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Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: LIN-02-028-53440 Office: Nebraska Service Center Date: OCT 22 2003

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]

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

The petitioner is gas station/convenience store. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its executive manager. The director determined that the petitioner had not established that a qualifying relationship continues to exist between the U.S. and foreign entities, or that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel submits a brief in rebuttal to the director's findings.

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.

Regulations at 8 C.F.R. § 214.2(l)(14)(ii) state that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

> (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
>
> (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
>
> (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
>
> (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
>
> (E) Evidence of the financial status of the United States operation.

The United States petitioner was established in 2000 and states that it is a wholly owned subsidiary of [redacted] located in Kenya. The petitioner seeks to extend the employment of the beneficiary for a three-year period at an annual salary of $42,000.

The first issue to be addressed in this proceeding is whether a qualifying relationship exists between the U.S. and foreign entities.

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 (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.

Regulations at 8 C.F.R. § 214.2(l)(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.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

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

Regulations at 8 C.F.R. § 214.2(l)(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 his decision, the director noted, in pertinent part, that:

> The balance sheets from the foreign entity do not address any subsidiaries. Furthermore, an unsigned tax return would not be acceptable evidence of a relationship in ant case, and the return provided also did not indicate any sort of relationship with the foreign entity. The statement, again prepared and signed by the petitioner's representative, asserts that the United States entity is a wholly owned subsidiary, but no evidence was provided to substantiate such claim. In addition, the statement is contradictory, stating sometimes that the parent company is the beneficiary's former employer in Kenya and then later stating that the parent company is in India.

On appeal, the petitioner's counsel states, in pertinent part, that:

> In this case we have already provided information about Doing Business. All supporting documents relating to the business and qualifying relations of [sic] foreign entity and US are being provided with the extension papers. (Please find enclosed the copy of these papers for your kind attention).
>
> We have already provided the copies of payroll and tax withholdings for [redacted] US and [redacted] the parent company. (Please find enclosed the duplicate copy of all these papers).

The record does not contain copies of the documents purportedly submitted on appeal. Further, the petitioner has not addressed nor overcome the director's objections regarding the documentation previously submitted, which failed to establish that a qualifying relationship continues to exist between [redacted] U.S. and [redacted] For this reason, the petition may not be approved.

Another issue in this proceeding is whether 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:

> "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:

> "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.

On appeal, counsel resubmits a list of the beneficiary's duties previously submitted in response to the CIS's request for additional evidence. Since the director addressed these duties in their entirety in his decision, the duties will not be restated here.

On appeal, counsel states, in pertinent part, that:

> The appellant has, because of the growth of the company, been relieved from performing the non-managerial, day-to-day operations involved in running the enterprise. The duties of the beneficiary are primarily concerned with all of Beeco's marketing. It is within this position, where [sic] the beneficiary has experience. [H]is day to day functioning is in the area of expanding business operations. The position is an "Executive Position" with the beneficiary keeping the other partners in India informed of the developments in the beneficiary's area of operations.
>
> Service (CIS) completely ignored the fact that the beneficiary is the only employee among three employees in US entity, performing managerial duties.
>
> The beneficiary is the person who set up this company and generated business and cash reserves for US entity. It was his planning to set the business into motion and then going for bigger [sic] and his ultimate aim was to go for international trade, which is already in progress.

From the description of duties for the beneficiary such as negotiating, hiring sub-contractors, setting goals, and hiring and firing staff, it appears that all of the other employees have been performing the operational duties of the U.S. company. The petitioner's claim to being in the construction business notwithstanding, the U.S. entity is a gas station/convenience store. The evidence does not establish that the U.S. entity has grown to a point where the other three employees would be primarily involved with activities of a managerial or executive nature, as suggested by their job titles. The evidence does not establish that the U.S. entity contains the organizational complexity to warrant the services of a manager and an executive. The petitioner has not demonstrated that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. The petitioner has not demonstrated that it employs a subordinate staff of professional, managerial, or supervisory

personnel who relieve the beneficiary from performing nonqualifying duties. The record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary has been and will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. For this additional reason, the petition may not be approved.

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.

ORDER: The appeal is dismissed.