



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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File: EAC 00 040 51617

Office: VERMONT SERVICE CENTER

Date: JAN 10 2003

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:



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 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Rose
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the nonimmigrant visa petition. Upon notice from the American Consulate in Lagos, Nigeria, the director reviewed the record and notified the petitioner of his intent to revoke the approval of the petition and his reasons thereof. The director subsequently revoked his approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as an import/export "trading on electronics" business. The petitioner seeks to employ the beneficiary as a manager or executive, namely as its president and director. In revocation proceedings, the director found that the petitioner had not established that the intended United States operation, within one year of the approval of the petition, would support an executive or managerial position.

On appeal, counsel provides a statement.

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 continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and seeks to enter the United States temporarily to continue to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(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 (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 within 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 services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

The initial Form I-129, Petition for a Nonimmigrant Worker, was filed on December 5, 1999. The petitioner was incorporated in the State of New York on July 13, 1999. Therefore, the petitioner must be considered a new office.

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, 8 C.F.R. 214.2(1)(3)(v) states that the petitioner shall submit evidence to establish 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.

The petition was approved on March 9, 2000. The beneficiary subsequently applied for the nonimmigrant visa at the Lagos,

Nigeria office of the Consulate General of the United States of America. During the course of the interview with the beneficiary, it was determined by the United States Consulate that further inquiry was necessary to determine the legitimacy of the petitioner's business claims.

Information obtained during the course of an investigation was provided to the Director, Vermont Service Center. On March 13, 2001, the director notified the petitioner and counsel of his intent to revoke the approval of the petition based on information received from another United States government agency and further review of the record. The petitioner was allowed up to 30 days to provide sufficient evidence to overcome the reasons for revocation.

Counsel furnished a response and additional evidence. However, the director found the response to be insufficient to overcome his findings and the report from the Consular Office. On June 11, 2001, the Director, Vermont Service Center, revoked the approval of the petition.

On appeal, counsel submitted a statement and indicated that a brief and/or additional evidence would be submitted within 30 days after July 11, 2001. To date, no brief or additional evidence has been received. Therefore, the record will be considered complete.

In his decision, the director stated:

Your company's address, telephone number, and employee do not appear to be authentic. You have not submitted your 1999 or 2000 business income tax returns establishing the legitimate nature of your operation. Your 2000 Profit and Loss Statement is not acceptable in lieu of these returns since it is internally generated. Your telephone bills and bank statements are not sufficient to overcome the grounds for revocation since there are already several serious factual discrepancies in the record revealed by this Service's Anti-Fraud Unit.

Based on the findings of an investigation that was conducted from April 7 through December 13, 2000, the United States Consulate's Anti-Fraud Unit in Lagos, Nigeria, furnished a report to the Director, Vermont Service Center. This report indicated that the petitioner and the beneficiary misrepresented several facts surrounding the businesses. The investigators found that the petitioner's business enterprise consisted of a "spray painted sign" and a phone line for the company. A call to the petitioner's telephone number indicated that the telephone number was not in service. The report indicates that the beneficiary would only come to the business location to pick up mail, and that there was no business being transacted at the location. The

petitioner's only other employee has never been "heard of" by any of the respondents to the investigation. The only mail that is delivered "...comes through the owner of the [adjacent] auto shop."

In a letter dated March 28, 2001, the petitioner furnished additional information in an attempt to clarify these findings. The petitioner stated that:

- The entrance to the business location is not actually located at [REDACTED], but around the corner at [REDACTED], as of January 2000, and that the entrance at Sommers Street was closed. The landlord, a Mr. [REDACTED] a Nigerian auto technician, has his own separate entrance to the building;
- There are lapses from time to time in start-up businesses, but that with time, these lapses will disappear. The petitioner does not explain the nature of the "lapses" to which he is referring, but states that, in time, the company will achieve the level of success that the foreign entity has achieved;
- Ms. [REDACTED] has been employed by the petitioner with the intention of employing additional personnel upon the beneficiary's return to the United States;
- The petitioner has purchased and installed office equipment in the office, where it remains to date; and,
- The landlord collects the petitioner's mail and "...hands them over to the company secretary [REDACTED]."

