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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

[redacted]

File: EAC 99 127 53418 Office: VERMONT SERVICE CENTER Date: MAY 07 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. 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 a web designing company. It seeks to employ the beneficiary temporarily in the United States as manager of its new office. The U.S. entity is described as a branch of the foreign entity. The director determined that the petitioner had not demonstrated that the beneficiary has been employed for one continuous year by the foreign organization in a capacity that is managerial or executive. The director also determined that the petitioner had not submitted evidence of a physical premises appropriate for doing business or evidence that the foreign organization has the financial ability to remunerate the beneficiary and commence doing business.

On appeal, counsel claims that the beneficiary acted in a capacity that was primarily managerial and will continue to do the same for the petitioning U.S. organization. Documentation is submitted in support of this claim.

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.

The issue in this proceeding is whether the beneficiary has the qualifying one year of employment in a primarily managerial or executive capacity.

8 C.F.R. 214.2(l)(3)(v) states that if the 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;
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> 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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 110'(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-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component or function;
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> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petition indicates that the beneficiary's past duties included "exhibitions on computer technology" and states that his proposed duties will include "widespreading [sic] of web-design technology (IPIX, Shockwave) in both countries." No further description of the beneficiary's past or future duties was provided. On April 16, 1999, the director instructed the petitioner to submit the following information:

> 1. Evidence that the beneficiary was employed in a managerial or executive capacity for at least one year with the foreign organization.
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> 2. Evidence of the management and personnel structure of the foreign entity, including the number of employees and the duties they performed.
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> 3. Evidence establishing that the beneficiary will be employed in an executive capacity in the U.S.
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> 4. Evidence of a sufficient physical premises to house the new office.
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> 5. Number of employees in the U.S. office, their job titles, job descriptions and their salaries, as well as the management and personnel structure of that office.

6. Evidence that establishes the size of the U.S. investment and the foreign organization's ability to remunerate the beneficiary and commence doing business in the U.S.

In response to the above request for additional information, the petitioner submitted a certified translation of the minutes from a meeting that took place at the foreign organization. The notes indicate that the beneficiary was elected general director of the U.S. petitioning organization. The notes also indicate that the foreign organization planned to apportion $30,000 to begin business activity in the United States. While the record contains evidence of two wire transfers (one in the amount of $1,500 and the other in the amount of $1,504) both addressed to the beneficiary, each transfer contains a different account number, only one of which matches what appears to be the petitioner's bank account number that is contained in the two bank statements that were submitted. There is no evidence that the petitioner received $30,000, either cumulatively or in one lump sum, from the foreign entity. Furthermore, regarding the translated account balance report reflecting the foreign entity's finances, the numerical figures contained therein are not self-explanatory. Nor has the petitioner provided a sufficient explanation of the report which would indicate that a significant sum of money was allotted for the start-up of the petitioner's business.

The petitioner also submitted the names and salaries of the staff of the foreign entity. However, no job descriptions were provided for any of the employees. Although a notarized statement was submitted indicating that the beneficiary has been the owner and general manager of the foreign organization, his job description with that entity was not given, nor did the petitioner provide a description of proposed duties in the United States.

While the petitioner also submitted a copy of the floor plan and lease for the premises which is claimed to be the petitioner's place of business, the director deemed such premises inadequate as a place of business.

The director denied the petition. On appeal, the petitioner asserted that the beneficiary performed primarily managerial duties for the foreign entity and claims that the petitioner has a valid business premises even though that premises is also the beneficiary's residence. Other than the floor plan of the beneficiary's residence, the petitioner has not submitted any new evidence. Counsel merely asserts that the petitioner's business is no less legitimate because it operates out of the beneficiary's premises, and justifies this assertion by bringing up other businesses which operate out of private residences. Nevertheless, the fact remains that the petitioner, by regulation, is required to submit evidence of sufficient physical premises to house the new

office. 8 C.F.R. 214.2(l)(3)(v)(A). It is concluded that the beneficiary's residence is not sufficient physical premises. The remaining documents provided by the petitioner on appeal consist of photocopies of previously submitted evidence.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. Based on the evidence submitted, it cannot be found that the beneficiary has been employed in a primarily executive or managerial capacity, or that the petitioning organization will support an executive or managerial position within one year of the approval of the petition. For this reason, the petition may not be approved.

Beyond the scope of the director's findings, the petitioner did not submit sufficient evidence of a qualifying relationship between it and a foreign entity. The record contains documents, such as a Delaware Annual Franchise Tax Report and a certificate of incorporation, which indicate that the petitioner is incorporated in the U.S. However, the record contains no documentation, such as a stock transfer ledger or even stock certificates, which would determined who owns and controls the petitioning entity, thereby establishing a qualifying relationship. As the appeal will be dismissed based on the above stated grounds, this issue need not be addressed 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 appeal is dismissed.