



U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

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PUBLIC COPY

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File: EAC 99 123 53147 Office: Vermont Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



Identification 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

Mary C. Mulrean, Acting Director
Administrative Appeals Office

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

The petitioner, a company engaged in the international sale of household goods, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary had been or would be employed by the U.S. entity in a primarily managerial or executive capacity, or that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

On appeal, counsel argues that the beneficiary has been and will be employed by the U.S. entity in a primarily managerial or executive capacity.

It is noted that the director found that the petitioner had submitted insufficient evidence to establish that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three-year period preceding the filing of the petition. This is not an issue for consideration in a petition for extension of previously approved employment and should have been discussed in connection with the adjudication of the original petition. Therefore, this issue will not be addressed in this proceeding.

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)(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 U.S. petitioner states that it was established in 1992 and that it is a wholly-owned subsidiary of [REDACTED] Ltd., located in Russia. Although the petitioner declares 270 employees and a gross annual income of approximately \$13.5 million, this information appears to relate to the foreign entity rather than the U.S. entity. The U.S. petitioner seeks to extend the petition's validity and the beneficiary's stay for two years at an annual salary of \$190,000.

At issue in this proceeding is whether the beneficiary has been and 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.

The petitioner describes the beneficiary's duties with the U.S. entity as follows:

This position involves responsibility for the running [of] the US operations for a multi[-]million dollar Russian enterprise specialized in the sale of household products. This entails staffing; strategic planning; maintenance of liaison with the headquarters office in Russia; arrangement for transfer of capital; monitoring of negotiations with US suppliers; analysis of US market potential of selected Russian products; [and] overseeing the shipping and customs clearance process. The President will direct the activities of financial and marketing personnel, some of whom will be working out of the offices of the parent company in Russian.

In a letter dated April 1, 1999, the Service requested that the petitioner respond to the following:

Submit a copy of your 1997 United States income tax return filed by the United States entity including all schedules. Also, submit your 1998 quarterly tax forms showing 270 paid employees as indicated on your Form I-129....

Submit copies of all I-9's, 1099's, W-2's and forms 1096 and W-3 filed on behalf of the employees needing such for the United States entity for 1997 and 1998.

Submit a complete copy of your form 941, Employer's Quarterly Tax Return, for the first quarter(s) of calendar 1997 and 1998....

Submit a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis.

In response, counsel submitted some invoices and bank statements and requested that the Service review materials submitted with the initial L-1 petition. In a letter dated June 21, 1999, the petitioner's accountant stated that the petitioner was incorporated on March 10, 1998, and therefore does not have completed tax returns for 1997 or 1998. The accountant further advised that the U.S. entity "has not paid payroll until this quarter" and that the payroll taxes are not yet due. Accordingly, the above-requested tax and payroll information was not submitted.

On appeal, the petitioner submits an organizational chart of which only the following employees appear to be employed within the United States:

President: [REDACTED]
Vice President/USA: [REDACTED]
Finance Director: [REDACTED]

The petitioner does not describe its employees' duties on appeal.

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 being responsible for funding the U.S. operations, including staffing, strategic planning, liaison with the foreign office, and directing the activities of finance and marketing personnel are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as arranging for the transfer of

capital, analyzing the U.S. market potential, and overseeing the shipping and customs clearance process, have not been demonstrated to be managerial or executive in nature. The use of the position title of "president" is not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be 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 or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be 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 or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner initially claimed 270 employees; however, this number appears to relate to the foreign entity's structure. According to minutes of a shareholders meeting dated March 2, 1998, the U.S. entity's proposed staff would be the beneficiary, a vice president, and a secretary.

The petitioner also claimed that the beneficiary would direct financial and marketing personnel, some of whom will be working from the office of the Russian parent company. The petitioner does not state how many employees have been and will be working from the foreign office, what their job titles and duties are with regard to the U.S. entity, or how many hours have been and will be devoted to working for the U.S. entity. In a letter dated October 25, 1999, the petitioner's accounting company stated that the beneficiary, the vice president, and the "finance manager/treasurer," were the sole employees. It is noted that the accounting firm also stated that the vice president runs an unrelated business, [REDACTED] in Buffalo, New York, and that the petitioner initially hired the finance manager as its accountant. It is unclear how the vice president divides his time and duties between the petitioning entity and his own business, and whether the "finance manager/treasurer" is actually a self-employed accountant with other employment. The petitioner submitted payroll records for the foreign entity, but has not submitted any payroll information showing that the U.S. entity's claimed employees have received wages or compensation for services rendered.

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 decision of the director, the petitioner has not established that there is a qualifying relationship between the U.S. and foreign entities. The petitioner initially claimed that the U.S. entity is a wholly-owned subsidiary of the Russian entity [REDACTED]. Share certificate number 1 shows that as of March 12, 1998, 1,000 [REDACTED] [sic] owns 100 of 100 authorized shares of the U.S. entity's stock. According to minutes of a shareholders meeting dated March 2, 1998, [REDACTED] td. owns 51 per cent of the U.S. entity's capital shares, and the remaining 49 per cent are held by "the American partner." The petitioner has not explained this conflicting information. 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 (BIA 1988).

In addition, it is unclear where the petitioning entity's office is located. Bank statements and wire transfer records dated from February to September of 1999 show that it is located at [REDACTED] [REDACTED] New York. This is the address of the petitioner's "finance director/treasurer." As discussed above, it appears that he may be a privately employed accountant, and that this is his office rather than that of the U.S. entity. According to the petitioner's stationary, the "branch office" is located at [REDACTED] and the executive office is located at [REDACTED] New Jersey. Invoices and bank statements from September to October of 1999 show that the U.S. entity is located at [REDACTED] New York, but other bank statements indicate that this is the beneficiary's home address. Invoices from July of 1999 show that the U.S. entity is located at [REDACTED] New York. A lease in the record shows that this is 1,000 square feet of warehouse space. There is no evidence that the U.S. entity is run from an office at any specific location.

Finally, the petitioner has not established that the U.S. entity was doing business at the time the petition was filed. On appeal, the petitioner submits invoices showing that the U.S. entity has been doing business only since July of 1999. On appeal, the beneficiary stated that "the crisis that has been shaking [the] Russian economy since the August of 1998 forced me to attend to the parent company's business" and that he "decided to make survival of the Russian business a number one priority." The petitioner's accountants confirm that the U.S. entity had been in an "extended start-up mode." The petition was filed on March 19, 1999. 8 C.F.R. 103.2(b)(13) states, in pertinent part: "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." The information submitted on appeal does not demonstrate the U.S. entity had been doing business as of March 19, 1999, the date the petition was filed. 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.