D7

U.S. Department of Justice

Immigration and Naturalization Service

Identification data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: WAC 98 203 50078 Office: CALIFORNIA SERVICE CENTER Date: 0 6 MAR 2002

0 6 MAR 2002

IN RE: Petitioner: [redacted]
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:

[redacted]

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. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California 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 manufacturer's representative that deals with key accounts of certain manufacturers ensuring that the products represented are designed into and used in production. The petitioner seeks to continue the employment of the beneficiary in the United States as its secretary and treasurer. The director determined that the petitioner had not established that the beneficiary had been functioning and would continue to function in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary falls squarely within the definition of an executive and managerial employee.

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 United States petitioner is a business incorporated in the state of Arizona in March of 1997. The company has issued 500 shares to the beneficiary and 500 shares to Jonathan Ungerson. In addition, the petitioner represents that it is part of a joint venture called Anoma North America Corp. U.S.A. wherein the beneficiary owns 25 percent, Jonathan Ungerson owns 25 percent and Anoma Electric Co. LTD. of Taiwan owns 50 percent. The petitioner

requests the continuation of the beneficiary's employment in the United States.

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

> 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

iv. 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 the "day to day management of company business financials, etc." The director requested that the petitioner provide a hiring plan to show that the beneficiary would employ a supporting staff.

In response to the request, the petitioner provided a letter indicating that one support staff employee had been hired in September of 1997 to assist with the administration and secretarial duties of the company. The letter also indicated that the business planned to hire sales representatives in the second quarter of 1999, a warehouse manager in mid-1999 and a national sales manager by the third quarter of 1999. The petitioner also provided an Internal Revenue Service Form W-4, for one employee.

The director determined that the petitioner had not provided sufficient evidence to demonstrate that the beneficiary had been functioning and would continue to function in a managerial or executive capacity. The director determined that there was no indication that the beneficiary had exercised, and would continue to exercise significant authority over generalized policy or that the beneficiary's duties had been and would be primarily managerial or executive in nature.

On appeal, counsel for the petitioner lists the beneficiary's specific duties as including:

developing, implementing, and evaluating corporate marketing and sales programs;

assisting or enabling localization of marketing materials and activities in a cost effective manner;

tracking and measuring the effectiveness of programs;

ensuring consistency of image and messages;

developing an integrated marketing communication plan for products;

implementing the marketing plans according to budget and time line;

measuring program results and suggesting adjustments;

maintaining and evolving corporate identity through the World Wide Web.

Counsel for the petitioner also indicates that the beneficiary had been involved in contract negotiations and follow-up discussions with all Anoma customers and that the beneficiary had full signing authority on the corporate bank account. Counsel further indicates that the beneficiary has established a relationship with the Scottsdale Chamber of Commerce and that the beneficiary was Anoma's representative at a large trade show with full responsibility for the company's exhibit. Counsel notes further that the beneficiary is the personal guarantor on the Company's office lease. Counsel notes finally that the beneficiary is compensated at the rate of $52,000 per year and that the company pays for the beneficiary's car lease and insurance.

Counsel asserts that based on the above information the beneficiary is an executive and managerial employee and that the beneficiary exercises significant control over an essential component of Anoma's business, i.e. sales and marketing. Counsel asserts that in addition, the beneficiary will directly supervise a team of professionals and management-level employees within the next 12 months.

Counsel's assertions are not persuasive. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization. It appears the beneficiary will primarily be performing operational rather than managerial or executive duties. The record indicates that a preponderance of the beneficiary's duties have been and will be directly performing the operations of the company, that is negotiating contracts, implementing marketing plans, tracking and measuring the effectiveness of programs and measuring program results. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The record indicates that the beneficiary is providing the necessary services to the petitioner to allow its continued operation. The record reveals that at the time of filing the petition, the petitioner did not have a staff sufficient to relieve the beneficiary from performing non-qualifying duties. The plans of the petitioner to hire additional staff a year or more subsequent to the filing of the petition does not contribute to the beneficiary's eligibility at the time of filing the petition. Service regulations require a new office to demonstrate viability after the initial one-year period of operation. 8 C.F.R. 214.2(l)(14)(ii). The petitioner at the time of filing the extension petition had not demonstrated its ability to support a managerial or executive position.

Beyond the decision of the director, the petitioner has not sufficiently established that it and the foreign entity are qualifying organizations.

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)(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.

In this case the petitioner submitted its Articles of Incorporation, and copies of share certificates issued to the beneficiary and one other individual. The petitioner also indicated in a statement and a chart that the foreign entity in this case was also owned 50-50 by the beneficiary and the one other individual. The petitioner has provided copies of partial agreements that apparently relate to the ownership of the Canadian foreign entity and the joint venture entered into by the beneficiary, his partner and a second foreign entity. The partial information is not sufficient to establish the control of the Canadian foreign entity and hence whether a qualifying relationship can be found. Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this nonimmigrant visa classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant proceedings). In addition, the beneficiary appears to now be primarily engaged in performing services for the joint venture not the petitioner. The record is not sufficient to conclusively establish that a qualifying relationship exists between the petitioner and the Canadian foreign entity and that the petitioner is the entity utilizing the beneficiary's services. As the appeal will be dismissed for the reason stated above, this issue need not be examined further.

Finally and also beyond the decision of the director, it appears that the beneficiary is a major stockholder of the petitioner. 8 C.F.R. 214.2(l)(1)(ii) requires that the beneficiary of an L-1A petition seek to enter the United States temporarily. To evidence the temporary nature of the beneficiary's services, 8 C.F.R. 214.2(l)(3)(vii) requires that:

> If the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States.

The petitioner has not offered evidence that the beneficiary's services will be used for a temporary period as required by the regulation.

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.