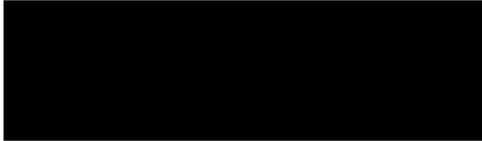




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U.S. Department of Justice
Immigration and Naturalization Service

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



PUBLIC COPY

File: LIN 00 103 51718 Office: Nebraska Service Center Date: **MAR 6 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)(L)

IN BEHALF OF PETITIONER:



Immigration data cannot
prevent clearly unworkable
application 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, 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 involved in the sale of flue gas oxygen analyzer equipment, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its international marketing manager. 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 the U.S. entity is doing business.

On appeal, counsel argues that the beneficiary is employed in a primarily managerial or executive capacity and that the U.S. entity is doing business.

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(l)(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 (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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 1997 and that it is an affiliate of [REDACTED] located in Germany. The petitioner declares two employees and a gross annual income of approximately \$2,000 to 50,000. It seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$55,000.

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the U.S. entity is doing business.

8 C.F.R. 214.2(l)(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 (l)(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(l)(1)(ii)(H) states:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

On appeal, counsel argues that:

Although [REDACTED] Inc.'s bank account did not show a great deal of profit for the first year, this was understandable and due to several factors. One the tax consequences in the U.S. and two the uncertainty and shortness of the L-1A visa which impacts on the amount of investment in the U.S. [REDACTED] accountant set forth the tax realities for the company which at least

for the last year made it prudent to continue selling product directly from Germany. (See copy of letter from [REDACTED] accountant attached hereto and incorporated herein as Exhibit 8). This however will change as the [REDACTED] name becomes more familiar in the U.S. Additionally, by the time the L-1A was approved, there were less than 10 months left on the visa for that first year. The uncertainty of this visa being extended made additional investment too risky for the company. However, so far this year, [REDACTED] has increased sales by 21% over last year. This should only increase in future years. (See Exhibit 7).

In spite of counsel's assertions, the record does not contain evidence such as tax records, financial statements, contracts, and invoices to demonstrate that the U.S. entity is engaged in the regular, systematic, and continuous provision of goods and/or services. For this reason, the petition may not be approved.

The record does contain various sales orders which indicate that some business activity is taking place. They do not, however, reflect a regular, systematic, and continuous provision of goods and/or services. As noted by the director, "[t]he evidence clearly indicates that the U.S. enterprise exists as an agent of the foreign parent organization. As such, it will produce neither a product or service in the United States." Therefore, the record as presently constituted does not sufficiently establish that the U.S. entity is doing business. For this reason, the petition may not be approved.

The other 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's] duties remain the same to build and grow the North American independent distributive network for our products sold through our exclusive hub distributor [REDACTED] located in Chicago, Il. Specifically, he will continue to:

* Research and find independent instrumentation companies and/or distribution outlets in our market areas that do not currently have Oxygen/Analyzer instrumentation or locate those companies who are

dissatisfied with their existing product line and wish to change to ours.

* Visit National, Regional and Local instrumentation and engineering trade show.

* Visit selected key customers in large combustion/fuel burning processes ie: Utility Plants, Chemical, Petro-Chemical, Paper Mills, Cement, brewing, marine, Incineration and Steel Production Plants.

* Prepare product and application press releases.

* Prepare, monitor and respond to national and regional advertising seeking qualified distributors.

* Contract with distributors to: 1) Introduce the product line to their existing customer base either by personal visit, letter, mailer, phone, email, internet or other communications medium; 2) Sell an agreed annual sales volume; 3) Exhibit at trade shows, report new applications, provide premium customer care and support as required. Additionally, provide a periodic update of activities with sales projections and if required copies of negotiations.

* Monitor performance of the Distribution network. Identify weak areas, provide product/application training to Distributors and also customers. Develop the Distribution Network to produce a sizeable, sustainable market share in a mature low growth industrial market.

* In liaison with Seimens-Westinghouse, redesign sales literature and other sales tools to the North American format. Prepare, write and distribute sales information and product technical notes to the network. Prepare American price lists, discount schedules, terms and conditions and mailing materials.

* Present seminars, business presentations, product training and installation assistance to both the distributive network and Siemens-Westinghouse regional offices.

* Conduct onsite distributor performance reviews and recommend enhancements, alterations or cancellations where considered necessary.

* Provide support to distributors at Trade Shows, customer site visits, contractor meeting and

presentations to answer product, technical, pricing, feature/benefit/value and performance questions.

* Follow up with distributors providing a local North American presence through the following communication mediums: email, fax, letter, phone and personal visits.

On appeal, the petition reiterated the beneficiary's duties and states that the U.S. entity "will be using part-time clerical help during this coming year to support [the beneficiary] with various marketing activities such as; Direct mail programs; Promotional campaigns, monitoring and general clerical office communications while he is traveling."

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 finding companies that do not currently have the product being offered by the petitioner, preparing product and press releases, preparing, monitoring and responding to national and regional advertising, contracting with distributors, and conducting onsite distributor performance reviews, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as following up with distributors, and redesigning sales literature, have not been demonstrated to be managerial or executive in nature. The use of the position title of "international marketing 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.

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.

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.