Here, the petitioner asserted that the landlord opened the beneficiary's mail and viewed the approval from the INS. The petitioner stated that the landlord was so affected by this information as to provide the negative reply when he was approached by investigators. The secretary, [REDACTED] stated that the landlord was not pleased with the fact that the beneficiary had just arrived in the United States and was "recognized by the INS" while the landlord had been in the United States for ten years and still had no such recognition. The petitioner indicated that the statements made by the landlord to the investigator were fueled by his resentment of the beneficiary's achievements. The petitioner stated "In fact, I was opportuned to speak with him from Nigeria and it could be confirmed that he is not happy that [REDACTED] was given the L-1A approval." The petitioner also stated that although the investigators visited the petitioner's office in New York, the findings of the investigators were based on the information supplied by the landlord. These assertions are not supported by evidence.

Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record contains the following relevant documentation referencing the foreign entity:

- Various receipts from January 2000 through February 2001.
- Multiple bank account statements for the period of 1998-2002.
- A Nigerian income tax clearance certificate stating that the foreign entity had not yet commenced business as of September 1, 1995. Other tax clearance statements indicate that the foreign entity did not begin doing business until 1997.

The record contains the following relevant documentation concerning either the beneficiary or the petitioner:

- Two Lagos State government Income Tax Clearance Certificate indicating that the beneficiary paid income tax from 1997-2000.
- Bank account statements of the beneficiary, and a letter dated March 12, 2001, indicating that the beneficiary maintains an account with that institution, and that his business is that of "Telecommunication, Sales & Servicing of Computer;"
- A few telephone bill summary billing pages for the telephone number, [REDACTED], for November 1999 through February 2000. Most of the phone bills are nominal with almost no phone calls occurring during the billing periods.
- A few of the petitioner's bank business checking account statements. Statements submitted include only a minimal number of transactions, with the majority being ATM cash withdrawals, and with no indication of the petitioner doing business.
- A U.S. Customs Service Form 4790, Report of International Transportation of Currency or Monetary Instruments, indicating the beneficiary's travels to St. Louis, Missouri, in 1997.
- A Business Certificate indicating that the beneficiary also is conducting business under the name of O.K. Dynamics, at another location [REDACTED]. Counsel stated that the beneficiary has "registered an auto dealership company in the name of OK Dynamics Autosales, but that the issuance of the license is dependent on the approval of the L-1 visa.

In a letter dated February 18, 2000, in response to a request for additional evidence, counsel stated that the beneficiary possesses the requisite time with the foreign entity as a manager or executive. These assertions are not supported by sufficient evidence in the record. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1990).

Counsel also stated that there is no U.S. staff as this is a new office, but that the petitioner plans to hire a secretary at \$20,000, and also expects to hire a cargo officer by the end of the year.

In a letter dated March 20, 2000, [REDACTED] indicated that [REDACTED] has been hired as a "secretary/system operator" effective on "March 27," with her pay at \$9.00 an hour at 40 hours a week. In an undated letter from the beneficiary to counsel, the beneficiary stated that he is enclosing the secretary's salary in the amount of \$1000.00 for the month of November 2000. One uncanceled check dated November 21, 2000, from the petitioner to [REDACTED] in the amount of \$1,000.00, is included in the record. The petitioner also has submitted a facsimile of the front of [REDACTED] Form I-551, Resident Alien Card, and a copy of her social security card. No other evidence that the petitioner paid the secretary on a regular basis is included in the record.

The Petition for a Nonimmigrant Worker, Form I-129, indicated the beneficiary's title as that of "President Director" and described the beneficiary's responsibilities in this position as: "To plan, develop and establish policies and business objective, review financial statements, plan long-term objectives." The petitioner also indicated that it employs two individuals and that the beneficiary will earn between \$25,000 and \$50,000 per year.

