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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



FILE: EAC 02 085 53819 Office: VERMONT SERVICE CENTER

Date: OCT 28 2003

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for 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:



PUBLIC COPY

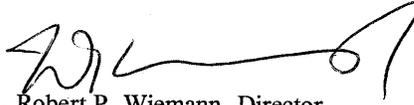
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is described as an importer of oriental rugs. It seeks to employ the beneficiary in the United States as a manager of the U.S. entity, and therefore, on January 14, 2002, petitioned to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). In a decision dated March 22, 2002, the director denied the petition stating that the petitioner, as a new office, had failed to establish the following: (1) that the beneficiary had been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity; (2) that the new U.S. office will grow to be of sufficient size to support a managerial or executive position; and, (3) that sufficient physical premises to house the new office had been secured.

On appeal, petitioner's counsel asserts that (1) the beneficiary was continuously employed abroad for at least one of the past three years in an executive and managerial position; and, (2) that the beneficiary's position in the U.S. company qualifies as a managerial position. Counsel indicated that a brief would be submitted within thirty days of the appeal, which was filed on April 19, 2002, yet the AAO has not received any additional documentation. As it is now over a year since the appeal date, the record will be considered complete.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101 (a) (15) (L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a) (15) (L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2 (1) (3) further 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.

Further, if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

(i) sufficient physical premises to house the new office have been secured;

(ii) 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;

(iii) 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 organization structure of the foreign entity.

Initially, the AAO will address whether sufficient premises has been obtained by the petitioner to house the new office.

Petitioner filed its initial petition on January 14, 2002, and submitted no evidence to substantiate that sufficient premises had been obtained for the new office. Subsequently, the director issued a request for evidence indicating the petitioner had not shown that it had acquired leased premises, including shipping and receiving facilities, of sufficient size to conduct international trade. Specifically, the director asked that the petitioner submit at a minimum the following information: original lease agreements, a statement from the petitioner's lessor identifying the square footage of the leased premises, the telephone number of the lessor, and photographs of the interior and exterior of the U.S. entity. The director noted that the photographs should clearly depict the organization and operation of the entity.

In response to the director's request for evidence, the petitioner submitted a copy of a commercial lease agreement for the period of January 3, 2002 through January 2, 2004, and four photographs of the inside premises only. The photographs depicted an area in which several oriental rugs were hung on the walls and were placed on the floor and a desk with a computer. The lease agreement identified the leased premises as 1728 G1 Conn. Ave. N.W.. No other information requested by the director was submitted to establish the adequacy of the leased premises.

The director determined that the petitioner did not provide ample evidence to support the claim that it had obtained sufficient premises to house the new office. The director noted that the lease did not identify the city or state in which the office is located, although it was assumed to be in Washington, D.C. In addition, despite the director's request, the petitioner did not submit any photographs of the outside of the office, any information regarding the size of the office, or whether any additional space had been obtained for purposes of storage and shipping. The director concluded that the evidence submitted did not support a finding that the leased premises were sufficient to support the function of international trade.

As petitioner's counsel did not address on appeal the issue of insufficient premises for the U.S. office, the AAO is compelled to uphold the finding of the director. Pursuant to 8 C.F.R. § 214.2 (1)(3)(viii), the director may, in his or her discretion,

request any additional evidence that he or she deems necessary to establish the criteria required for an individual petition. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2 (b)(14).

In the present case, the petitioner failed to submit the majority of evidence requested by the director. As already noted by the director, the petitioner did not provide any information regarding the size of the office and whether any facilities had been obtained for storage, shipping and receiving. The petitioner's own business plan, submitted as part of the record, describes the leased premises as a "storage/showroom," yet from the photographs provided, the space may be a showroom at most. In addition, the address reflected on the lease agreement, 1728 G1 Conn. Ave. N.W., is different from that indicated on the petitioner's I-129 and the petitioner's application for an employer identification number. Both of these forms list the petitioner's address as 6338 Draco Street, Burke, Virginia. The petitioner has not provided any explanation as to this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, the AAO cannot conclude that the petitioner has secured sufficient physical premises to house the new office.

Second, the AAO will address the issue of whether 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 position.

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 initial petition, the petitioner described the beneficiary's duties in the foreign company as "manage import-export rug business." The petitioner also submitted a letter, printed on the letterhead of the foreign company, stating in part that "[the beneficiary] has been employed by this company as a manager for tha [sic] past ten years. He has substantial experience in the field of import/export of oriental rugs and antiques." The beneficiary himself, as the owner of the foreign company, signed this letter. In addition, the petitioner submitted a letter written to the petitioner from a tax accountant, in which the accountant indicated in part, "You are the manager of your company." The accountant made no reference to the name of the company.

In his request for evidence, the director asked that the petitioner submit the beneficiary's last annual tax return, the foreign entity's payroll documents reflecting the beneficiary's employment and salary, a tax withholding statement identifying the employer and any other unequivocal evidence substantiating the beneficiary's employment as a manager or executive. The petitioner did not submit any of the evidence requested by the director.

