

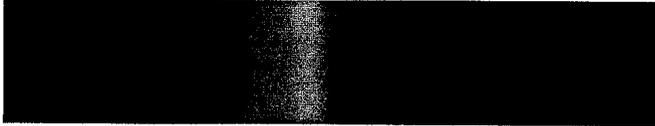


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: EAC 00 104 50128 Office: VERMONT SERVICE CENTER

Date: JUN 21 2002

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)

IN BEHALF OF PETITIONER:



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. Wiemann, 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 engaged in the manufacturing and export of diamond studded gold jewelry and finished diamonds. The petitioner seeks to employ the beneficiary in the United States as its marketing director and president. The director determined that the petitioner had not established that the beneficiary was employed in an executive or managerial capacity for the foreign entity. The director also determined that the petitioner had not adequately documented the beneficiary's duties for the United States company.

On appeal, the petitioner asserts that the director's decision is an abuse of discretion and that the evidence submitted demonstrates that the beneficiary functioned in an executive capacity for the foreign entity and will function in an executive capacity for the United States entity.

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(1)(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 (1)(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 December of 1999 and the petition was filed in February of 2000. 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(1)(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(1)(3)(v).

8 C.F.R. 214.2(1)(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.

The petitioner initially submitted a statement dated February 4, 2000 signed by its attorney indicating the intention of the beneficiary to open a new office in the United States. The statement briefly described the beneficiary's proposed duties in the United States but did not describe the beneficiary's job responsibilities for the foreign entity. The only reference to the job duties of the beneficiary was contained in a partnership document that indicated that each partner would diligently attend to the business and look after the day-to-day business activities

of the partnership. The beneficiary appears to be a partner in this partnership. The petitioner also provided a copy of a stock certificate indicating that 200 shares of stock had been issued to a foreign company. The petitioner did not provide evidence that sufficient physical premises had been secured for the new office in the United States. The petitioner also did not provide evidence to demonstrate that the petitioner would be able to support a managerial or executive position within one year of the potential approval of the petition.

The director requested that the petitioner supply evidence that established a qualifying relationship between the petitioner and the foreign entity. The director also requested the petitioner provide evidence that physical premises had been secured in the United States. The director further requested evidence demonstrating that the foreign entity had the ability to invest in the United States entity. The director also requested a copy of the business plan for the new office in the United States. The director finally requested evidence that the beneficiary had been employed abroad, by a qualifying organization, in a managerial or executive capacity for one continuous year of full-time employment within three years prior to the filing of the petition.

In reply, the petitioner re-submitted its share certificate issued to the foreign entity. In addition, the petitioner submitted a copy of a lease agreement between two unrelated entities that provided the leased premises could be used only for a variety and grocery store. The petitioner also submitted a copy of a sublease entered into between itself and the tenant of the variety and grocery store lease. The sublease was dated May 25, 2000 and indicated the sublease was for the use of an 8 x 8 table to be used only for the sale of stones, diamonds and jewelry items. The petitioner also provided photographs of the table and a sign on the outside of the premises indicating that the petitioner was located therein and that the beneficiary was the owner. The petitioner further submitted a letter signed by a director of the purported foreign entity stating that the beneficiary had been appointed its overseas business manager. The petitioner further provided letters purporting to be the pay stubs of eight individuals employed by the foreign entity. The letters stated the salary and title of each individual. The beneficiary was identified as the partner and director of the foreign entity in the alleged pay stubs. Finally, the petitioner submitted a copy of an export invoice of the foreign entity as well as recent bank statements of the foreign entity.

The director determined that the petitioner had not provided evidence establishing the beneficiary's duties for the foreign entity and that those duties were executive or managerial in nature. The director also noted that the petitioner had not submitted a business plan and had not established that the beneficiary would function at an executive level for the United States entity.

On appeal, counsel for the petitioner asserts that the petitioner submitted evidence regarding the employment of the beneficiary as an executive for the foreign entity. Counsel also asserts that the Service decision was an abuse of discretion as the evidence submitted did establish that the beneficiary would be acting in an executive capacity for the United States entity. Counsel further asserts that the Service incorrectly determined that the petitioner's business plan was unclear.

Counsel's assertions are not persuasive. The petitioner has not provided a comprehensive description of the beneficiary's day-to-day duties and responsibilities for the foreign entity. Contrary to counsel's presumption, an executive or managerial title is not sufficient to establish that the beneficiary functions in an executive or managerial capacity. A simple listing of employees with job titles and salaries does not add sufficient information to the record to allow a conclusion that the beneficiary was acting in an executive or managerial capacity. As the record is deficient in providing a description of the beneficiary's activities for the foreign entity, the Service cannot determine that 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.

Beyond the decision of the director, the petitioner has provided inconsistent evidence regarding its ownership. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this nonimmigrant visa classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant proceedings). The petitioner has only provided a copy of a share certificate to demonstrate that it is wholly owned by the foreign entity. The beneficiary, however, advertises that he is the owner of the United States entity. Doubt cast on any aspect of the petitioner's proof may lead to a re-evaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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). In light of this inconsistent evidence, the stock certificate alone cannot establish that the foreign entity is the sole owner of the petitioner. In the case at hand, insufficient evidence has been submitted to establish the ownership and control of the petitioner. For this additional reason, the petition is not approved.

In addition, the petitioner has not provided evidence that sufficient physical premises have been secured for the United States office. The original lease between entities unrelated to the petitioner provides that the premises are only to be used for a variety and grocery store. This calls into question the ability of the leasee to sublease a table for the petitioner's business of manufacturing and export of diamond studded gold jewelry and finished diamonds. Further, an 8 x 8 foot table is not sufficient to provide the necessary premises for the petitioner to commence business. Finally, on this issue, the sublease was entered into subsequent to the filing of the petition. As the petitioner did not have premises prior to the filing of the petition, the petitioner cannot establish filing eligibility at the time the petition was filed. 8 C.F.R. 103.2(b)(12).

Further, the petitioner has not provided sufficient evidence that it will be able to support an executive or managerial position within one year of the potential approval of the petition. The petitioner has not provided sufficient evidence outlining the proposed nature of the new office, has not adequately described the scope of the United States entity, its organizational structure, or its financial goals. Furthermore, the petitioner has not adequately documented 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. For these additional reasons, the petition may not be approved.

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.