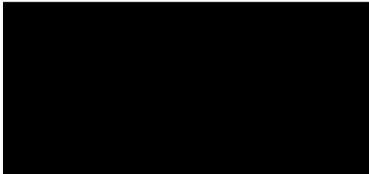




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U.S. Department of Justice
Immigration and Naturalization Service

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



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy.

JAN 11 2002

File: EAC 99 178 52658 Office: VERMONT SERVICE CENTER Date:

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)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

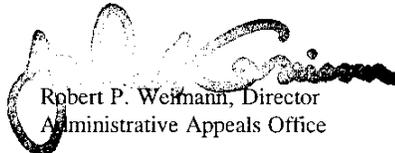
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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. Weimann, 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 described as a consulting concern. The petitioner seeks to continue the employment of the beneficiary in the United States as its managing owner. The director determined that the petitioner had not provided evidence that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, the petitioner requests that the petition be reconsidered.

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

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

The petitioner states that it is a sole proprietorship that began doing business in New York in 1994. A business certificate was filed in New York in that year indicating that the beneficiary was transacting business as the petitioner. The petitioner claims to be a subsidiary of GJG Polish-American Joint Venture.

The issue in this proceeding is whether the petitioner has established that the beneficiary 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:

The term "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:

The term "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

iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the petition the petitioner described the beneficiary's job duties as managing owner. The director requested that the petitioner provide a comprehensive description of the

beneficiary's job duties and a list of the petitioner's employees.

In reply, the petitioner submitted a statement indicating that the beneficiary was the president of the petitioner and its only representative in the United States and was responsible for running the entire enterprise.

The director determined that based on the record, the beneficiary was performing the non-qualifying operational duties of the company rather than the duties of a qualifying position.

On appeal, the petitioner challenged the director's decision because of the previous decision approving L-1A status for the beneficiary. The petitioner also asserted that the Service had not properly considered the nature of a small enterprise and the use of independent contractors.

The petitioner's challenge is not persuasive. First, if the previous nonimmigrant petition was approved based on the same unsupported claims that are contained in this petition, the approval would constitute clear and gross error on the part of the Service. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Sussex Enqq. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988). Second, the petitioner has provided no evidence of the beneficiary's day-to-day activities other than to assert that the beneficiary will be running the enterprise. It appears from this statement that the beneficiary will be performing all the non-qualifying duties of the business. The petitioner's assertion that the Service has not considered the nature of a small business and the use of independent contractors is disingenuous when the petitioner has provided no record that it has ever used independent contractors.

On review, the petitioner has supplied insufficient evidence to demonstrate that the beneficiary will be acting in a managerial or executive capacity. As noted by the director, the Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title.

Beyond the decision of the director, the record is not persuasive in demonstrating that a qualifying relationship exists between the petitioner and the overseas company.

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 (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(l)(1)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

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

Branch means an operation division or office of the same organization housed in a different location.

8 C.F.R. 214.2(l)(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(l)(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.

According to the evidence submitted, the United States petitioner is a sole proprietorship. The petitioner also claims to be a subsidiary of GJG Polish-American Joint Venture of which the beneficiary is the president. The petitioner has submitted documents without translation, purporting to establish the foreign

entity as a joint venture.

The record as presently constituted is not persuasive in demonstrating a qualifying relationship. A sole proprietorship does not qualify as a legal entity for purposes of filing a nonimmigrant intracompany transferee petition for an owner. 8 C.F.R. 214.2(1)(1)(ii) requires that the beneficiary seek to enter the United States temporarily in order to continue to render his services to a branch of the foreign employer or a parent, affiliate, or subsidiary thereof. For nonimmigrant purposes, a corporation is a separate legal entity from its stockholders and able to file a petition and employ them. Matter of Tessel, 17 I&N Dec. 631 (Comm. 1981). However, neither a sole proprietorship nor a partnership is a legal entity apart from its owner or owners. Matter of United Investment Group, 19 I&N Dec. 248 (Comm. 1984). Accordingly, where a sole proprietor files a petition for its owner, there is no separate legal entity that can employ the beneficiary and that can continue the business operations once the beneficiary is transferred abroad upon completion of the temporary services. Further, the petitioner has not provided sufficient evidence to demonstrate that the beneficiary's employment in the United States will be temporary. Matter of Isovich, 18 I&N Dec. 361 (Comm. 1980); 8 C.F.R. 214.2(1)(3)(vii).

In addition, the petitioner has not established the nature or ownership structure of the foreign entity. The petitioner has provided two documents apparently written in Polish that it claims establishes the foreign entity as a joint venture. However, 8 C.F.R. 103.2(b)(3) states:

Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Without the translation of the purported ownership documents the Service is unable to determine the nature of the ownership structure of the foreign entity. The petitioner has not provided evidence to establish a qualifying relationship. As the appeal will be dismissed, 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.