



U.S. Department of Justice

Immigration and Naturalization Service

51

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



File: LIN 99 209 52502 Office: Date: FEB 1 2001

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)

PUBLIC COPY

IN BEHALF OF PETITIONER:
[Redacted]

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, Nebraska 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 manufacturing, selling, and exporting products, seeks 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 in a primarily managerial or executive capacity, or that there is a qualifying relationship between the U.S. and foreign entities.

On appeal, the petitioner argues that the beneficiary is 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) 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 (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, a managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies

him/her to perform the intended services in the United States.

The U.S. petitioner states that it was established in 1997 and that it is a wholly-owned subsidiary of [REDACTED] Ltd., located in Vladivostok, Russia. The petitioner declares 18 employees and a gross annual income of approximately \$249,605. It seeks authorization to employ the beneficiary for three years at an annual salary of \$50,000.

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

The petitioner describes the beneficiary's duties as follows:

[The beneficiary] will direct the management of the newly devised cosmetic product development and U.S. manufacturing that is the heart of the new business plan. In fact, Mr. [REDACTED] has already started the crucial elements of his managerial and marketing challenge. He has developed the "Essence" line of cosmetics as stated above. He is presently in the process of completing plans of volume export of the Essence line and a coordinated strategy for marketing the new line in the parent company boutiques in Russia. In addition to this specific start up task, Mr. [REDACTED] will exercise the usual managerial responsibilities incident to the start up to a new company: he will confer with company employees and the joint owner of the company to perfect and extend the presently defined business objectives, develop marketing and personnel policies to implement these objectives, and coordinate functions and operations between the new company and the parent company. In regard to the last managerial function, it is essential that he continue to operate as head of both companies because each step of manufacturing and marketing implemented in the U.S. requires a coordinate[d] effort by the Russian company to receive a particular product and promote and market it in the Soviet Union. In addition to these overall managerial functions, Mr. [REDACTED] will execute the following managerial tasks peculiar to the Sweetlana 1999 business plan:

- He will evaluate and compare the manufacturing quality and costs of current contracts with [REDACTED] Ltd. and

██████████ Mfg. and as necessary develop new sources of manufacture for further products as they become ready for manufacture in late 1999 and 2000.

-He will finalize the purchase of a U.S. retail site either in Seattle or the Los Angeles area. A number of prospective sites have been isolated by Mr. ██████████ for this purpose and the final selection among these competing sites is in the process of being made. See Appendix 3 which contains real estate prospectus and earnest money agreements incident to the selection process for the retail site in process.

-Mr. ██████████ will recruit managerial and sales persons to run the executive offices in Bellevue and the newly established retail outlet. The number and description of these employees is set out in part seven of Exhibit 1.

-After these employees are hired, Mr. ██████████ will evaluate performance of personnel in compliance with established policies and hire and fire and promote these employees consistent with such evaluation.

-As part of his continued responsibility to both the Russian and American branches, Mr. ██████████ will be directly responsible for maintaining business contacts in the U.S. and Russia to maintain a working relationship to both manufacture and market the company's services and products.

In a letter dated August 30, 1999, the Service set out the above regulatory definitions of manager and executive and requested that the petitioner respond to the following:

[S]ubmit evidence to establish that the beneficiary qualifies under all four criteria stated above for either a Manager or Executive. Submit a statement signed by an authorized official of the prospective employer describing the alien's employment for one continuous year abroad within the three years immediately preceding the filing of this petition, or if the alien is already in the U.S., immediately preceding his/her entry as a nonimmigrant, and describing the intended employment in the U.S. The statement should include information concerning the dates of employment, job titles, specific job duties, types of employees supervised, if any, level of authority, and title and level of authority of the alien's immediate supervisor. The statement should not merely repeat the regulations cited above.

Also submit a clear organizational chart showing the alien's current and proposed positions in relations to others in the company for the foreign AND United States company, Sweetlana, Inc.

In response, counsel argued that the beneficiary "has assumed primary responsibility for the development of sub-contract manufacture of cosmetics and toiletry products," and that he supervises and controls the work of professional and managerial employees. Counsel further argued that the beneficiary is employed as a functional manager because he "is responsible for the overall direction and control of the type of items to be manufactured and the assessment of the sales potential in the U.S. and in Russia."

It is noted that the petitioner submitted a business plan showing that it proposes to hire a manager, three sales employees, and a secretary. The petitioner's office lease is expired. Further, the lease shows that its office is only 120 square feet. It is unclear how five additional employees would have fit into this space.

The petitioner does not address the issue of the beneficiary's capacity of employment on appeal.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as directing the management of the product development and manufacturing; recruiting managerial and sales people; completing plans to export a cosmetic line; coordinating marketing strategy; and conferring with company employees and the joint owners of the company to perfect and extend business objectives, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as evaluating and comparing manufacturing quality and costs of current contracts with other entities; finalizing the purchase of a retail site; evaluating the performance of sales personnel; and being responsible for maintaining business contacts to manufacture and market the company's service and products, 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.

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.

The other issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities. The U.S. petitioner claims that it is an affiliate of [REDACTED] Ltd., located in Vladivostok, Russia, and that the U.S. and foreign entities are owned by the same individuals. The petitioner claims that [REDACTED] Ltd., is a joint-venture owned by [REDACTED] and [REDACTED]. The director found that a translation of a Russian certificate of public registration shows that [REDACTED] and [REDACTED] are the founders of the foreign entity. It is noted that [REDACTED] is actually [REDACTED] the beneficiary. Accordingly, there are only two founders. The petitioner did not submit independent evidence showing the breakdown in the ownership of the foreign entity.

The petitioner submitted share certificates 1 and 2 showing that as of August 1, 1997, [REDACTED] and [REDACTED] each own 1,000 of 10,000 authorized shares of [REDACTED]. However, in response to schedule K of a 1997 U.S. Corporation Income Tax Return, the petitioner stated that no individual, partnership, corporation, estate or trust owns 50 per cent or more of the petitioner's stock. The discrepancy regarding the ownership of the U.S. entity has not been resolved. 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). 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 additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to demonstrate that the beneficiary's employment in the United States will be temporary. Matter of Isovic, 18 I&N Dec. 361 (Comm. 1980); 8 C.F.R. 214.2(1)(3)(vii). The petitioner claims that the beneficiary owns 50 per cent of the

U.S. entity. Accordingly, a greater degree of proof is required that the employment offered is temporary. As the appeal will be dismissed on the grounds discussed, this issue 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.