



U.S. Citizenship
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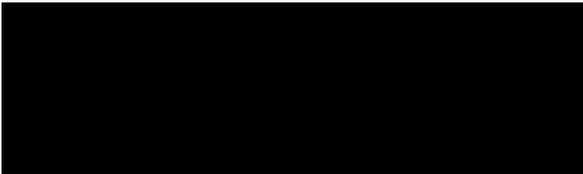


FILE: EAC 02 099 54088 Office: VERMONT SERVICE CENTER Date: APR 26 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

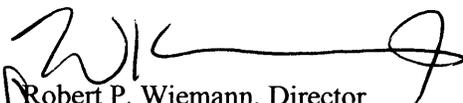
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


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 claims to be engaged in the retail of cellular equipment and services. It seeks authorization to employ the beneficiary temporarily in the United States as its general manager. The director determined that the petitioner had not established that the beneficiary is currently employed or will be employed in one year in a primarily managerial or executive capacity. On appeal, counsel disputes the director's findings and submits additional information in support of the petition.

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(l)(3)(v) state that 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 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 (l)(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 U.S. petitioner was established in 2001 and claims to be an affiliate of Sai Motors, located in India. The petitioner seeks to employ the beneficiary for an initial stay of one year at an annual salary of \$40,000.

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

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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.

The petition was accompanied by the following description of the beneficiary's job duties abroad:

As director of sales and marketing, [the beneficiary] managed the entire department and was responsible for planning the entire sales operation of the firm. [The beneficiary] analyzed the market, organized the price structure, trained his subordinates, assigned sales territories and goals and reported to top management on the sales activities of the firm.

The petitioner also provided an organizational chart of the overseas entity showing the position titles of all of the company's employees. The chart showed the beneficiary's position as the director of sales and marketing and indicated that the beneficiary supervised two regional sales people. The petitioner did not, however, provide position titles or job descriptions for either of the beneficiary's immediate subordinates.

On March 4, 2002, CIS issued a request for additional evidence. The petitioner was instructed to discuss its plans for advancing beyond the start-up stage of development, namely the number of employees it planned to have in one year, as well as their job titles. The petitioner was also asked to provide a description of the beneficiary's typical workday in the offered position.

In its response, the petitioner stated that it currently employs a sales professional and a sales associate and stated that it plans to have a total of five employees by the end of the beneficiary's first year with the petitioning entity. The petitioner also provided the following description of the beneficiary's proposed duties:

Develop and implement regional marketing and promotion plan.

Oversee financial record keeping by manager.

Identify additional vendors; negotiate contracts.

Oversee ordering of inventory

Survey the market weekly to identify new products. Analyze information, decide which products should be stocked.

Hire and train key employees.

Motivate store manager and sales force by settling force compensation based upon achievement of targets and quotas.

Identify new retail locations, do market research/analysis of profitability.

Negotiable [sic] leases.

Implement POS (point of sale) software after analyzing software options.

Analyze operations on ongoing basis to decide when and whom to hire; how and what to train; how to motivate.

The petitioner further stated that the petitioner's sales people and professionals will handle the day-to-day operations of the business leaving the beneficiary to concentrate on managerial tasks.

On September 13, 2002, the director denied the petition. The director noted that the petitioner had been doing business for less than one year and should therefore be deemed a "new office." *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). Despite that fact, the director proceeded to comment on the petitioner's relatively low earnings and small support staff, thereby ignoring the regulation that allows the petitioner one year from the

date of approval of the petition to actually support an executive or managerial position. *See* 8 C.F.R. 214.2(l)(3)(v)(C)(3). As such, the director's comments that pertain to the petitioner's state of operation as a *new office* are hereby withdrawn.

However, the director properly concluded that the petitioner failed to submit sufficient evidence to establish that the beneficiary will be employed in a managerial or executive capacity one year after the petition's approval. On appeal, counsel asserts that in addition to engaging in retail of merchandise, the petitioner will also be engaged in providing cellular phone services. However, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In the instant case, the description of the beneficiary's proposed job duties indicates that the beneficiary will be developing marketing and promotion plans, contacting vendors and negotiating contracts, doing market analysis, and training employees. Although these duties may be essential to the petitioning organization, they are day-to-day operational tasks and cannot be deemed managerial or executive. The fact that the beneficiary will need to perform these duties one year after approval of the initial petition suggests that the petitioner has not attained the stage of development where the beneficiary is needed to primarily perform managerial or executive duties. An employee who primarily performs the tasks necessary to produce a product or to 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). Thus, regardless of the beneficiary's discretionary decision-making authority, the description of his proposed job duties suggests that he will primarily be performing tasks of a non-qualifying nature. For this reason the petition cannot be approved.

Beyond the decision of the director, the petitioner failed to submit sufficient evidence of the ownership of the U.S. company and the overseas partnership so that CIS may determine whether a qualifying relationship exists. *See* 8 C.F.R. § 214.2(l)(3)(i). The petitioner claims that it is affiliated through common ownership with the overseas partnership in India. The petitioner submitted a letter from the foreign entity's accountant discussing the percentage breakdown of that company's ownership, but did not submit any documentary evidence in support of this claim. Without documentary evidence to support the claim, mere assertions will not satisfy the petitioner's burden of proof. 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).

Furthermore, the petitioner has not adequately established the ownership of the U.S. company. It is noted that the stock certificates submitted for the petitioning entity start with number three. The petitioner did not account for certificates numbered one and two and did not disclose whether these stock certificates are owned by other individuals. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Therefore, for the additional reason stated herein this petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683

(9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.