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U.S. Department of Justice
Immigration and Naturalization Service

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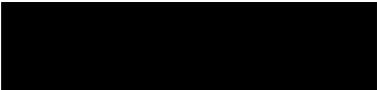


OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

File: EAC 01 274 53793 Office: VERMONT SERVICE CENTER Date:

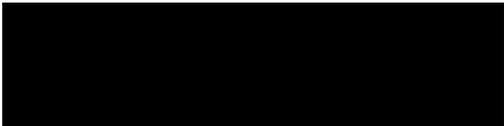
JAN 15 2003

IN RE: Petitioner:
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:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a jewelry company that imports 21 karat Middle Eastern jewelry for retail and wholesale businesses in the United States. The petitioner seeks to extend its L-1A authorization to employ the beneficiary for additional time in the United States as its president. The director determined that the petitioner had not established the beneficiary had been or would be employed in a primarily managerial or executive capacity by the United States entity.

On appeal, counsel asserts that the Service erred in concluding the beneficiary did not perform primarily executive duties. She also provides additional materials with regard to new employees and the distributorship stores set up by the beneficiary that relieve him from non-qualifying duties.

8 C.F.R. 214.2(1)(1)(ii) states:

(B) *Managerial capacity* means an assignment within an organization in which the employee primarily:

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) 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;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) 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.

8 C.F.R 214.2(1)(1)(ii) also states the following:

(C) *Executive capacity* means an assignment within an organization in which the employee primarily:

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

With regard to the extension of a new office L-1 petition, 8 C.F.R. 214.2(1) states the following:

(14) Extension of visa petition validity-

(i) Individual petition. The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

(ii) New offices. A visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to

employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The petitioner, Gulf Fine Jewelry, Inc., of Paterson, New Jersey, filed the extension petition with the Vermont Service Center on September 19, 2001. The U.S. company claims that it was incorporated in March of 1999 in the State of New Jersey. According to the petition, the U.S. company imports fine custom made gold jewelry from the parent company in Jordan for both retail and wholesale sales of fine jewelry. For the preceding year, the beneficiary has served as president of the U.S. company. According to the petition, the beneficiary's job responsibilities for the petitioner are "President" and "Highest Executive." The petition also states:

From 1995 to February 2001, alien was President of the Parent Company and partial owner of Parent Company from 1995 to February 2001. In February 2001, the alien was employed as President of Petitioner company. The alien acted as one of the highest executive so the parent company. Alien was responsible for control and management of the business. Alien shall continue to work as president-highest executive responsibilities for daily business activities of the parent company. [sic]

The petition also stated that the [beneficiary] "has for past 10 years been employed in jewelry design, manufacturing and sales."

A cover letter claimed that the U.S. company had gross sales for the last year of over one million dollars. It also stated:

Each month our company has further imported from our Parent company nearly one hundred thousand dollars worth of fine gold jewelry. The company is conducting business with U.S. companies in Chicago, Los Angeles and New York each month. We presently our [sic] conducting business with US companies in Chicago, Los Angeles and New York. We have further plan [sic] of expanding our business in the United States.

The petitioner also submitted receipts from the parent company in Jordan as proof that the claimed parent company was still conducting business; copies of United States Customs trade transactions listing the petitioner's importer number; copies of the petitioner's 2000 U.S. corporate tax return with all schedules; copies of the petitioner's receipts of customhouse brokers and airway bills for jewelry shipments; and copies of statements, checks and debit memos for the petitioner's bank account.

On September 24, 2001, the Vermont Service Center requested the following items of information:

- Additional evidence to establish that a qualifying L-1 relationship still exists between the foreign business and the United States firm. Copies of all share certificates, stock ledgers, or other evidence documenting ownership and control of Gulf Fine jewelry as evidence of its subsidiary relationship.
- Additional evidence to establish that the beneficiary has been and will be employed in a managerial or executive position as described in the regulations.
- An additional detailed statement describing the specific duties of the beneficiary's qualifying employment abroad. With a breakdown of the number of hours, devoted to each of the beneficiary's job duties on a weekly basis and a discussion of the managerial or executive nature of these duties. Indicate the number, job titles and minimum education requirements of the beneficiary's subordinates abroad and provide brief job descriptions of each.
- A statement indicating the number of individuals employed by the foreign firm and provide evidence of the staffing of the foreign operation. Evidence may include copies of tax withholding statements, payroll records, etc.
- A more detailed description of the beneficiary's duties in the United States to include a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis and a discussion of the managerial or executive nature of these duties. If the beneficiary is not the sole employee of the United State firm, a description of the current staffing of the United States office to include the name of each employee as well as their job titles, a position description, and minimum education requirements for each position.

In response to the request for further evidence, counsel submitted a copy of a stock certificate that stated the Jordanian company was the owner of 900 shares; a copy and translation of the parent company's social security payment from Jordan that listed the number of employees; the originals of the petitioner's company distributorship agreements as evidence of how the petitioner conducts business; a letter from the petitioner's accountant stating general information on the U.S. company; and a copy of the cover letter, along with a prior support letter with appendices that was used in the initial petition.

On September 22, 2001, the director determined that the petitioner had not established that the beneficiary had been or would be employed primarily in a managerial or executive capacity during the first year as a L-1 beneficiary, noting in his decision that the beneficiary appeared to be performing the day-to-day tasks necessary to produce a product or to provide a service of the organization. The petitioner had not established that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the corporation.