The director determined that the petitioner had not provided sufficient evidence to conclude that the beneficiary had been employed for one year during the three years preceding the filing of the petition in a managerial or executive capacity. The director noted that the petitioner submitted only two letters to establish the beneficiary's role as a manager, one signed by the beneficiary himself and a second written by a tax accountant of the foreign company. The director gave little credence to the letter signed by the beneficiary, and concluded that the beneficiary had not been employed abroad in a managerial or executive duty for the required period of time.

On appeal, petitioner's counsel asserts that the beneficiary was employed abroad in an executive and managerial position for at least one year of the past three years. However, counsel failed to submit any additional evidence sufficient to establish such assertion. In the business plan of the U.S. entity, it is indicated that the beneficiary "has been in continues [sic] management position of [the foreign company] . . . for the past seven years." In addition, a letter, which was written by an attorney in Germany, states that after inspecting the books of the foreign company, the attorney concludes that the beneficiary did not receive a fixed salary from the foreign company, but rather the amounts depended upon the operating receipts and the beneficiary's financial needs. The amounts the beneficiary received during the year 2000 were reflected in the letter and amounted to approximately DM 126.000,00, or 64.627,29 euro. It should be noted that, contrary to the instructions given by the director that all financial data submitted must be converted to United States currency rates, the petitioner submitted financial information listed in deutsche marks and euro only. See 8 C.F.R. § 103.2 (b)(3). In addition, the attorney stated that the beneficiary received monthly remittances from the foreign company that, the attorney asserted, were equivalent to a paid salary.

The record does not support a finding that the beneficiary has been employed for at least one year in the three years preceding this filing as a manager or executive in the foreign company. The little evidence submitted indicates that the beneficiary is

an owner and stockholder of the foreign company, yet does not establish that the beneficiary was employed in an executive or managerial capacity. The petitioner never submitted a detailed description of the beneficiary's overseas job duties so that CIS could determine whether he was employed in a primarily managerial or executive capacity. The only information provided is statements from counsel, the petitioner's attorney, and those in the business plan that merely claim that the beneficiary has worked in a managerial position. Yet, the petitioner did not offer any payroll or personnel records, or tax returns. Counsel's assertions that the beneficiary's past employment with the foreign company meets this requirement do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, the petitioner did not submit any evidence requested by the director to establish that the beneficiary was employed in a managerial or executive capacity. The financial statement submitted does not account for the supposed "salary" paid out to the beneficiary during the year 2000 (approximately DM 36.000,00). The amount disbursed in the year 2000 for "wages and salaries" is indicated on the financial statement as DM 31.304,72. As noted above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, supra at 591-92.

Counsel cites several cases on appeal that refer to the classification of an individual as an employee even if the employee is also a majority or substantial stockholder, a sole stockholder, or a sole proprietor of a company. Counsel's argument seems to be that the beneficiary should likewise be found to be an employee of the foreign entity merely because the beneficiary is the owner of the foreign company. Counsel's argument is misplaced. In the instant case, the analysis is not only whether the beneficiary was an employee, but also whether the beneficiary worked in a primarily managerial or executive capacity. As the petitioner has failed to provide sufficient evidence, the AAO cannot conclude that the beneficiary has been employed for one year in the three year period preceding the filing of this petition in an executive or managerial capacity.

The final issue is whether the new United States office, within one year of the approval of the petition, will support a managerial or executive position.

In his request for evidence, the director asked that the petitioner submit the following information to demonstrate that the U.S. entity would support a managerial or executive position within one year: (1) a business plan that gives specific dates for each proposed action over the next two years; (2) the total number of proposed employees; (3) the dates the U.S. company expects to hire the employees; (4) the duties to be performed by each employee; (5) the proposed management and personnel structure of the United States office; and, (6) any other evidence to establish petitioner's claim. The petitioner submitted a business plan within which it defined the beneficiary's duties in the U.S. operation as "[g]ather, organize and direct the use of any and all information that can advance the company's success in all areas of operations." The beneficiary was also described as the chief executive officer, not a manager of the U.S. branch, as noted in the original petition. It was also noted in the business plan that the U.S. company expected to hire five employees by the end of the year 2002: two sales associates, one carpet specialist repairperson, and two helpers. No description was given of the duties to be performed by each.

The director concluded that the petitioner had not established that the new office would support a managerial or executive position within one year of the filing. The director indicated that the staffing level at the end of the year 2002 would be insufficient to relieve the beneficiary from performing the tasks involved in producing a product or providing a service. The director agreed that "the owner of a company that employs five people obviously is responsible for all of the important 'executive' level decisions. However, that same person is also responsible for all of the other non-managerial tasks necessary to run a company. These non-managerial duties require the majority of the time." As such, the director determined that the beneficiary would not be working in a managerial or executive capacity after one year of filing the petition.

