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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: LIN 99 165 50085 Office: NEBRASKA SERVICE CENTER Date: 07 JAN 2002

IN RE: Petitioner: [redacted]
Beneficiary:

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

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Weimann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as an import and export company dealing in " jewelary [sic], gems, garments and manpower." The petitioner seeks to employ the beneficiary in the United States as its business manager. The director determined that the petitioner had not established a qualifying relationship between the United States entity and the foreign entity. The director also determined that the petitioner had failed to establish that the beneficiary would be acting in a managerial capacity.

On appeal, counsel asserts that a qualifying relationship has been established and that the beneficiary will be performing the function assigned to him.

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 the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
>
> (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The petitioner appears to be a foreign entity requesting that the proposed beneficiary be approved for L-1A nonimmigrant status to set up a new office in the United States. The petition indicates that the foreign entity is setting up a branch office in the United States. The Service received the petition on May 20, 1999. However, the petitioner also provided information on a company incorporated in the state of Virginia in January of 1998. It appears that the foreign entity is requesting that the beneficiary be employed by the Virginia corporation as its business manager.

The confusing documentation makes it unclear if the United States entity is to be a branch office or a subsidiary of the foreign entity.

The petitioner initially submitted the Articles of Incorporation of the Virginia company, financial statements of the foreign entity and an office lease agreement for the United States entity.

The director requested that the petitioner supply additional evidence to establish a qualifying relationship between the United States entity and the foreign entity. The director also requested the petitioner provide evidence that sufficient physical premises had been secured for the new operation in the United States. The director, in addition, requested evidence that demonstrated the beneficiary's qualifying employment abroad was in a managerial or executive capacity and that the proposed employment would involve executive or managerial authority over the new operation. The director finally requested organizational charts showing the beneficiary's position in the foreign and United States company, evidence that the petitioning entity would maintain a qualifying organization in another country during the beneficiary's stay, and copies of the United States entity's business permits.

In reply, the petitioner submitted the Articles of Incorporation of the United States entity and a memorandum of association indicating that six individuals received one share of the United States entity. The petitioner also submitted minutes of a meeting held by the foreign entity in March of 1997 allocating the foreign entity's shares amongst six individuals, four individuals were allocated 1300 shares, the fifth individual was allocated 1299 shares and the sixth individual was allocated one share. In addition, the petitioner submitted a copy of the lease agreement previously submitted with the petition. The petitioner further submitted an organizational chart for the United States entity and the foreign entity, showing the directors of each company. Finally, the petitioner submitted office photographs of the United States company and the foreign entity and a 1998 audited financial statement of one of the companies in the petitioner's closely held group of companies.

The director determined that although both entities were owned and controlled by the same group of individuals, each individual in the group did not own and control approximately the same proportion of each entity and thus a qualifying relationship could not be established. The director also noted that the petitioner had not provided any evidence describing the actual work of the beneficiary and had not provided any evidence that the new office would support a managerial position within one year. Based on the lack of evidence, the director determined that the beneficiary did not qualify as an L-1 intracompany transferee. Finally, the director noted that the office space leased for the United States office had a maximum occupancy of 1 to 3 people, but that the office organizational chart indicated that the new office would

employ four managers. The director determined that sufficient physical premises had not been secured.

The first issue in this proceeding is whether the petitioner has provided sufficient evidence to demonstrate a qualifying relationship between the United States entity and the foreign entity.

On appeal, counsel submits minutes of the United States entity's board of director's meeting dated December 28, 1999, in which the directors resolved that the United States entity was allocating 1300 shares each to four individuals and 1299 shares to one individual. Counsel asserted that the new evidence rectified the problems noted in the Service's previous determination.

Counsel's assertion is not persuasive. After the director requested additional documentation on this issue the petitioner failed to submit sufficient evidence. On appeal, the petitioner now submits evidence which was not submitted to the director and which was not in existence at the time the petitioner was filed. 8 C.F.R. 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). The petitioner's new evidence will not be considered and the record as presently constituted does not demonstrate a qualifying relationship between the United States entity and the foreign entity.

The second issue in this proceeding is whether the petitioner has provided sufficient evidence to comply with the requirements to set up a new office. The new office definition is set forth in 8 C.F.R. 214.2(l)(1)(ii) and states:

> (F) New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

8 C.F.R. 214.2(l)(3)(v) sets forth the requirements for an organization setting up a new office in the United States. 8 C.F.R. 214.2(l)(3)(v) states that if a petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

On appeal, counsel submits a new lease agreement dated January 2000 indicating the maximum office occupancy is for four persons. Counsel also asserts that the beneficiary will perform the function assigned to him and that supervision of other executives is not mandatory to fulfill the eligibility requirements of a manager.

Upon review of the record as presently constituted, the United States entity has office space with a maximum occupancy of three people. As noted above, evidence created after the petition is filed will not be considered in this proceeding or on any subsequent appeal. The record does not support a finding that sufficient physical premises have been secured for the new office.

In addition, the record provides no evidence that the beneficiary has been employed in an executive or managerial capacity by the company abroad. A position title is insufficient to support a finding that the beneficiary actually engaged in managerial or executive acts as defined by the regulations at 8 C.F.R. 101(a)(44)(A) and (B).

Further, counsel's assertions that the beneficiary would perform the function assigned to him is not sufficient to indicate that

the proposed employment will involve executive or managerial authority over the new operation. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The only documentary evidence provided to describe the beneficiary's job duties is the minutes of a board meeting of the foreign entity. The minutes provided re-state the elements of the regulatory definition of managerial and executive capacity and do not describe the beneficiary's proposed day-to-day duties. The petitioner has not demonstrated that the United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in the regulation.

Beyond the decision of the director, the record is not persuasive in demonstrating the size of the United States investment or the financial ability of the foreign entity to remunerate the beneficiary. Further, there is no evidence of the temporary assignment of the beneficiary in the United States pursuant to 8 C.F.R. 214.2(l)(3)(vii). As the appeal will be dismissed for the reasons above, these issues will not be examined further.

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.