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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: EAC 99 222 50821 Office: VERMONT SERVICE CENTER Date: 11 JAN 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 appeal will be dismissed.

The petitioner is described as an import and export company. The petitioner seeks to continue the employment of the beneficiary in the United States as its manager. The director determined that the petitioner had failed to demonstrate that the beneficiary had been employed in either a managerial or executive capacity.

On appeal, the petitioner disagrees with the director's determination and states that the beneficiary is performing in primarily a managerial capacity.

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 United States petitioner was incorporated in January of 1996. The petitioner indicates it is 100 percent owned by Victor Yudin, nationality unknown. The petitioner indicates that Victor Yudin owns 50 percent of the Russian entity, SpetsStroiTrest, for which the beneficiary previously worked. The petitioner declared three employees, including the beneficiary and a gross income of approximately $249,272 for the year of 1998. The petitioner seeks to continue the employment of the beneficiary as its manager.

The issue in this proceeding is whether the petitioner has established that 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:

> The term "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:

> The term "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
>
> iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the July 16, 1999 petition, the petitioner indicated that the beneficiary had been given full discretionary authority to enter

into sales negotiations, to determine shipping schedules, establish prices and in general, conduct all aspects of marketing the Russian entity's products in the United States and Europe. The petitioner also noted that the beneficiary managed two employees, a sales and marketing manager and a technical support and transportation manager. The petitioner also stated that the beneficiary had been responsible for managing and directing the two employees in order to support the mother company's (referring to SpetsStroiTrest) smooth and continuous business operations and to develop new areas of both companies business activities. The petitioner concluded by indicating that the beneficiary developed a budget for marketing and exercised complete management and control of the local corporation and its employees.

On August 26, 1999 the director requested on this issue, that the petitioner provide a complete position description of all the petitioner's employees, including a breakdown of the number of hours devoted to each of the employees' weekly job duties, the minimum educational requirements for the employee positions and evidence, if any, that independent contractors were employed.

In reply, the petitioner submitted Internal Revenue Service Quarterly Tax returns for three quarters of 1999 reflecting income paid to the employees in the United States. Counsel for the petitioner also stated that:

> the employees managed by the beneficiary should have a high school degree and two years of work experience in a related field;
>
> the sales and marketing manager was responsible for marketing research for the petitioner and for its United States partners, providing business consulting, and purchasing wood-processing equipment and spare parts for the mother company, SpetsStroiTrest;
>
> the technical support and transportation manager was responsible for arranging shipment of wood-processing equipment from the United States and Europe to Russia and providing technical support for the said equipment to SpetsStroiTrest's employees;
>
> the beneficiary also managed two of SpetsStroiTrest's employees; and
>
> the beneficiary had been entrusted with the goal of researching the United States market and developing strategies for growth and prosperity of the parent corporation, that the beneficiary managed projects such as the export of wood-processing equipment, packaging and bottling equipment and foodstuffs.

The petitioner, through its counsel, concluded the statement regarding the beneficiary's duties by paraphrasing the regulatory

definition of manager and indicating that the beneficiary was responsible for those duties. The petitioner declined to provide a breakdown of the number of hours devoted to each of the employee's job duties as the job functions of the employees was not static but fluid depending on their obligations and responsibilities.

The director determined that the information provided by the petitioner was insufficient to show that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel asserts that the petitioner's office in the United States although small "performs a significant and vital role in the functioning of the parent corporation." Counsel further states that,

> [the beneficiary] has the sole and discretionary authority to manage [the petitioner's] daily activities, to oversee [the petitioner's] business decisions in the United States and to serve as the foreign manager and representative of the parent corporation in Russia. Without the beneficiary to manage, supervise and organize the activities of the petitioner's U.S. subsidiary office, it would, in all probability, cease to exist, with its concurrent negative effects on the parent corporation's business activities.

Counsel concludes that the beneficiary is employed in a managerial capacity, that she manages three employees and the subsidiary corporation. Counsel also provides an excerpt from an unidentified business school textbook that provides a definition of management duties and requirements.

Counsel's assertions are not persuasive. The record is insufficient to support the counsel's conclusion that the principal duties of the beneficiary are managerial in nature. No concrete description is provided to explain the beneficiary's activities in the day-to-day execution of her position with the petitioner. The least vague description of the beneficiary's job duties found in the petition provides a description that is more indicative of operational duties, such as sales negotiations, determining shipping schedules and conducting marketing of products, rather than managerial ones.

In addition, the petitioner has provided insufficient information to show that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees. The two employees managed by the beneficiary are clearly employed in non-professional positions. Section 101(a)(32) of the Act states that the term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers. The record provides no information that the "managed" employees are supervisors or managerial employees themselves. Thus

the beneficiary is not supervising the work of other supervisory, professional, or managerial employees. Further, the record contains no documentary evidence of the employment of the two individuals allegedly employed in Russia other than counsel's statement in response to the director's request for evidence. 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). On review, the record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization or managing an essential function of the petitioner, other than in position title.

Beyond the decision of the director, the record is not persuasive that a qualifying relationship exists between the petitioner and a foreign firm, corporation or other legal entity. Though reference is made throughout the information provided by the petitioner to a Russian entity, the by-laws of this entity are only partially translated. There is no translated agreement or other indication that the alleged 50 percent owner of the Russian entity who apparently is the 100 percent owner of the petitioner has negative control over the foreign company. See 8 C.F.R. 103.2(b)(3) (regarding the requirement of complete translations). See 8 C.F.R. 214.2(l)(1)(ii)(G) (providing the definition of qualifying organizations). Furthermore, counsel's assertion that without the beneficiary to manage, supervise and organize the activities of the petitioner's U.S. subsidiary office, it would, in all probability, cease to exist, implies that the beneficiary's services for the petitioner are not of a temporary nature. The regulation at 8 C.F.R. 214.2(l)(3)(vii) requires the beneficiary's services to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad on completion of the temporary assignment in the United States. As the appeal will be dismissed for the reason stated above, these issues need 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.