On appeal, counsel asserts the following:

In the instant case [the beneficiary's] position in the U.S. company does qualify as a Managerial position in that he solely will be responsible to direct, organize and manage the operations and activities therein and will fulfill the requirements as cited hereinabove under the

definition of Manager. The INS was in error in not finding that the U.S. business will have enough staffing to relieve the beneficiary from performing the tasks involved in producing a product or providing a service. There is absolutely no requirement that there even be more than one employee in the U.S. company. 'A person may be a manager or executive under new regulations, even if he is the sole employee of the company where he utilizes outside independent contractors or where business is complex. He may be a functional manager.' See *Matter of Irish Dairy Board, Ltd.*, Case No. A28 845 421 (AAU Nov. 16 1989) [Schedule A, Group IV case], reported in 66 Interpreter Releases 1329-30 (Dec. 4, 1989), *IKEA US, Inc. v. U.S. DOJ, INS*, 48 Supp. 2d 22 (D.D.C. 1999). (emphasis in original)

Counsel's argument is not persuasive. It appears that counsel misinterpreted the statute as requiring that only one element be satisfied in order to establish managerial capacity. Counsel specifically italicized the language "manage an essential function within the organization" and stated that the beneficiary will be performing as a manager because he will be solely responsible for directing, organizing and managing the operations of the U.S. office. However, the statute requires that all elements of the definition of managerial capacity be satisfied, not just one element, as argued by counsel.¹ The record does not establish that the beneficiary will primarily manage the organization, or a department, subdivision, function or component of the organization; will supervise other professional or managerial employees; has the authority to hire and fire; and, exercises discretion over the day-to-day operations of the activity. The petitioner has failed to provide evidence requested by the director explaining the duties of the proposed employees and management, as well as an organizational chart. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denial. 8 C.F.R. § 103.2 (b) (14).

There is also insufficient evidence to support a finding that the beneficiary will primarily establish the goals and policies of the organization; exercise wide latitude in discretionary decision-making; and will receive only general supervision from higher level executives. It must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities will be managerial or executive in

¹ As counsel did not correctly quote the applicable statute, reference should be made to the previously quoted Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A) herein, which demonstrates that all elements must be met.

nature. The director is correct in noting that as the owner of the U.S. company, the beneficiary will likely perform some executive level decisions. However, the petitioner has provided no comprehensive description of the beneficiary's duties. In fact, the description of duties provided is too general and vague to convey an understanding of exactly what activities the beneficiary actually will conduct on a daily basis. Counsel's assertion that the beneficiary will be solely responsible "to direct, organize and manage the operations and activities therein" merely paraphrases portions of the statutory definition of managerial and executive capacity without describing the actual duties of the beneficiary with respect to the daily operations. See §§ 101 (a) (44) (A) (iii) and 101 (a) (44) (B) (ii) of the Act. Again, the assertions of counsel do not constitute evidence. *Matter of Obaigbena, supra; Matter of Ramirez-Sanchez, supra.*

Counsel further refers to an unpublished decision involving an employee of the Irish Dairy Board. In the Irish Dairy Board case it was held that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee of the petitioning organization. Yet in the present case, counsel has furnished no evidence to establish that the facts of this petition are in any way analogous to those in the Irish Dairy Board case. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Finally, the record does not establish the financial ability of the foreign company to remunerate the beneficiary. The petitioner submitted an annual financial statement purported to have been prepared by a tax accountant, however, the letter accompanying the financial statement is not signed. The balance sheet in the financial statement reflects the foreign company's assets in the amount of DM 1,095,315.92 and liquid assets in the amount of DM 12,769.58. Again, as none of the monetary figures have been transferred into U.S. currency, the amounts provided are ineffective in establishing the financial status of the company. See 8 C.F.R. § 103.2 (b) (3). The record also contains a letter from the same tax accountant indicating the total amount of sales, in deutsche mark, of the foreign company for the years 1995 through 2001. In regards to the size of the United States investment, the only information provided is a projected income statement for the first five years of business

that indicates a net gain of \$73,700.00 the first year. There is no mention of how the new organization will be funded.

On review, the record contains no contemporaneous documentation substantiating the financial background of both the foreign company and the U.S. subsidiary. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Re. Comm. 1972). Accordingly, there is insufficient evidence in the record to persuade the AAO that the petitioner has sufficient financial ability to remunerate the beneficiary and to commence doing business. For this reason, the petition may not be approved.

Beyond the decision of the director, the record indicates that the beneficiary is the sole owner of the foreign company, and the petitioning office is the subsidiary of the foreign company. The regulation at 8 C.F.R. § 214.2(1)(3)(vii) states 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 that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this case, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

Another issue not examined by the director is whether there is a qualifying relationship between the U.S. entity and the foreign entity as required in the regulation at 8 C.F.R. § 214.2(1)(1)(ii)(G). As the appeal will be dismissed, this issue also 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.