

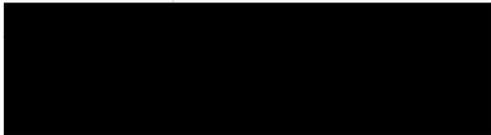


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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: WAC 00 127 52715

Office: California Service Center

Date: APR 23 2001

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: Self-represented

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

Myra L. Rosenbey
for Robert P. Wiemann, Acting Director
Administrative Appeals Office

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

The petitioner, a company that provides "services," seeks authorization to employ the beneficiary temporarily in the United States as its president and general manager. The director determined that the petitioner had not established that there is a qualifying relationship between the U.S. and foreign entities or that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity.

On appeal, the petitioner argues that there is a qualifying relationship between the U.S. and foreign entities and that the beneficiary has been and will be employed in a primarily managerial or executive capacity.

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 (1)(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 1999 and that it is a wholly-owned subsidiary of Auction House, located in the Czech Republic. The petitioner declares two employees and a gross annual income of approximately \$462,000. It seeks authorization to employ the beneficiary for ten years at a weekly salary of \$600.

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(1)(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 (1)(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(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.

The petitioner claims that the U.S. entity, [REDACTED] and the foreign entity, [REDACTED] s.r.o., are both owned and controlled by the beneficiary, [REDACTED], and his wife, [REDACTED] and that the U.S. entity is a joint venture.

The petitioner also submitted a letter dated January 10, 2000, in which the foreign entity merely stated that the beneficiary is "an establisher" of the foreign entity, as well as president and manager. The foreign entity further stated that the beneficiary is a general partner, president, and chief manager of the U.S. entity. The petitioner submitted a translation of a document issued by the Tax office in Ostrava, Czech Republic, on July 15, 1999, stating that the beneficiary is the sole owner of the foreign entity, Auction House, s.r.o.

In a letter dated May 11, 2000, the petitioner was requested to respond to the following:

1. Articles of Incorporation: Submit a copy of the foreign company's articles of incorporation.
2. List of Owners: Provide evidence of all owners of the foreign company and what percentages they own.
3. Photographs of Foreign Company: Submit photos of the foreign company's business premises. Photos should show both the inside and outside of all factory, production, warehouse, and office spaces with equipment, merchandise,

products and employees clearly visible. Also, include any company logs, emblems or signs displayed on buildings and products. Provide addresses, directions, and telephone number for each facility.

It is noted that the petitioner returned the request for evidence with a note stating that it had submitted the requested documentation as part of a response to a request for evidence on a petition for the U.S. entity's vice president. The petitioner cannot be considered to have properly responded to the Service's request for evidence on the instant petition when it provided only one response, and it is not incumbent upon the Service to find evidence contained in the record of proceeding for an unrelated petition and include it in this record. Accordingly, documentation submitted by the U.S. entity that relates to another petition is not contained within this record. If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned, and accordingly, shall be denied. 8 C.F.R. 103.2(b)(13).

On appeal, the petitioner submits Articles of Regulation that state that the beneficiary and Helena Srncova, the vice president, are co-owners of the foreign entity. The petitioner also submits a share transfer agreement showing that [REDACTED] owned 100 per cent of the U.S. entity, but transferred 49 per cent of the shares to [REDACTED] on March 16, 2000. There is no evidence that the articles were ever filed with the Czech government, or that [REDACTED] ever provided payment for her purchase of the shares.

The petitioner submitted a business license issued by the City of Huntington Beach, California, showing that as of September 1, 1999, the "owner/mgr[s]." of the U.S. entity are [REDACTED] and [REDACTED]. There is no independent evidence establishing the ownership of the U.S. entity, or the exact number of shares owned by [REDACTED] and [REDACTED].

Regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this nonimmigrant visa petition. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); see also Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. Id.

In a nonimmigrant petition for an intracompany transferee, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, 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., *supra*. Without full disclosure of all relevant documents, the Service is unable to determine the elements of ownership and control.

Furthermore, a certificate of stock is merely written evidence that a named person is owner of a designated number of shares of stock in a corporation. Black's Law Dictionary (Fifth Edition, West Publishing Company, 1979). The regulation at 8 C.F.R. 103.2(b)(8) specifically allows the director to request additional evidence in appropriate cases. 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. The petitioner was requested to submit evidence that the U.S. and foreign entities are qualifying organizations. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. 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. There is no such evidence within the record. The petitioner has submitted insufficient evidence to establish the ownership of the U.S. and foreign entities. Accordingly, it cannot be determined whether there is a qualifying relationship between the U.S. and foreign entities. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary has been employed by the foreign 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.

