



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



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Office: California Service Center

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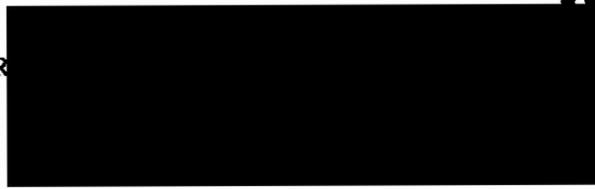
AUG 31 2000

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 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.

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FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

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

The petitioner, a distributor of recording and broadcast equipment, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its marketing manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity, that the U.S. entity is doing business, or that a qualifying subsidiary or affiliate relationship exists between the U.S. entity and the beneficiary's foreign employer.

On appeal, counsel submits a brief in rebuttal to the director's findings.

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.

8 C.F.R. 214.2(1)(14)(ii) states that 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 United States petitioner was established in 1990, and states that it is the sole owner of the foreign subsidiary, [REDACTED]. The petitioner seeks to extend the employment of the beneficiary for a three-year period at an annual salary of \$50,000.

At issue in this proceeding is whether the beneficiary will be employed 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 her decision, the director noted that the petitioner had not submitted an organization chart, as requested. The director further noted that the U.S. entity had only five employees and that the beneficiary would perform, at best, as a first-line supervisor for a couple of sales representatives.

On appeal, counsel reiterates the petitioner's description of the beneficiary's duties in part as follows:

- 1) Develop the marketing policies and guidelines for the company's various international customers;
- 2) Direct and manage the international marketing staff of the company;
- 3) Identify emerging markets;
- 4) Act as liaison with international organizations.

[The beneficiary] will be responsible for a marketing staff of ten, who are assigned to the various project teams. She has day to day discretionary authority in coordinating and directing the marketing department. She is responsible for acting as liaison between international counterparts and the company's marketing department.

The duties listed above such as identifying emerging markets and developing marketing policies and guidelines are too general to convey any understanding of exactly what the beneficiary's actual daily activities have been and will be. The record reflects that the U.S. entity was incorporated on October 18, 1990, and the beneficiary was granted L-1A status from September 1, 1996 through August 31, 1999. The present petition was filed on February 26, 1999. Although information on the petition indicates that the U.S. entity has 50 employees, the U.S. entity's quarterly tax return for the period ending on December 31, 1998, reflects that the U.S. entity had six employees in October 1998, five employees in November of 1998, and five employees in December 1998; it is further noted that the beneficiary's name does not appear on such

return. The record contains no explanation for these discrepancies. Although requested by the director and mentioned a second time in the director's decision, the petitioner has not submitted an organization chart for the U.S. entity.

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).

Upon review of the record, the petitioner has not sufficiently demonstrated that the beneficiary functions and will function at a senior level within an organizational hierarchy other than in position title. There is no comprehensive description of the beneficiary's duties that persuasively demonstrates that the beneficiary has been and will be performing in a primarily managerial or executive capacity. 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 record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary has been and will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. For this reason, the petition may not be approved.

Another issue in this proceeding is whether a qualifying relationship exists 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(1)(1)(ii)(I) states:

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

8 C.F.R. 214.2(1)(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(1)(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(1)(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 her decision, the director noted that the petitioner had not submitted evidence to establish who actually purchased the foreign entity's stock and who deposited the initial capital with the petitioner. The director further noted that the copies of the foreign corporate documents were written in Russian and not translated into English.

On appeal, counsel states in part that:

Attached please find minutes of [REDACTED] and declaration of [REDACTED] evidencing his 100% ownership of [REDACTED] stock. [REDACTED] owns 100% of the stock of the foreign entity [REDACTED] Moscow. Attached is the translation of the foreign entity's articles which describe the ownership.

The record contains the following:

"Articles of Incorporation of [REDACTED] A Close [sic] Corporation" filed in the State of Nevada on October 18, 1990, reflecting the total number of authorized shares as 2,500;

"Certificate of Qualification" (State of California) executed on July 15, 1991, reflecting in part that [REDACTED] "is fully qualified and authorized to transact intrastate business in the State of California, subject, however, to any licensing requirements otherwise imposed by the laws of this State.";

DECLARATION OF CORPORATE STOCK OWNER AND MINUTES OF THE CORPORATION OF [REDACTED] A Nevada Corporation, signed on February 21, 1992, declaring that [REDACTED] is the director and sole shareholder of the said corporation;

Undated "ARTICLES OF INCORPORATION [REDACTED] [REDACTED] stating that the U.S. entity, [REDACTED] is the shareholder of [REDACTED] and that "The Shareholder establishes the Charter Capital of the Company in the amount of RUR 8,601,998.81.

Information on the petition indicates that the name of the foreign entity is [REDACTED] however, the articles of incorporation submitted by the petitioner for the foreign entity contain the name of [REDACTED]. No explanation for this discrepancy has been provided. Further, although it is stated in the U.S. entity's articles of incorporation that [REDACTED] is its sole shareholder, the record contains no evidence such as canceled checks and deposit receipts reflecting that he paid for such share ownership. Also, the record contains no evidence reflecting that the U.S. entity [REDACTED] paid for its stock ownership of the foreign entity. As such, the petitioner has not demonstrated that a qualifying relationship exists between the U.S. and foreign entities. For this additional reason, the petition may not be approved.

Another issue in this proceeding is whether the U.S. entity is doing business.

Title 8 C.F.R. 214.2(l)(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.

In her decision, the director noted that the petitioner purchases musical instruments, recording and broadcast equipment to send to the foreign entity for distribution, thereby performing merely as a purchasing office for the foreign entity.

On appeal, counsel states in part that:

Attached are [REDACTED] U.S. Corporate Tax return and letter from [REDACTED] describing the nature of the business as well as the original company support letter which was submitted in 1996 and led to the approval of [REDACTED] [the beneficiary's] status. They certainly evidence [REDACTED] [REDACTED] significant business.

The record contains the following:

U.S. entity's 1998 corporate tax return reflecting \$1,644,475 in gross receipts/sales;

U.S. entity's 1997 corporate tax return reflecting \$1,534,869 in gross receipts/sales;

U.S. entity's 1996 corporate tax return reflecting \$1,361,081 in gross receipts/sales.

The petitioner has not provided evidence requested by the director such as contracts, sales invoices, and shipper's export forms to demonstrate that the U.S. entity has been engaged in the regular, systematic, and continuous provision of goods and/or services. Rather, the record as presently constituted indicates that the U.S. entity is performing only as a sales office for the foreign entity. As such, the petitioner has not sufficiently demonstrated that the U.S. entity is doing business as defined by Service regulation. 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 appeal is dismissed.