

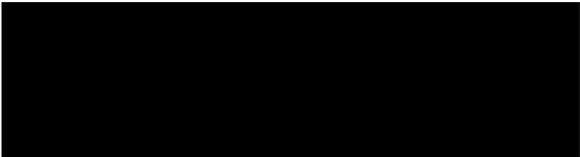
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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*DM*

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



File: WAC 00 034 53846 Office: CALIFORNIA SERVICE CENTER Date:

SEP 12 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)

ON 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 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 nonimmigrant visa petition was denied by the Director, California Service Center and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an international transportation company that seeks to employ the beneficiary temporarily in the United States as its president for a period of three years. The director determined that the petitioner had not established that a qualifying relationship exists between the U.S. and foreign entities. The director also determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel states that the director erred in stating that there was insufficient evidence to show that the foreign entity in Russia is in fact a subsidiary of the petitioner, Boston Continental Service, USA, LLC. Counsel also states that the director erred in denying the petition based on the grounds that there is insufficient detail regarding the actual duties to be performed by the beneficiary.

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.

The regulations at 8 C.F.R. § 214.2(1)(3) state 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.

The petitioner is a limited liability company that originated in the State of California on September 16, 1998. The petitioner filed its petition on November 11, 1999. Since the petitioner had been doing business for more than one year at the time the visa petition was filed, it shall not be considered under the regulations covering the start-up of a new business.

The first issue to be addressed in this proceeding is whether the petitioner and the foreign entity are qualifying organizations.

The regulations at 8 C.F.R. § 214.2(1)(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.

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(I) state:

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

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(J) state:

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

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(K) state:

*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.

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(L) state, 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 registered holders of the membership interests of the petitioning firm [REDACTED] USA, LLC, are as follows:

[REDACTED] 900 interests  
[REDACTED] 100 interests

The petitioner's claimed subsidiary abroad, [REDACTED] LLC, Russia was said to be held by two companies as follows:

[REDACTED] 60%  
[REDACTED] 40%

In her decision, the director noted that the \$50,000 paid by the petitioner for its interest in [REDACTED] LLC, Russia is less than the authorized capital stock worth of 294,000 rubles specified by the petitioner. Counsel does not dispute the director's calculations but argues that the the 294,000 ruble figure represented book value of the enterprise and not the actual value of the capital stock. Counsel argues that the 294,000 rubles included only the assets of the firm and did not include the value of good will and future income. The director also found that although the petitioner stated that the purchase of the 60% interest in the Russian company was completed on January 25, 1999, the payment dates were as late as December 23, 1999, January 27, 2000 and February 7, 2000.

The petition was filed on November 17, 1999. To establish that it had purchased a 60% interest in [REDACTED] LLC, Russia, the company where the beneficiary had been employed abroad, the petitioner submitted "global payment service debit advice notices" from Wells Fargo Bank dated December 23, 1999, January 27, 2000 and February 7, 2000. These payment service debit advice notices did not exist at the time of the filing of the petition on November 17, 1999. Therefore, this evidence cannot be considered for purposes of this petition. A petitioner must establish eligibility at the time of filing; See 8 C.F.R. § 103.2(b)(12); *Matter of Izummi*, 22 I&N Dec. 169 (AAO 1998). The director's determination that the petitioner had not established that a qualifying relationship exists between the U.S. entity and the beneficiary's foreign employer is affirmed.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated September 10, 1999, the petitioner describes the beneficiary's job duties in the United States as follows:

- a) He will occupy the position of the Manager of the Company and its President, which will allow his reputation in the industry to positively reflect on our company and will allow us to integrate and coordinate our services with the foreign subsidiary.
- b) He will (sic) be the senior sales person. While Mr. Popsuy-Shapko cannot operate without local resident employees who know the English language and American culture, the employees also cannot operate without his knowledge of the international cargo business and, particularly, Russian System of transportation and deliveries.
- c) He will be responsible for planning the development, shipping and pricing policies and objectives of our company.
- d) He will coordinate the activities of our company with our subsidiaries and other affiliated companies in Ireland, Italy, Finland and the Czech Republic.
- e) He will be primarily responsible for assuring the quality of service to our U.S. customers by communicating to "Boston Russia," receiving reports and information from Russia, and making world-wide orders relating to delivery of individual shipments of the higher importance (in terms of quality or value).

Counsel emphasizes that pursuant to the operating agreement of the company the beneficiary would be a "Member" of the petitioning entity. In that role he would be fully authorized to make operational decisions subject only to proper recording and inspection by other members.

The record shows that the petitioner intends to hire a cargo account manager (sea transportation), a telephone operator and a cargo account manager (air transportation) and to place them under the beneficiary's supervision.

The record reveals that at the time of filing the petition, the petitioner employed two persons. The record does not clearly show that the petitioner had any staff that would relieve the beneficiary from performing non-qualifying duties. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing or directing the management of a function, department, subdivision or component of the company upon his entry into the United States. The petitioner has not shown that the beneficiary will be functioning at a qualifying senior level within an organizational hierarchy.

In this case, the evidence submitted is insufficient to establish the beneficiary will be acting in a managerial or executive capacity. The planned addition of three new employees in the future does not enhance the beneficiary's eligibility for this classification at the time the petition was filed. Consequently, the petition may not be approved.

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.