The petitioner describes the beneficiary's duties with the foreign entity as follows:

Organization of work, stating job duties of employees, supervising employees and other managers, [and] creating business strategy.

In a letter dated May 11, 2000, the petitioner was requested to submit the following:

7. Employment Abroad: Submit the following evidence to establish that the beneficiary has the requisite one year [of] continuous employment abroad within the three years preceding the time of filing [to] the present petition.

-Payroll records: Copies of the foreign company's payroll records pertaining to the beneficiary for the year preceding the filing of the petition for L-1 status.

-An original employer letter specifying when the beneficiary was hired, the positions that were held and why the beneficiary was selected for the position with the U.S. entity. The letter should be on the foreign company's original, foreign language or character letterhead and should include a complete company address, telephone, and facsimile numbers and the name and signature of a responsible official (pres., vice-pres, or chief financial officer, etc.) from the foreign company.

8. Manager or Executive: Submit the following evidence to establish that the beneficiary has been performing the duties of a manager or executive with the foreign company;

-Foreign Company's Organizational Chart: Submit a copy of the foreign company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also, include a brief description of job duties, educational level and annual salaries (in U.S. dollar equivalents) for all employees under the beneficiary's supervision.

- Duties Abroad: Submit a more detailed description of the beneficiary's duties abroad. Be specific. List all employees, with job title[s] and duties, under the beneficiary's direction. Also, indicate percentage of

time the beneficiary spends in each of the listed duties.

As discussed above, the petitioner did not properly respond to the instant request for evidence.

On appeal, the petitioner discusses the beneficiary's duties abroad as follows:

BOTH BENEFICIARIES ARE EMPLOYED IN THE ENTITY ABROAD AS MANAGERIAL AND EXECUTIVE CAPACITIES. Each of them exercises discretion over day to day operations of the activity. Each of them has authority to hire people or fire them, over promotion and other and these are on managerial and executive level. They manage components of the organization, establish aims, policy of the company, [and] they exercise decision-making.

According to the foreign entity's Articles of Regulation, submitted on appeal, the beneficiary's duties with the foreign entity are as follows:

- to establish the goals and policies of the company
- to exercise final decision for daily operations
- to supervise and control other managers
- to supervise and control representatives of subordinated companies and external workers
- to take part in summits and to conclude contracts

AUTHORITIES:

- to sign documents on company's behalf
- to concludes [sic] agreements and contracts with third parties on company's behalf
- to lead discussions with third parties, companies, authorities
- to appoint and recall treasurer
- to call general meeting
- to appoint and recall managers, to control and supervise work of managers
- to sel [sic] tasks for managers
- to approve company's policies
- to approve budget
- to approve advertising and propagation strategy of the company
- to approve regulations
- to approve expenses of the company
- to approve rules in company

DUTIES:

- is responsible for the company towards [sic] third parties
- is responsible for the company toward contracting parties
- is responsible for the company legally, financially and also organizational[l]y

The petitioner also submitted an organizational chart for the foreign entity showing that the company is managed only by the beneficiary and the vice president. Although the petitioner lists other departments, it does not name any employees or provide a description of their duties.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. Although the petitioner's descriptions are lengthy, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as exercising discretion over day-to-day operations; having the authority to hire and fire people; managing components of the organization; establishing aims and policy; establishing the goals and policies of the company; exercising final decisions; supervising and controlling other managers and external workers; having the authority to sign documents, conclude agreements, and lead discussions; and having the authority to approve policies, regulations, expenses, and the budget, are without any context in which to reach a determination as to whether they would be qualifying. The use of the position titles of "president" and "general manager" are not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been functioning at a senior level within an organizational hierarchy other than in position title.

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary has been managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties.

Based on the evidence furnished, it cannot be found that the beneficiary has been employed in a primarily 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 the foreign entity is doing business, that the petitioner has secured sufficient physical premises to house the new office, the size of the U.S. investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business, or that the beneficiary's employment will be temporary. Matter of Isovich, 18 I&N Dec. 361 (Comm. 1980); 8 C.F.R. 214.2(1)(3)(vii). As the appeal will be dismissed on the grounds discussed, 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.