U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: WAC-99-071-51140 Office: California Service Center Date: APR 18 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:

[redacted]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was originally approved. Upon further review, the Director, California Service Center, determined that the beneficiary was not clearly eligible for the benefit sought and served the petitioner with notice of her intent to revoke the approval of the petition and her reasons therefore. The director subsequently ordered that the approval of the petition be revoked. On appeal, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter for further consideration and action. On remand, the director recommended that the approval of the petition be revoked and the case is now before the AAO, by certification, for further review and issuance of a final decision. The recommendation of the director will be affirmed, and the approval of the petition will be revoked.

The petitioner is described as a financial and business management consulting services company. It seeks to employ the beneficiary temporarily in the United States as its president and general manager. The director recommended that the approval of the petition be revoked after determining that the petitioner had not established that the beneficiary had been employed abroad in a primarily managerial or executive capacity. The director also determined that a qualifying relationship did not exist between the petitioning U.S. entity and another organization doing business in at least one other country.

The petitioner has not responded to the Notice of Intent to Revoke or the Notice of Certification.

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.

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 (l)(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 United States petitioner was incorporated in 1998 and states that it is an affiliate of an unnamed company, located in Anglet, France. The beneficiary is claimed to have been employed by the foreign entity since 1986 as its owner and general manager. The petitioner claims that both the French company and the U.S. petitioning company "are majority-owned by [the beneficiary]." The petitioner expects to employ two or three individuals and projects $100,000 in gross annual revenues. The petitioner seeks to employ the beneficiary for three years.

The first issue in this proceeding is whether the beneficiary has been employed abroad in an executive or managerial capacity for one continuous year in the three-year period preceding the filing of the petition.

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: petition in an executive or managerial capacity

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 supplement to the petition, the petitioner stated that the beneficiary's work with the claimed French affiliate consisted of directing "daily operations of financial and business management consulting service; financial and tax analysis."

Subsequent to the filing of the petition, the Service received an investigative report from the American Consulate, Paris, France. The consulate's investigation revealed that the beneficiary "was registered as a self-employed private counselor in accounting, management and finance but not a company engaged in counseling."

Pursuant to a Notice of Intent to Revoke dated June 1, 2001, the director provided the petitioner with the opportunity to submit additional evidence to establish that the beneficiary had, in fact, been employed abroad in a qualifying managerial or executive capacity. As of this date, no response has been received.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been employed abroad in a primarily managerial or executive capacity. The record indicates that the beneficiary was self-employed and that a preponderance of his duties consisted of directly providing the services of the business on a day-to-day basis. For this reason, the petition may not be approved.

The remaining issue in this proceeding is whether a qualifying relationship exists between the petitioning U.S. entity and an organization doing business abroad.

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 operation 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.

A supplement to the petition indicates that the petitioning company is affiliated to a company in France on the basis of the fact that both "are majority-owned" by the beneficiary.

Subsequent to the filing of the petition, the Service received an investigative report from the American Consulate, Paris, France. The consulate's investigation revealed that the beneficiary was "a self-employed private counselor" in France. The investigator concluded that "In opening his office in the United States which he intends to manage himself [the beneficiary] has, in theory, ceased his business activity in France . . . The concept of an ongoing international nature of his firm has also ceased."

In the above-mentioned Notice of Intent to Revoke dated June 1, 2001, the petitioner was provided with an opportunity to respond with evidence to establish that it had a qualifying relationship with an organization doing business abroad. No response has been received from the petitioner.

The petitioner has not established that a qualifying relationship exists between it and a foreign organization that will continue doing business for the duration of the alien's stay in the United States as an intracompany transferee as required by 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). For this reason, the petition may not be

approved.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary would be employed in the United States in a managerial or executive capacity as defined at section 101(a)(44) of the Act. In addition, 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this case, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. As the appeal will be dismissed, these issues need not be examined further.

In visa 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 direction's recommendation dated December 13, 2001, to revoke the approval of the initial visa petition is affirmed. The approval of the initial visa petition is hereby revoked.