

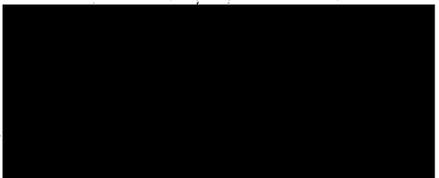


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U.S. Department of Justice  
Immigration and Naturalization Service

**PUBLIC COPY**

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



File: EAC 01 184 52521 Office: VERMONT SERVICE CENTER Date: FEB 28 2003

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]

**Identifying data deleted to prevent clearly unwarranted invasion of personal privacy**

**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 that 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 that 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 manufacturer and marketer of holistic health products. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief executive officer (CEO). The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary is a function manager and submits additional evidence in support thereof.

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 U.S. petitioner states that it was established in 1998 and that it is an affiliate of Biomantus, T.E.A., located in Liubliana, Slovenia. The petitioner declares three employees and \$550,000 in gross revenues. The prior petition was approved and was valid from May 1, 2000 to April 30, 2001. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years at an annual salary of \$65,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed primarily in a managerial or executive capacity.

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-

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.

In support of the petition, the vice-president of the U.S. entity stated that the beneficiary's duties in the United States will consist of the following:

He will continue to direct and operate all management activities of the US Company which will include exploring new avenues for growth, licensing and marketing of existing technology, research and development and acquisition of assets. He will also coordinate with the manufacturing activities in Slovenia. 100% of his time will be spent on managerial activities.

On July 20, 2001, the Service sent the petitioner a notice requesting that additional evidence be submitted. Namely, the petitioner was instructed, in part, to submit its organizational chart, indicating where within the organization's hierarchy the beneficiary's position falls, and a comprehensive description of the beneficiary's duties.

In response to the Service's request, the petitioner submitted an organizational chart which shows the beneficiary in the position of CEO and another employee in the position of marketing director. Contrary to statements made in the petition, a third employee is not indicated anywhere in the chart. The petitioner also submitted the following description of the beneficiary's duties:

██████████ is the chief executive Officer of Biomega Inc. currently. In this role, he directs the overall strategic direction of the company, as well as makes all day to day operational decisions. He is accountable for the company's financial success and reports directly to the Board of Directors. As additional managers + employees are added ██████████ will remain in the CEO capacity and supervise those managers/staff as appropriate.

The petitioner further indicated that the beneficiary supervises a marketing director and divided the beneficiary's daily tasks into three main categories: managing the organization, controlling the work, and new inventions and intellectual property work.

The director denied the petition, noting that after three years of operation, the beneficiary is essentially the only employee. The director also states that the petitioner has not provided evidence of the work the beneficiary actually controls or evidence to show

that initiatives are being made in the area of inventions and intellectual property.

On appeal, counsel submits a brief asserting, in part, that the beneficiary manages a function, not personnel, and that the petitioner's size is therefore irrelevant. Counsel further points out that the nature of the petitioning entity is not one that requires a large staff, since the product is manufactured abroad. However, product manufacturing is only one component of the U.S. entity. As counsel readily admits, the petitioner still needs to create intellectual property, market the products, and license its technology. None of these tasks in and of themselves are of a qualifying nature. While the beneficiary may manage any of these listed functions, the petitioner must establish that the beneficiary is not actually performing these functions. Therefore, the petitioner must show that it has personnel, other than the beneficiary, to perform the day-to-day duties such that the beneficiary can focus primarily on managerial or executive tasks. The evidence in the instant case does not indicate that the petitioner has met that burden. As previously stated, the petitioner has not submitted evidence that it employs three individuals, as claimed in the petition. While the petitioner has submitted evidence of an agreement between the petitioning entity and a company agreeing to be the petitioner's consultant, such an agreement is dated January 17, 2002. Therefore, it was clearly not in effect as of the petition's filing date in April 2001. 8 C.F.R. 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed."

Further, counsel has submitted a series of emails, some of which were sent by the beneficiary and others of which were sent by what appear to be the petitioner's potential clients whom the beneficiary was attempting to target. Several of the emails addressing the beneficiary referred to information which he personally provided, or promised to provide, in regards to price quotes or just general information about the petitioner's products. This further supports the conclusion that the petitioner does not have sufficient personnel to relieve the beneficiary from having to deal with sales-related and other nonqualifying functions. In fact, the idea that the beneficiary directly communicates with potential customers in regards to the sale of the petitioner's product negates the inference in the organizational chart that the marketing director handles the marketing and sales functions.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicated, in the response to the request for additional evidence, that it plans to hire additional managers and employees in the

future. However, 8 C.F.R. 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Service regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant case, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. In fact, the description of the beneficiary's duties that has been provided is too general and vague to convey any kind of real understanding of what exactly the beneficiary does on a daily basis. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, based on information provided in the petition, it does not appear that the petitioner has a qualifying relationship with an entity abroad. Namely, the petitioner indicates that it is an affiliate of an overseas entity. 8 C.F.R. 214.2(l)(1)(ii)(L) states, in pertinent part:

*Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In the instant case, the petition indicates that the beneficiary owns 100% of the foreign entity's stock, but only 60% of the U.S.

entity's stock. According to the regulatory definition provided above, relationship of the two entities does not fit under the definition of "affiliate." However, as the appeal is being dismissed on grounds as specified above, this issue need not be addressed 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.