



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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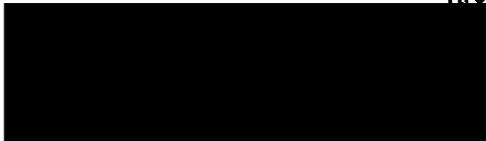
IN RE: Petitioner:
Beneficiary:



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)

identifying data deleted to
prevent clearly unwarranted
disclosure of personal privacy

IN BEHALF OF PETITIONER:



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 Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: This is a motion to reopen the Associate Commissioner's decision dismissing the appeal of the denial of the nonimmigrant visa petition. The motion to reopen will be granted and the previous decisions of the director and the Associate Commissioner for Examinations will be affirmed. The petition will be denied.

The petitioner is primarily engaged in providing casting services to various production companies. Information contained in the record indicates that the beneficiary was granted L-1A status from March 8, 1995 through October 15, 1995 and subsequently granted another L-1 visa on December 1, 1995, with an expiration date of March 12, 1999. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for three years. The director determined that the petitioner had not established that the beneficiary would be employed primarily in a managerial or executive capacity, or that the foreign entity is doing business. The director's decision was affirmed by the Associate Commissioner on appeal.

On motion, counsel submits additional information in rebuttal to the director's findings.

The first issue to be addressed in this proceeding is whether the foreign entity is doing business.

The regulations at 8 C.F.R. 214.2(1)(1)(ii)(H) states:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

On motion, counsel submitted unaudited copies of the foreign entity's balance sheet and profit and loss statement for 1999, a two year agreement between the foreign entity and a British company, a certificate from the Kuwait Ministry of Commerce and Industry stating that the beneficiary is registered with the Department of Commerce, the petitioning entity's owner's personal bank statements, the foreign entity's lease, a recent invitation to a trade show in Germany, two invoices, a letter from the publisher/editor-in-chief of the Kuwait Times attesting to the petitioning entity's owner's character, evidence showing that the foreign entity is listed as a business on the Kuwait Chamber of Commerce and Industry Website, and a copy of a list of the foreign entity's employees indicating their salary and length of employment.

The petitioner has not submitted evidence which clearly establishes that the foreign entity is involved in the regular, systematic and

continuous provision of goods and/or services in the Middle East. Without substantiating documentary evidence such as detailed audited financial statements, the foreign entity's certified commercial bank account statements, current contracts, current invoices with its financial data converted to U.S. currency rates, and documentary evidence of a paid staff of employees, the petitioner cannot sufficiently demonstrate that the foreign entity is doing business. Personal bank account statements and unaudited financial statements cannot be considered as credible evidence since in a corporation, personal accounts are the assets of the individual owner(s) and unaudited financial statements have not been substantiated by the actual financial records. Accordingly, the documents submitted are insufficient to demonstrate that the foreign entity is doing business.

Another issue in this proceeding is whether the beneficiary will continue to be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act (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.

The United States petitioning entity was established in 1994 and states that it is a wholly-owned subsidiary of Ahmed M. El-Wazzan Est. dba AMW, located in Safat, Kuwait. The petitioner seeks to extend the employment of the beneficiary for a three-year period at an annual salary of \$52,000.

On motion, counsel states that the beneficiary's responsibilities are guiding the petitioning company through a complex assortment of duties and is given almost unlimited rein in determining how to best achieve the goals and policies he has developed. Counsel also states that the beneficiary reports only to the owner of the parent company, has full managerial responsibility for the direction and coordination of the U.S. company's activities and operations, has authority to implement managerial and nonmanagerial personnel changes and directly supervises and controls the work of an office manager and an accounting firm.

The record indicates that the petitioning entity currently employs two full-time employees other than the beneficiary. One of these employees is the casting director who works under the supervision of the office manager and head casting director. These two employees, aside from the beneficiary, carry out the main function of the company, which is casting for the entertainment industry.

The office manager and head casting director also determine whether to handle the casting in-house or whether it should be subcontracted out. They also hire part-time freelance office

workers to complete day-to-day clerical affairs, such as update the company's website and assist in the casting process. However, the petitioner has presented no evidence to show that an accounting firm and additional casting agencies are subcontracted for jobs, and that freelance office assistants are hired. Absent such evidence, such as contracts, wage and earning statements, etc., the beneficiary, the casting director and the office manager/head casting director are performing the services necessary for the operation to run. Therefore, the office manager/head casting director and the casting director are not functioning in supervisory, professional or managerial positions other than in position title. The petitioning entity has not demonstrated that the beneficiary will be supervising other managerial or supervisory personnel and will not be primarily involved in performing the day-to-day functions of the petitioning entity.

Upon review of the record, the petitioning entity has not demonstrated that the beneficiary functions or will function at a senior level within the organizational hierarchy other than in position title. There is no evidence to establish that the petitioner employs a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing nonqualifying duties. The petitioning entity submitted only Quarterly Wage and Withholding Reports for the quarters ending June and September 30, 2000. The petitioning entity's 1998 and 1999 U.S. Corporate Income Tax Returns submitted do not include the page that indicates the compensation paid out to officers. 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 professionals. Section 101(a)(44)(A)(iv). The record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. Based on the evidence submitted, it cannot be found that the beneficiary will continue to be employed primarily in an executive or managerial capacity. For this additional reason, the petition may not be approved.

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 order of August 15, 2000 dismissing the appeal is affirmed. The petition is denied.