



U.S. Department of Justice

Immigration and Naturalization Service

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



PUBLIC COPY

File: LIN 99 252 52647 Office: Nebraska Service Center Date:

FEB 12 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)

**identification data deleted to
prevent clearly unwarranted
invasion of personal privacy**

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

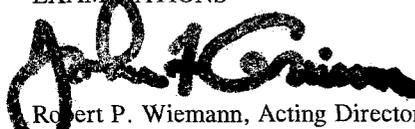
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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


Robert P. Wiemann, 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 software development company, seeks authorization to employ the beneficiary temporarily in the United States as general manager of its new office. The director determined that the petitioner had not established that there is a qualifying relationship between the U.S. and foreign entities, that the beneficiary would be employed in a primarily managerial or executive capacity, or that the U.S. entity would support a managerial or executive position within one year of the approval of the petition.

On appeal, counsel argues that the record demonstrates that there is a qualifying relationship between the U.S. and foreign entities, that the beneficiary will be employed in a primarily managerial or executive capacity, and that the U.S. entity will support a managerial or executive position within one year of the approval of the petition.

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 an affiliate of Nautilus Limited Liability Company, located in St. Petersburg, Russia. The petitioner declares two employees. 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 petitioner has submitted sufficient evidence to establish that 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(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.

The petitioner claims that the U.S. entity, [REDACTED] is an affiliate of the foreign entity, [REDACTED], and that both companies are owned in equal amounts by the beneficiary and by [REDACTED]. The petitioner submitted a translation of the articles of incorporation for the foreign entity showing that [REDACTED] and [REDACTED] each own fifty per cent of the foreign entity. The petitioner submitted an organizational chart showing that [REDACTED] own unspecified amounts of the U.S. entity. The U.S. entity's articles of organization show that [REDACTED] and [REDACTED] [sic] are "organizers" of the U.S. entity. The articles do not indicate how much of the U.S. entity is owned by each "organizer."

On appeal, counsel states that the petitioner had submitted evidence of joint ownership and control, including organizational charts, charts showing the ownership of both entities, and articles of association for the foreign entity. The documentation submitted regarding the ownership of the U.S. entity consists of the petitioner's claims. There is no independent evidence, such as share certificates, a share certificate registry, or evidence of money paid in exchange for stock, that demonstrates the ownership of the U.S. entity. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel argues that the Service had not requested additional evidence demonstrating that there is a qualifying relationship and that "[d]ue process and fundamental fairness would demand an opportunity to respond to any concerns." However, counsel does not submit additional documentation on appeal to demonstrate the ownership and control of the U.S. entity. The petitioner has submitted insufficient evidence to establish the ownership and control of the U.S. entity. 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 second 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.

In a letter dated September 15, 1999, the Service requested that the petitioner respond to the following:

Please state the proposed duties of the beneficiary in the [U]nited State[s] entity. Please be specific. The description of the beneficiary' [s] duties should include the percentage of time.

* * *

[Submit evidence] including the proposed number of employees, their job titles, and duties, etc.

In response, the petitioner described the beneficiary's duties as follows:

a. General decision-making; 50%. As General Manager, [REDACTED] will be responsible for the overall direction of the company, including decisions regarding hiring of new officers and employees, product development, marketing or withholding of products, direction of marketing and technical resources, marketing and price setting strategy and other major functions of the company.

b. Market research and analysis; 20%. Mr. Shelstyuk will be responsible for studying competitive products, investigating new markets, determine [sic] pricing, advertising and marketing strategies and setting and implementing marketing plans.

c. New product development; 20%. Please refer to our business plan, which sets out our product line and plans for the future. Mr. Shelestyuk will be in charge of determining which new products will be fully developed and marketed in the U.S. and Western Hemisphere and, as he has done in the past, to implement fresh ideas for imaging software in the cosmetic, medical and other areas.

d. Financial decision-making; 10%. Mr. Shelestyuk will be responsible for reviewing financial reports, consulting with the accountants and other professionals and determining the expenditure of resources within the company.

The petitioner claims that it has two employees, and that it will have the following five employees:

- ██████████ CEO/General Manager
- ██████████ Technical Manager
- ██████████ Sales Manager
- To be recruited: Sales Associate
- To be recruited: Technical service and support specialist

The petitioner submitted the following description of its employees' duties:

██████████ CEO/General Manager

Responsibilities:
 Develops and maintains the vision of the company. Oversees marketing, product development, production, finance and customer service. Approves all financial obligations. Seeks business opportunities and strategic alliances with other companies and organizations. Analyzes sales statistics to formulate policy. Directs and coordinates financial programs to provide funding of new or continuing operations in order to maximize return on investments, and increase productivity.

██████████ Marketing Coordinator

Responsibilities:
 Manages planning, advertising, public relations, sales promotion, merchandising, and facilitating staff services. Identifies and oversees new market research and competitive research. Directs staffing, training, and performance evaluations to develop and control [the] sales program. Manages all administrative activities.

On appeal, counsel argues that the evidence already contained within the record demonstrates that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel does not submit additional evidence 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 being responsible for the overall direction of the company, including decisions regarding the hiring of new employees, product development, and marketing; developing and maintaining the vision of the company; approving all financial obligations; seeking business opportunities and strategic alliances with other companies; and analyzing sales statistics in order to formulate policy, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as conducting market research and analysis, determining pricing, advertising and marketing strategies; and being in charge of determining which products to market and develop, have not been demonstrated to be managerial or executive in nature. The use of the position title of "general manager" 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. In fact, the job titles and duties of the petitioner's other employees is unclear. According to its organizational chart, the petitioner will employ Arthur Simonyan as its technical manager and Patricia Buskin as its sales and marketing manager. However, according to a more detailed description of its proposed employees and their duties, the petitioner indicated that Arthur Simonyan will be employed as a marketing coordinator and Patricia Buskin will simply be a sales manager.

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 final issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that it will support a managerial or executive position within one year of the approval of the petition.

On appeal, counsel argues that the petitioner has already submitted sufficient evidence to demonstrate that the U.S. entity will support a managerial or executive position, including evidence of a large, international advertising campaign in trade journals, invoices, banks statements. The petitioner's bank account shows a balance of \$90 as of May 28, 1999; a balance of \$9,004.13 as of June 30, 1999; and a balance of \$11,282.64 as of July 30, 1999. The petitioner states that it will pay the beneficiary a salary of \$40,000, and that it will have a total of five employees, but does not indicate what it will pay the other employees. The U.S. entity's financial goals are unclear.

The petitioner does not appear to have funding from the foreign entity. Instead, it appears that the petitioner is relying on its U.S. sales in order to fund its continued operations. The petitioner has submitted insufficient evidence to establish the size of the U.S. investment and the financial ability of the foreign entity to remunerate the beneficiary and commence doing business. Accordingly, the record does not contain sufficient evidence to establish that the U.S. petitioner will support a managerial or executive position within one year of the approval of the petition. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not provided sufficient evidence to demonstrate that the beneficiary's employment in the United States will be temporary. Matter of Iovic, 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, 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.