Counsel states that the beneficiary has been spending 40 hours a week "setting up the business." Counsel asserts:

Since July 1999, he has incorporated the business, opened banking accounts; negotiate[d] the leasehold; set-up an office; established short and long-range goals for the U.S. corporation; conducted business negotiations; traveled to Boston, St. Louis Missouri, Nebraska, California to negotiate for exportation of electronics, Cellular Data Adapters, cellular phones, etc., to be shipped to Nigeria; received a sample order of cellular ear pieces which will be shipped to Nigeria by April 2000.

During the course of the day, he speaks with the parent company, attends meetings, makes phone calls to set up appointments, contacts potential customers in Nigeria, negotiates contracts, does banking, does research to set up marketing plans and contracts.

While counsel states that the petitioner has, in fact, begun doing business, the record fails to support this assertion.

The petitioner states that the foreign entity is:

...engaged in the business of contracting for and providing a wide range of products and services from Engineering, Marketing and Petroleum to automobiles, Mobile phone and accessories to other companies and

individuals in Nigeria. One of their future marketing directions is to expand mobile phone sales to West African countries including Nigeria...

The petitioner also has submitted correspondence attesting to the fact of the beneficiary's employment in a managerial or executive capacity during the requisite period. The petitioner states that the beneficiary has over four years of experience with the foreign entity as the head of that company. The foreign entity was created in 1995 and the petition was filed in 1999. However, according to the Nigerian tax documents submitted for the foreign entity, while the foreign entity incorporated in 1995, it did not commence doing business until 1997. That would preclude the beneficiary's having four years of experience with the foreign entity, since at the time the petition was filed, the most experience the beneficiary could have had was approximately two years, and not four as the petitioner states. To compound these discrepancies, included in the record is a letter dated April 2, 2000, from the current chief executive officer of the foreign entity, asserting that the beneficiary was the chief executive officer of the parent company, OK Dynamics Investments, Ltd. from June 1994 to May 1999, a time before the foreign entity actually existed.

The petitioner also has submitted the foreign entity's profit and loss statements for 2000. However, as the compilation is based primarily on representations of management, no opinion as to whether they present fairly the financial position of the employer for that year can be expressed by the preparer(s). In light of this, limited reliance can be placed on the validity of the facts presented in the financial statements that have been submitted. No further supporting documentation is included in the record to reflect the assertions made by the accountant in the financial documentation, or contained within the unaudited financial statements. In addition, this documentation was not in existence at the time of the filing of the initial petition, and cannot be considered as evidence in support of the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katiqbak, 14 I&N Dec. 45, 49 (Comm. 1971).

In a letter dated November 10, 1999, the petitioner submitted a statement as to the duties of the beneficiary with the foreign entity. The petitioner also stated that the beneficiary would perform virtually identical duties in the United States. These duties are largely generic, non-specific and vague in their presentation.

On appeal, counsel states that the director's decision to revoke the petition was based on major mistakes in fact and law and an abuse of discretion. Counsel asserts that the Service made

"wholly conclusory allegations not supported by the record..." Counsel states that there is sufficient evidence in the record to support approval of the petition. Counsel also states that the director failed to consider the substantial evidence rebutting the notice of intent to revoke and supporting the viability of the L-1 petition and the beneficiary's intent. Counsel argues that the revocation was not based on 8 C.F.R. 214.2(1) and that the petition was revoked outside of the scope of the director's authority. Counsel also states that a notice of intent to revoke the approval of a visa petition is not properly issued unless there is good and sufficient cause and that the notice includes a specific statement not only of the facts underlying the proposed action but also of the supporting evidence (the investigative report). Counsel states that the report offered by the investigation was based primarily on a hearsay statement from a Consular Officer, was not supported by evidence, and therefore, cannot be sustained. Counsel asserts:

Where a notice of intent to revoke is based on an unsupported statement or where the petitioner has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained.

