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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: LIN-01-152-52326 Office: Nebraska Service Center Date: JAN 15 2003

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:

PUBLIC COPY

[redacted]

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

for Mary L. Rosenberg

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an international trading company. It seeks authorization to employ the beneficiary temporarily in the United States as its manager. The director determined that the petitioner had not established that there is a qualifying relationship between the U.S. and foreign entities, that it had secured sufficient physical premises to house the office, that the beneficiary had been employed in a primarily managerial or executive capacity abroad, or that the beneficiary would be employed in a primarily managerial or executive capacity by the U.S. entity.

On appeal, counsel argues that the Service had failed to consider all the evidence and that the petitioner had demonstrated the beneficiary's eligibility.

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(l)(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 (l)(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.

Title 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;

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 U.S. petitioner states that it was established in 1997, and that it is a branch of Shark Sports, located in San Paulo, Brazil. The petitioner declares eighteen employees and states that its gross annual income is $300,000. The petitioner seeks to temporarily employ the beneficiary for a period of two years at an annual salary of $300 per week.

The first issue in this proceeding is whether there is a qualifying relationship between the U.S. and foreign entities.

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

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

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

Parent means a firm, corporation, or other legal entity which has subsidiaries.

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

Branch means an operating division or office of the same organization housed in a different location.

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

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns directly or indirectly, less than half of the entity, but in fact controls the 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.

To establish eligibility in this case, it must be shown that the foreign entity and the petitioning entity share common ownership and control. Control may be *de jure* by reason of ownership of 51 per cent of outstanding stocks of the other entity or it may be *de facto* by reason or control of voting shares through partial ownership and possession of proxy votes. Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982).

The petition indicated that both the Foreign and United States entities are 99% owned [redacted] (president of the foreign entity) and 1% owned [redacted] secretary of the foreign entity). The petitioner submitted a "Contract for the Rights, Shares, and Responsibilities for the Company (LLC)" corroborating the ownership of the foreign entity. In response to a Service request for additional evidence, the petitioner submitted an

amendment to the Articles of Incorporation for the foreign entity authorizing the establishment, operation and closing of branch offices. On appeal, counsel indicates that both entities are owned and controlled by the same two individuals. The record, however, contains no evidence of ownership for either the foreign or the United States entity. Without substantiating documentary evidence, such evidence as stock certificates, corporate stock certificate registry, corporate bylaws, and the minutes of relevant annual stockholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder(s), and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all rem=levant documents, the Service is unable to determine the elements of ownership and control. Therefore, the petitioner has not overcome this portion of the director's decision.

The second issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office.

On appeal, counsel asserts that the outdoor nature of the planned soccer school and indoor "futsal" in local gyms does not require any owned or leased commercial property. Counsel's statements on appeal, however, are contradicted by the numerous photographs showing expansive facilities purported to a similar operation of the foreign entity. Further, the record contains no documentary evidence that the petitioner has leased, or otherwise made any provisions for the use of any facilities on which to conduct its activities. Public facilities, as a general rule, may not be regularly used for private enterprise.

The record contains a photocopied lease agreement executed on May 26, 2001 and terminating on May 31, 2002. The lease does not state the amount of square footage leased, but indicates that it is an apartment lease. Further, the lease in question was not in effect at the time the petition was filed. Title 8 C.F.R. 103.2(b)(12) states that 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. 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 Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Based on the evidence furnished, it cannot be found that the beneficiary has leased sufficient physical premises to house the new office. Therefore, the petitioner has not overcome this portion of the

director's decision. For this reason, the petition may not be approved.

The final issue in this proceeding is whether the beneficiary has been employed by the foreign entity abroad or will be employed by the U.S. entity in a primarily 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 a letter dated April 3, 2001, counsel, stated, in pertinent part, that:

> [The beneficiary] is exceptionally qualified to open the company's branch office. Upon graduation from high school in 1993, he entered the world of professional soccer and futsal through 1997 when he assumed the vice-presidency of Shark Sports. He also became the company's sports manager in charge of marketing and teaching youth players, coaches and directing the company's soccer and futsal programs but he also managed the instructional programs in Shark Sport's Fitness Center and their swimming pool lessons. [The beneficiary's] responsibilities will be focused on the already-popular youth soccer leagues in the Bremerton area of Washington State. His Brazilian professional experience will be a magnet for enrolling youth soccer players from the area in clinics sponsored by Shark Sports. His teaching to adult coaches will be more widespread. Coach[es] will travel to Bremerton [from] other areas where coaching clinics can [not] be sponsored.

In response to a request from the Service for additional information, the petitioner submitted the following description of the beneficiary's duties abroad:

> With regard to the beneficiary's duties in that company [foreign entity], with his lifelong experience as a youth soccer player, soccer coach, and professional soccer player, the beneficiary was hired to be in charge of Shark Sports' outdoor soccer and indoor futsal soccer programs. As indicated in the company's cover letter, [the beneficiary] had management responsibilities as he evaluated, hired, and fired coaches teaching under him in the program. He also performed executive tasks as he prepared, designed, and adopted instructional strategies for different skill levels and age groups, and provided his instructors with lesson programs for on-going classes for youth and adult players and coaches.

The petitioner also provided the following description of the beneficiary's proposed United States duties:

> Unlike his Brazil work, however, [the] beneficiary's first task will be the executive aspects of preparing, designing, and adopting instructional strategies for different skill levels and age groups, and providing local coaches with lesson programs for on-going classes for youth and adult players and coaches. As the benefits and popularity of world renown Brazilian outdoor soccer styles and as indoor futsal becomes adopted as a winter alternative to outdoor soccer in the rainy winter months, the beneficiary will be hiring coaches and instructors for Shark Sports' clinics and teams for outdoor soccer and indoor futsal.

On appeal, counsel asserts, in pertinent part, that:

> The denial seems to deem that the existence of supervisory duties makes it impossible for [the] beneficiary to have any primary managerial duties when, in fact, all of the beneficiary's duties are managerial to direct or carry on the business of Shark Sports Brazil from its inception.

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 fact that an individual oversees a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44)(A) and (B) of the Act. The record does not establish that the majority of the beneficiary's duties will be primarily directing the management of the organization.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual daily duties to be performed by the beneficiary. Therefore, the record, as presently constituted, contains insufficient evidence to demonstrate that the beneficiary will be engaged in managing or directing the management of a function, department, subdivision or component of the petitioning company. Simply stating that the beneficiary will be preparing, designing, and adopting instructional strategies for different skill levels and age groups, without further elaboration, is not sufficient in demonstrating the beneficiary's managerial or executive responsibilities. The petitioner has not established that the beneficiary will be functioning at a senior level within an organizational hierarchy. In addition, the evidence of record is not sufficient in establishing that the beneficiary will not be primarily involved in performing the day-to-day functions of the

petitioning company. The use of the position title "manager" is not persuasive.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the director's decision, the petitioner has submitted conflicting information. In response to a Service request for additional evidence, the petitioner submitted an unexecuted Washington State business license entitled "Master Application." The petitioner indicated that the business license for the United States company was "pending." The record does not, however, over a year after the filing of the petition, contain any evidence that a business license application was, in fact, filed or that the United States entity was approved to operate a branch office in the State of Washington. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on 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 (Comm. 1988). Since the appeal will be dismissed for the reasons stated above, these issues 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, that burden has not been met.

ORDER: The appeal is dismissed.