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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

File: EAC 99 270 52376 Office: VERMONT SERVICE CENTER Date: JAN 09 2002

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]

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, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the matter remanded for further consideration.

The petitioner is described as an import, export and distribution business involving construction materials, consumer goods and automotive supplies. The petitioner seeks to employ the beneficiary in the United States as its president and chief operation officer. The director determined that the petitioner was a new office for immigration purposes but that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, either immediately or within one year.

On appeal, counsel for the petitioner asserts that the director's decision was incorrect as a matter of law.

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 was incorporated in the state of New Jersey in June of 1999 and the petition was filed in September of 1999. The petition requests an L-1A nonimmigrant visa for the beneficiary in order to set up a new office for the petitioner in New Jersey. The petitioner qualifies under the new office definition in 8 C.F.R. 214.2(l)(1)(ii) that states in pertinent part that:

(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.

The issue in this proceeding is whether the petitioner has provided sufficient evidence to comply with the requirements set forth in 8 C.F.R. 214.2(l)(3)(v).

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 (l)(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.

The petitioner initially submitted the following documents:

Its articles of incorporation, a stock certificate issued to Kraz International, Inc., a stock registration ledger showing 2000 shares of Kraz International, Inc. issued to Krazcross, a Russian Joint Stock Company (Krazcross);

The charter and Russian Federation registration number of Krazcross;

An abstract of personnel and payroll records indicating the beneficiary's position with Krazcross, an organizational chart with job titles of all subordinate employees to the beneficiary, education of the management staff reporting to the beneficiary and the beneficiary's government workbook indicating his commencement of work in the capacity of vice-general director for Krazcross;

A lease agreement for warehouse space in New Jersey expiring August 31, 2001;

A bank statement and Internal Revenue Service Employer Identification number for the petitioner;

A business plan, including a budget, spreadsheet, listed goals, competition factors, and proposed organizational chart for the petitioner;

A brochure and photographs of Krazcross's business;

The unaudited balance sheets for the years 1996, 1997, 1998, a 25 year lease and a record of tax payments made to the Russian government, all for Krazcross;

Various contracts entered into by Krazcross;

A letter from the petitioner regarding its start up in the United States;

A letter from Krazcross regarding the start up of the petitioner and the transfer of the beneficiary to the petitioner.

The director requested that the petitioner supply additional evidence that demonstrated the dollar value of automotive components and construction materials sold by the parent company in the United States for the years 1998 and 1999. The director also requested an explanation of how the petitioner planned to hire professionals, skilled managers, and sales personnel within the next few months with a bank balance of only $55,000.

In reply, counsel for the petitioner submitted a letter from the petitioner indicating that the parent company had not exported automotive components or construction materials into the United States because the start up company had not yet been organized. The petitioner included with this letter, statements from two other American companies expressing an interest in importing goods from the foreign company. Counsel also included a more recent bank statement for the petitioner indicating a balance of $85,000. Counsel also submitted petitioner's cash flow schedule showing the proposed salaries of two potential employees.

The director determined that the petitioner had not submitted sufficient evidence regarding the potential viability of a business importing vehicle components from Russia, and thus the petitioner had not provided sufficient evidence that it would support a managerial or executive position within one year. The director also commented on the ethnicity of the individuals whose companies had expressed an interest for the petitioner's product.

On appeal, counsel for the petitioner asserts that it is not proper for the Service to impose its business judgment upon the petitioner. Counsel also asserts that it is inappropriate for the Service to comment on the ethnicity of the individuals involved in potential business deals with the petitioner. Counsel concludes that as a matter of law, the petitioner, as a start up company, has invested sufficient funds based on a calculated budget to become a successful business.

The Service agrees that the national origin of the petitioner's potential clients is not relevant to the petitioner's qualifications under the regulations. However, counsel's assertion that it is not proper for the Service to impose its business judgment on the petitioner does not take into account the requirements of 8 C.F.R. 214.2(l)(3)(v). The Service must determine whether the petitioner can within one year from the date of approval of the petition support an executive or managerial position as defined in paragraphs 8 C.F.R. 214.2(l)(1)(ii)(B) or (C). To satisfy this requirement, the Service must review the ability of the petitioner and the qualifying foreign entity to remunerate the beneficiary and to employ sufficient number of individuals to support a managerial or executive position. This requirement necessarily calls for the Service to consider the petitioning entity's viability as a business. However, after careful review of the record, it is determined that the petitioner has submitted sufficient evidence to demonstrate that the petitioner could support a managerial or executive position within one year from the date of the approval of the petition.

Beyond the decision of the director, however, the petitioner has not provided evidence of a qualifying relationship with a foreign entity. The stock certificate submitted by the petitioner indicates it has issued 2000 shares to itself or a company similarly named. This contradicts the evidence in the stock registration ledger that indicates 2000 shares, have been issued to Krazcross, the claimed foreign entity in this case. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). As the record now stands, the actual ownership of the petitioning company cannot be determined. For this reason, the matter will be remanded to the director so that he can request additional evidence regarding the claimed relationship. Upon considering

any additional evidence submitted by the petitioner, the director shall enter a new decision which, if adverse to the petitioner, shall be certified to the Associate Commissioner for review.

ORDER: The record is remanded to the district director for further proceedings consistent with the foregoing opinion and the entry of a new decision.