Here, the petitioner has been advised of the investigation and the resultant findings. In Matter of Cheung, 12 I&N Dec. 715 (BIA 1968), the Board of Immigration Appeals specified that the burden remains with the petitioner in revocation proceedings to establish that the beneficiary qualifies for the benefit sought under the immigration laws, a principle which was reaffirmed in Matter of Estime, 19 I&N Dec. 450 (BIA 1987) and Matter of Ho, 19 I&N Dec. 582 (BIA 1988). As stated in Matter of Ho, the approval of a visa petition vests no rights in the beneficiary of the petition. Rather, such approval may be revoked at any time for good cause shown. As there is no right or entitlement to be lost, the burden of proof in visa petition revocation proceedings properly rests with the petitioner, just as it does in visa proceedings.

Further, in Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984), the court held that "a proceeding to revoke a visa petition, like the petition itself, is a part of the application process and falls under section 291 of the Act, 8 U.S.C. 1361." Section 291 of the Act, states, in pertinent part:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act [chapter], and, if an alien, that he is entitled to the nonimmigrant; immigrant, special immigrant, immediate relative, or refugee status

claimed, as the case may be.

It is noted that the Service is not required to approve applications or petitions where eligibility has not been demonstrated. Each petition must be adjudicated based on the evidence contained in that record. Sussex Engineering, 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).

While counsel is diligent in pointing out issues in an attempt to discredit the findings of the investigation and report, it is noted that evidence to countermand these findings is not presented either by counsel or the petitioner.

Counsel states that the entrance to the petitioner's business is now located around the corner from the door that was visited initially, and that the investigator failed to visit the correct address. Counsel states that the leased space is at 114 Somers Street, but that the entrance is on 1950 Eastern Parkway. No evidence of this variation in the address or the petitioner's change of address is included in the record.

Counsel states that the phone number in the investigative report is incorrect and missing one of its ten digits. Elsewhere in the record, the telephone number is complete. Counsel fails to present evidence that the petitioner has a working telephone number or to provide that telephone number.

Counsel states:

We agree that no formal business has begun to be conducted at the address since the person who is supposed to set up the company and hire the workers is the beneficiary [REDACTED] who is in Nigeria.

The Service is aware of the circumstances surrounding the lack of visa issuance to the beneficiary. Counsel is reminded that the evidence is examined surrounding the approveability of the petition as a new office supporting an L-1A manager or executive, with the findings of the Consular investigation also considered. The facts surrounding the beneficiary's departure or absence from the United States are not a factor in the decision rendered.

Discrepancies in the petitioner's submissions have not been explained satisfactorily. These discrepancies call into question the petitioner's ability to document the requirements under the statute and regulations. Doubt cast on any aspect of the evidence as submitted may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective

evidence. Any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. Matter of Ho, 19 I&N Dec. 582. (Comm. 1988).

It must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities have been and will be managerial or executive in nature. The petitioner has provided no comprehensive description of the beneficiary's duties to establish this. In fact, the description of duties provided is too general and vague to convey an understanding of exactly what activities the beneficiary actually conducted, or will conduct, on a daily basis. Further, it has not been sufficiently demonstrated that the beneficiary will have a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The fact that the beneficiary's major function after incorporation and obtaining the leased site has been to explore the purchase of cellular phones and their parts is insufficient to warrant a finding that the beneficiary will occupy a position of the caliber of a manager or executive, or that, within one year of the approval of the petition, that the petitioner would be able to support a managerial or executive position.

The evidence as provided in this case remains insufficient to warrant the granting of a nonimmigrant visa. The findings of the director of the Vermont Service Center in his revocation of the approval of the petition have not been overcome. For this reason, the petition may not be approved.

Beyond the decision of the director, documentation submitted in support of the qualifying relationship between the petitioner and the foreign entity is incomplete. In addition, the record provides insufficient evidence that the beneficiary has been employed as a manager or executive for one continuous year in the three-year period preceding the filing of the petition. Finally, the petitioner has not provided sufficient evidence of the scope of its entity, the organizational structure of the foreign entity or the petitioner, or its financial goals. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.