Further, the director determined that the petitioner was not managing or directing a function within an organization, and that the petitioner also did not show that the beneficiary functioned at a senior level within the organizational hierarchy other than in position title.

On appeal, counsel asserts that the beneficiary has three stores with whom he had a sole distributorship relationship and these stores were handling the day-to-day menial tasks not associated with the position of an executive. In addition, counsel asserts that the U.S. company now employs three persons that have experience in jewelry sales. These employees were hired in December 2001 and have been continuously employed by the U.S. company. Counsel submits weekly pay stubs for December 2001 for two persons, Bilal S. Isriwea and Bilal M. Said.

In examining whether the beneficiary in the instant case is primarily working in an executive or managerial capacity, the record is unpersuasive. The Request for Further Evidence requested a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis and a discussion of the managerial or executive nature of these duties. This documentation was never submitted.

With regard to the addition of two new employees in December 2001, the record suggests that these employees would primarily be jewelry salespersons. The relationship of these employees to the beneficiary and his executive or managerial role with the petitioner is not established on the record. In addition, these employees were hired in December 2001, which is after the submission of the petition to extend the L-1A visa. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); 8 C.F.R. 103.2 (b)(12).

With regard to counsel's assertion that the three distributorships or retail stores would relieve the beneficiary from many menial non-executive or managerial duties, the record is not persuasive. The original copies of Agreement for Distributorship of Goods submitted by counsel describes the following relationship between

the distributorships and the petitioner: The petitioner, described as the first party, sells a certain amount of gold jewelry to the distributor, described as the second party, at a certain price and quality. The second party agrees not to sell the gold jewelry to other retailers within the state of New Jersey. The agreement contains no mention of any other obligations by the second party to take over any present duties of the petitioner.

Without more compelling evidence, 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, and that he is not directly providing the services of the business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In addition, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. 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, the petitioner has not established that a qualifying relationship exists between Gulf Fine Jewelry, Inc., and the parent company, Istanbuli Brothers of Amman Jordan. In the instant petition, the petitioner presented a stock certificate to document that Istanbuli Brothers of Amman Jordan, a Jordanian company, owns nine hundred shares of the U.S. company. Upon examination of the materials provided by the petitioner, to date, the petitioner has provided no evidence that the parent company actually purchased the shares.

The regulation at 8 C.F.R. 214.2(1)(3)(viii) specifically allows the director to request such other evidence as the director may deem necessary. As ownership is a critical element of this visa classification, the Service may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

Regarding the start-up activities of a corporation, such evidence would include documentation to establish that the claimed parent company actually formed the subsidiary and funded the start-up expenditures. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The petitioner submitted a statement by his accountant in the additional materials sent to the Service Center that the U.S. corporation "was established with a Capital of \$208,175.00 which was in the form of Jewelry shipment from Jordan to USA States and

it was shipped by an affiliated company owned by the same family." The record does not contain any evidence or documentation to further establish this assertion. With regard to the jewelry shipment documentation, no specific companies are named on the documents as the source of the jewelry shipments. The earlier documents from 1999 and 2001 indicate only the country from which the products were shipped. In addition, the majority of these earlier documents list Lebanon as the shipping point. The petitioner provided no further clarification or documentation of the alleged capitalization of the U.S. company.

The accountant's assertion that all wire transfers of funds going to Jordan to settle jewelry shipments from Jordan were made to the parent company located in Amman, Jordan, could also not be established from materials submitted to date. For example, while the bank statements submitted with the initial petition indicate that wire transfers for large amounts of money were processed in late 2000, no copies of debit memos were provided to show to whom the wire transfers were sent.

For later wire transfers, the petitioner provided copies of the debit memos that indicate the recipients. However, these primarily document the transfer of money to the United Arab Emirates, not to Jordan. No copies of relevant wire transfers or debit memos for the capitalization of the U.S. company are contained in the record.

The tax documents submitted with both the initial petition and the instant petition are not evidence of the qualifying relationship. For example, the record does not establish the final assertion by the accountant that the petitioner's 1999 U.S. Corporate Tax Return was amended to reflect the parent/subsidiary relationship between Gulf Fine Jewelry and the Istanboli company in Amman, Jordan. The amendment to the 1999 U.S. tax forms contained on the record is unsigned and undated.

In addition, the petitioner's Form 1120, U.S. Corporation Tax Return for tax year 2000, indicates on Schedule K that no foreign person owned, directly or indirectly, at least 25% of the total voting power of all classes of stock of the corporation, and did not identify the percentage owned by the claimed parent company in Jordan. Instead the petitioner submitted Schedule N, Foreign Operations of U.S. Corporation, with this tax return. This schedule is used to document the foreign operations of a U.S. corporation. On Schedule N, the petitioner indicates that the U.S. company is a U.S. shareholder of a controlled foreign corporation. The exact relationship between the petitioner and the claimed parent company is unclear from the submitted tax records.

It should also be noted that no articles of incorporation of the U.S. company for the State of New Jersey are contained in the record. Other than the wording of the stock certificate and the assertion of the company accountant that the company is

registered in the State of New Jersey, the record contains no documentation of such incorporation. The evidence provided is insufficient to establish this claimed incorporation.

The evidence submitted to establish that a qualifying relationship exists between the petitioner and the Jordanian company is unpersuasive. Simply 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). As the appeal will be dismissed on the grounds discussed, this issue 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, the burden has not been met.

ORDER: The appeal is dismissed.