

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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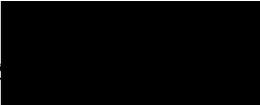


AUG 18 2003

FILE: SRC 01 218 53404 Office: NEBRASKA 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)

ON BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the nonimmigrant visa petition (L-1A). The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED] claims that it is an affiliate of [REDACTED], a Pakistani entity. [REDACTED] states that it is an export, import, and retail business. The petitioner seeks to use the beneficiary's services to open a restaurant. The director found that the beneficiary did not qualify as an executive or a manager. Furthermore, the director denied the petition because the foreign entity failed to show that it made an investment adequate to support a new office in the United States. On appeal, the petitioner's counsel asserts that the beneficiary's work in Pakistan qualified as managerial or executive. Additionally, counsel contends that the Pakistani company demonstrated sufficient investment in the U.S. entity.

Initially, the AAO will address the issue of whether the beneficiary served primarily in a managerial or executive capacity in Pakistan. 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.

Under 8 C.F.R. § 214.2(1)(3), 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 (1)(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.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(1)(3)(v), 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 of 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 paragraph (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.

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.

When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). In an attachment to Form I-129, the petitioner described the beneficiary's foreign work duties:

The [b]eneficiary is employed by the [p]etitioner's affiliate in Pakistan as General Manager. As the General Manager, his duties include: locating clients; negotiating with the clients [regarding] new related business; supervising subordinate employees who prepare marketing strategy; reviewing and analyzing data relating [to] market conditions [and] sales reports[;] establishing and implementing policies to manage and achieve marketing goals; reviewing and approving budgets prepared by [the] controller[;] and directing the employees of the company. The beneficiary receives no supervision in the day to day running of the business and he supervises at least four (4) subordinates, including a supervisor, who in turn oversees three other employees.

Except for a brief statement on appeal, the petitioner submitted no further details about the beneficiary's duties in Pakistan. Specifically, the petitioner's appellate brief stated, "[T]he beneficiary supervised four workers in Pakistan"

A large portion of the petitioner's description of the beneficiary's duties paraphrase the statutory and regulatory executive and managerial requirements. Going on record without supporting documentary evidence is insufficient to meet the

burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, a petitioner's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The more specific description of the beneficiary's responsibilities in Pakistan essentially comprise developing leads for future work which, by definition, qualify as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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).

Upon review, the managerial aspect of the beneficiary's position appears to largely comprise first-line supervisory duties. However, the petitioner failed to provide an organizational chart or the names and educational backgrounds of the four employees he supervised. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In sum, the beneficiary's duties in Pakistan demonstrate that he is, at most, a first-line supervisor of non-professional employees, not an executive or a manager. See, 8 U.S.C. § 1101(a)(44)(a)(ii).

The AAO now turns to the question of whether the foreign entity has invested adequately to support a new office in the United States. Under the regulations at 8 C.F.R. § 214.2(l)(2)(v)(C),

a foreign entity may establish an adequate investment by meeting certain requirements:

The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position . . . supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and the financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

Other than providing a nonqualifying description of the beneficiary's duties abroad, the petitioner provided no specific details about the foreign entity's organizational structure. Thus, the petitioner failed to meet the requirements under subsection 214.2(1)(2)(v)(C)(3).

Similarly, the petitioner provided an equally nonspecific description of the proposed U.S. entity's business plan:

The [p]etitioner intends to diversify . . . by operating a restaurant. The [p]etitioner wants to improve its fiscal health and it believes that it can improve its profits by running efficient and tight operations. In this regard, the [p]etitioner offered the position of Vice President to [the beneficiary]. [The beneficiary], for at least the past five . . . years, has been engaged in managing the business of [Hadi Brothers]. His business sense and acumen have proved to be an asset in the past and the petitioner believes that [the beneficiary] is indispensable for its progress.

On appeal, the petitioner's brief added that the beneficiary might supervise four to seven persons including two cashiers, two cooks, a grill person, cleaning persons, and a meat cutter. The precedent decision, *Matter of Ho*, 22 I&N Dec. 206, 213

(Comm. 1998), lists possible criteria for establishing an acceptable business plan. "The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions." The decision concluded, "Most importantly, the business plan must be credible." *Id.* at 213. Although *Matter of Ho* addresses the specific requirements for the immigrant investor visa classification, the discussion of the business plan requirements is instructive for the L-1A new office requirements. Upon review, the petitioner has not established the proposed nature of the office, the scope of the entity, the organizational structure, or its financial goals. See 8 C.F.R. § 214.2(l)(3)(v)(C)(1).

Finally, although the petitioner provided copies of some financial records, the documents not only appeared to be unrelated to one another but generally lacked supporting explanations. For example, the record included the a certified bank account balance of Farhadi Inc. Silver Design. The petitioner did not explain how that record - or other Farhadi Inc. Silver Design financial documents in the record - related to the foreign entity's investment in the petitioner's restaurant. Likewise, the petitioner proffered copies of canceled checks payable to utilities and food suppliers without any accompanying explanations. Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* In short, the petitioner did not submit records sufficient to meet the subsection 214.2(l)(2)(v)(C)(2) requirements.

Beyond the decision of the director, the AAO notes that the petitioner submitted insufficient evidence to demonstrate that the U.S. entity is a qualifying organization. The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

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.

In pertinent part, the regulations define "parent," "branch," "subsidiary," and "affiliate" as:

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

* * *

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

* * *

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.

* * *

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.

8 C.F.R. §§ 214.2(l)(1)(ii)(I), (J), (K), and (L).

The petitioner indicated on Form I-129 that it and the foreign entities are affiliates. The record contains copies of the petitioner's articles of incorporation as well as copies of various contracts. The contracts suggest that the petitioner not only operates a restaurant, but purchased two additional enterprises in the Chicago area - a silver design store and a news stand. However, the record contains no explanation of the financial relationship between the petitioner, the two additional enterprises, and the foreign entity. The petitioner did not identify itself as one of two subsidiaries both of which are owned and controlled by the same parent or individual. Further, the petitioner offered no evidence showing that the same group of individuals own the same share or proportion of shares in the foreign and U.S. entities.

The failure to submit supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. Furthermore, the regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Consequently, the record as it currently stands does not establish an affiliate relationship between the petitioner and the foreign entity.

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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.