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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

JUN 18 2001

File: EAC 99 124 51643 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: Self-represented

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

*Robert P. Wiemann*  
Robert P. Wiemann, 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 is a company engaged in the export of construction equipment and materials from the United States to Russia. It seeks to employ the beneficiary temporarily in the United States as "president of the branch" established in New York.

The director found that the petitioner had not established that the beneficiary had been employed abroad in a managerial or executive capacity for one year, that the applicant would be employed in a managerial or executive capacity in the United States, or that the petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

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.

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 record indicates that the United States entity, to which the petitioner seeks to transfer the beneficiary, was formed on February 25, 1999. The petition in this matter was filed on March 17, 1999. The petitioner, therefore, is a new office within the meaning of 8 C.F.R. 214.2 (1)(1)(ii)(F), and, pursuant to 8 C.F.R. (1)(3)(v), must demonstrate 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.

In the petition, the petitioner stated that the parent company was formed in 1994. The petitioner also stated that the beneficiary was employed as Executive/Manager since 1996, "from the very moment of the establishment of our company." The director noted that the petitioner had stated that the beneficiary, since 1996, managed nine to fifteen subordinates. The evidence, however, demonstrates that the beneficiary left Russia barely a year after he was hired, and was in the United States for a year and a half when the petition was filed on March 17, 1999. The director doubted the beneficiary's ability to manage nine to fifteen subordinates, in Russia, from his location in the United States.

On appeal, the petitioner amended the beneficiary's employment history by stating that the parent company was started in 1994, and began employing the beneficiary a short time later. The petitioner further stated that, in 1996, upon graduation from business school, the beneficiary took on his managerial role.

The petitioner's amendment of the applicant's employment history abroad is suspicious in itself. Further, the amendment is an attempt to reconcile the discrepancy noted by the director. That is; either the company was not formed during 1994, as the petitioner claimed, or else the applicant, who assumed his allegedly managerial duties in 1996, was not employed as an Executive/Manager "from the very moment of the establishment of (the) company," as the petitioner also claimed. The petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. 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).

The record contains a Russian document, dated October 12, 1998, and

a corresponding translation. The translation states that the beneficiary was hired by the parent company on August 1, 1996, as a manager of the department of "technical-materials supplying." The translation further states that the beneficiary "is competent. specialist (sic) with good behavior and relationship with other employees." The purpose of the document is unclear, as is the evidentiary weight to be accorded it, and it is insufficient in demonstrating that the beneficiary's duties abroad were primarily managerial or executive in nature.

The petitioner has not addressed the issue of the applicant's alleged management of employees in Russia during the one and one-half years he has been continuously in the United States. The petitioner has not even submitted a coherent, detailed version of the applicant's history of employment by the petitioner. Instead, the petitioner seems to be avoiding being pinned to any specific chronology of the applicant's employment with the parent company. Those facts, coupled with the petitioner's previous inconsistent statements pertinent to the applicant's employment history, and the subsequent failure to reconcile those inconsistencies, raise obvious suspicions. The petitioner has not provided evidence sufficient to resolve those suspicions.

The petitioner has submitted no convincing proof that the petitioner employed the beneficiary as claimed. As such, the petitioner has not sustained the burden of demonstrating that, within the three years preceding the petition, the petitioner employed the beneficiary abroad in a qualifying managerial or executive position for one continuous year.

In response to the director's finding that the petitioner had failed to demonstrate that the beneficiary would be employed in a managerial or executive capacity, the petitioner stated that the beneficiary is, in fact, the manager of the company's United States branch. The petitioner admitted that the branch had no employees other than the beneficiary, but stated that the company plans to hire as many as four additional workers if the petition is approved. Other than characterizing the beneficiary as the "manager" of the United States entity, the petitioner offered no argument or evidence to overcome the director's finding. The petitioner has provided no definitive description of the beneficiary's duties in the proposed position in the United States. The petitioner has failed to sustain the burden of demonstrating that the beneficiary would be employed in a managerial or executive capacity in the United States.

The final finding of the director was that the petitioner had failed to demonstrate that sufficient funds are available to open the new office and to pay the beneficiary's salary. The record contains various documents pertinent to the petitioner's funds and expenses.

The beneficiary submitted a lease purporting to demonstrate that the United States company leases office space for \$100 per month. The location of the leased premises is described only as "front room," rather than by street address, legal description, or metes and bounds.

The applicant submitted a corporate checking account statement showing various balances on various dates during April of 1999 ranging up to several thousand dollars.

On appeal, the petitioner attached another bank statement, which declares the corporate checking account to have ranged from slightly overdrawn to a balance of nearly \$19,000 during June of 1999. Most of the debits to the corporate account as shown on the more recent bank statement were ATM withdrawals and check card purchases ranging from a few dollars to \$500. In addition, seven checks drawn against that account, ranging from \$12.87 to \$7,000, were paid during that month. The account's average balance shown on that statement is larger than that shown in the previous statement. However, the petitioner purports to be a company purchasing and shipping construction materials and equipment, including road building machines. The current balance of the corporate checking account appears to demonstrate that the petitioning entity is under-funded for its stated purpose.

The petitioner has submitted no new information which demonstrates that the beneficiary was employed in a primarily managerial or executive capacity while in Russia, or that the proposed position in the United States is primarily managerial or executive. Further, the petitioner has not established the foreign entity's financial ability to pay the beneficiary's wages and to commence doing business in the United States. For these reasons, the petition may not be approved.

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. The petitioner has failed to sustain that burden.

ORDER:           The appeal is dismissed.