and three children were approved in error. The Service is not required to approve applications or petitions where eligibility has not been demonstrated. Each petition must be adjudicated based on the evidence contained in that record. *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (BIA 1988).

As previously discussed, the evidence presented does not permit a finding to indicate that the petitioner has proven a need for a managerial or executive employee. The petitioner has provided

insufficient evidence to demonstrate that the beneficiary's duties will be primarily managerial or executive in nature. A manager or executive may manage or direct the management of a function of an organization. However, it must be clearly demonstrated that the function is not performed directly by the 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). Counsel has provided no additional evidence that would overcome the findings of the director and the AAO. The record indicates nothing other than the fact that the beneficiary is in business for himself as an electrical contractor and is the primary individual performing the actual electrical work for the contracts granted.

The petitioner has not established that the beneficiary functions at a senior level within an organizational hierarchy; in fact, no organizational hierarchy exists, other than the promise of the hiring of a part-time administrative assistant. The petitioner has not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The petitioner has not established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing the services of the corporation. The evidence in the record does not demonstrate that the beneficiary will be involved in something other than performing the day-to-day functions and operational activities of the company. Upon review, it cannot be found that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

In the decision rendered by the AAO, it also was found that the record does not support a finding that the beneficiary's duties for the petitioner are temporary in nature as required under 8 C.F.R. §§ 214.2(l)(1)(ii) and (l)(3)(vii). The requirements of 8 C.F.R. § 214.2(l)(3)(vii) state:

> 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 evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States.

Counsel states that this clause is not relevant in the petitioner's case as the petitioner is not applying under the specialized knowledge category. This clause does not pertain specifically to the requirements of an applicant under specialized knowledge, but is contained as a separate clause

under section "(3) *Evidence for individual petitions*." While counsel argues that the Service has misinterpreted the regulations, only a letter generated by the beneficiary, as the petitioner's representative, is included in the record as evidence that the beneficiary's services are of a temporary nature. No other evidence is provided to overcome this finding of the AAO.

The AAO also found that the petitioner had not established that the petitioner and the foreign entity are qualifying organizations, or that the foreign entity continued to do business as a qualifying entity.

Counsel directs attention to the joint venture entered into between the petitioner and the foreign entity and states that the fact that the foreign entity entered into this agreement with the petitioner is evidence that the foreign entity is still conducting business.

A contract dated May 3, 1999, indicates that the petitioner has subcontracted with Johnson Control, Inc. on a particular project for $17,052.00, which in turn, the petitioner has sub-contracted with the foreign entity, Parkside Installations, Inc., in a "joint venture." The contract states that the purpose of the joint venture is to permit the foreign entity to "participate in the establishment of business activities in the United States with the petitioner." The contract also states:

> This Venture will facilitate the expansion of [redacted] into the United States via its affiliate, CAL-SUN ELECTRIC, INC. and will create a vehicle by which both Venturers may keep their common bonds and mutual interests viable.

It is noted that the beneficiary signed the contractual agreement of the joint venture as both the representative of the petitioner and as the representative of the foreign entity.

The foreign entity's 1999 Employer's Remittance Form, Workers' Compensation Board, indicates that no assessment was furnished for that year. A 1998 report (dated November 20, 1998) also indicates no balance, while earnings in 1996 are indicated as $30,000.00, and the 1997 earnings as $26,300.00. A few invoices indicate some charges, but these are not indicated on the tax statements furnished. It is noted that in its unaudited or verified financial statements, the foreign entity indicates net losses for the year ended August 31, 1998, as $6,715.00, after a year of profit in 1997 at $6,297.00. A few of the foreign entity's typewritten invoices from 1999 are included in the record. However, this is insufficient evidence to indicate that the foreign entity continued to operate as a viable business after 1998, and that a qualifying relationship continued to

exist. The record fails to indicate if the foreign entity employed any individuals other than the beneficiary. While the foreign entity's unaudited balance sheet does indicate some activity since the transfer of the beneficiary to the United States, it appears that activity of the foreign entity has virtually ceased. Documentation contained within the record is inconclusive to establish that the foreign entity was still doing business after the beneficiary's relocation into the United States. Thus, the petitioner has not overcome this finding of the AAO.

On motion, Canadian tax documentation indicates that the beneficiary owns 51 percent of the foreign entity, with [redacted] in ownership of 49 percent. The record contains an IRS form in which the petitioner indicates that the beneficiary owns 100 percent of the petitioner's common stock. No evidence of the petitioner's registration in the State of California as a corporation, the Articles of Incorporation, other documentation of ownership, stock ledgers, proof of purchase of the petitioner's stock, or of the foreign entity's ownership, is included in the record. The petitioner also did not overcome the finding of the AAO that insufficient evidence was contained within the record to establish that a qualifying relationship had been established between the petitioner and the foreign entity.

In addition, based upon the record, it is not clear from any evidence in the record what particular business space the petitioner has secured, as no lease indicating the location and size of the office is included in the record. Some indication is made that the petitioner pays a rental fee of $200.00 a month; however, it is not clear whether this is for an office or a mailbox location. Because the petition was denied for the reason raised by the director and the AAO, this issue will not be examined further.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here that burden has not been met.

ORDER: The previous decision of the AAO dated January 11, 2002, is affirmed.