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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: EAC-01-085-54150 Office: Vermont Service Center Date: MAY 07 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: [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

Myra L. Mosely

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is engaged in the sale and installation of windows and doors. A copy of the beneficiary's I-94 Departure Record shows that the beneficiary was admitted as a B-1, visitor for business, on October 20, 2000 until January 19, 2001. The petitioner seeks to employ the beneficiary temporarily in the United States as the president of its new office for three years. The director determined that the petitioner had not established that the petitioning entity will support an executive or managerial position within one year of its operation. The director also determined that the petitioner had not established the size of the U.S. investment and the financial ability of the foreign entity to commence doing business in the United States. Finally, the director determined that the petitioner had not provided information concerning the proposed nature of the office describing the scope of the entity, its organizational structure and its financial goals.

On appeal, counsel states that the petitioner has persuasively demonstrated through credible documentary evidence that the new office will be functioning at such a manner that would support an executive position within one year of approval of the petition.

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.

The first issue in this proceeding is whether the petitioning entity will support an executive or managerial position within one year of its operation.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

> "Managerial capacity" means an assignment within an organization in which the employee primarily-
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> > 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-

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

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The United States petitioning entity was incorporated on November 3, 2000. The petition indicates that the petitioning entity is an affiliate of Serenay Dayanikli Tuketim Mallari Sanayi ve Ticaret Limited Sirketi, located in Bursa, Turkey. The petitioner seeks to employ the beneficiary for three years at an annual salary of $18,000.

The petition describes the beneficiary's duties in the proposed position in the United States as follows:

> [redacted] will be responsible for making all decisions regarding the company's future, including setting and meeting budgets, overseeing the accounts payable and receivable managers, payroll, approving all expenditures and staffing requirements. In addition, he will supervise the work of the sales and construction managers.

Counsel states in his letter dated January 18, 2001 that the beneficiary is responsible for setting up the petitioner's office, establishing business relationships with quality window and door manufacturers in the United States, cultivating the company's client base and hiring staff. Counsel states that initially, the beneficiary will be responsible for hiring one clerical staff and two other employees. Counsel also states that the number of additional staff required will vary depending on the amount of work that the beneficiary will generate for the petitioner.

In an undated letter, the initial job duties of the beneficiary as president are stated to be as follows:

> Setup office, contact window and door manufacturers, contact potential clients (construction companies and contractors) in order to generate business, hire and fire personnel (including managers) based on recommendations of managers, set budgets, prepare proposals, banking, review and sign contracts, oversee accounts receivable and payable, and approve expenditures and staffing requirements.

In another undated letter, the anticipated job duties of the beneficiary are stated to be as follows:

> Oversee the work of the office, service, and sales managers, write checks for payroll, meet with clients and ensure they are satisfied with products and services, hire and fire personnel (including managers) based on recommendations of managers, set budgets, work with the service manager on the scheduling of installation and repair projects, attend sales meetings with sales manager and sales staff on a daily basis, approve sales goals set by sales manager, sit in on and oversee meetings with sub-contractors, if any, and service manager as they review projects and set project schedule, banking, go to work site and spot check work of Service department and sub-contractors, review and sign contracts, oversee office manager and accounts receivable and payable, and approve expenditures and staffing requirements.

Upon review of the record, the petitioner has not presented convincing evidence to show that the beneficiary will be employed in the United States in an executive or managerial capacity. The beneficiary's duties in the United States are not reflective of duties that are of an executive or managerial nature. There is no evidence to establish that the petitioner will employ a subordinate staff of professional, managerial, or supervisory personnel in the United States who will relieve the beneficiary from performing nonqualifying duties. The record contains a list of employees that the beneficiary will supervise, specifically, the sales, service and office managers. However, the petitioner has not described the positions and the duties of the subordinate staff working under the sales, service, and office managers to confirm that these individuals actually hold managerial positions. Both the Act and the Service regulations state that a first-line supervisor is not considered to be acting in an executive capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv). The record is not sufficient in demonstrating that the beneficiary will be primarily engaged in exercising managerial control and authority over a function, department, subdivision or component of the U.S. entity.

In conclusion, the description of the beneficiary's duties do not demonstrate that the beneficiary will be employed in managing or directing the management of a department, subdivision, function, or component of the petitioning organization. It must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities will be primarily managerial or executive in nature. Consequently, the petitioner has not established that the beneficiary will be employed primarily in an executive or managerial capacity, or that the petitioning entity will support such a position within one year of operation.

The second issue in this proceeding is whether the amount of funds currently at the beneficiary's disposal in the U.S. is sufficient to commence doing business in the manner alluded to in the petition. The record, as it is presently constituted, contains three of the beneficiary's personal checking account statements. The latest of these statements ending December 26, 2000 indicates that there is a balance of $3,243.77 remaining in the account. The beneficiary also received a transfer in the amount of $9,725, but the bank was unable to confirm where the transfer came from. This is the beneficiary's personal funds. The petitioning entity's business checking account reflects a balance, as of April 30, 2001, of $719.74. The record also contains a copy of the foreign entity's Detailed Income Schedule of the Establishment and the payroll records. The aforementioned evidence does not demonstrate the financial ability of the foreign entity to commence doing business in the United States.

The final issue in this proceeding is whether the petitioner provided the Service with a comprehensive business plan for its start-up organization. A comprehensive business plan is no more than the new office's proposed or tentative goals. Although the director used different verbiage, the regulations require that the petitioner provide information concerning the proposed nature of the office describing the scope of the entity, its organizational structure and its financial goals. See 8 C.F.R. 214.2(l)(2)(v). The record does not contain such information. For the above aforementioned reasons, this petition may not be approved.

This petition may not be approved for other reasons beyond the decision of the director. The petitioner has not established that the beneficiary has been employed abroad in a managerial or executive capacity. The record contains a list of employees that the beneficiary supervised abroad, specifically, the sales, construction and office managers. However, the petitioner has not described the positions and the duties of the subordinate staff working under the sales, construction, and office managers to confirm that these individuals actually hold managerial positions. Further, the record does not contain evidence to demonstrate that a qualifying organization exists between the foreign and petitioning entities. As this matter will be dismissed on the grounds discussed, these issues need not be examined 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.