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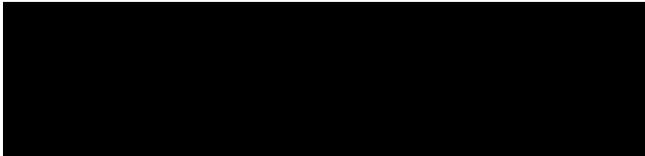
U.S. Department of Homeland Security

Citizenship and Immigration Services

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D7

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



FEB 02 2004

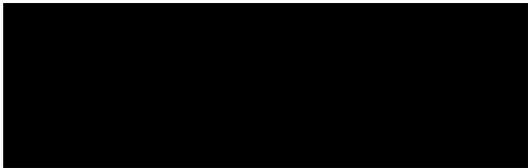
File: EAC 01 176 55372 Office: EASTERN SERVICE CENTER Date:

ON 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, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a limited liability company engaged in the jewelry business in Dubai, United Arab Emirates. It seeks to employ the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner was considered a new office for immigration purposes but that the petitioner had not established that it would be able to support an executive or managerial position within one year of approval of the petition.

On appeal, counsel states that the director incorrectly interpreted the law in regard to this case.

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 was incorporated in the State of Virginia on April 2, 2001 and the petition was filed on April 20, 2001. The petition requests an L-1A nonimmigrant visa for the beneficiary in order to set up a new office for the petitioner in Springfield, Virginia. The petitioner qualifies under the new office definition in 8 C.F.R. § 214.2(1)(1)(ii) that states in pertinent part that:

(F) New office means an organization which has been doing business in the United States through a parent,

branch, affiliate, or subsidiary for less than one year.

The issue in this proceeding is whether the petitioner has provided sufficient evidence to comply with the requirements set forth in 8 C.F.R. § 214.2(1)(3)(v).

The regulations at 8 C.F.R. § 214.2(1)(3)(v) state that if a 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 (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 petitioner submitted a company profile, a list of employees, a memorandum of association of the limited liability company abroad, a membership registration certificate and reports of auditors for the foreign entity. The petitioner also submitted an assignment letter appointing the beneficiary as one of its directors and as the chief executive of its newly formed subsidiary in the United States. The petitioner also submitted a business plan showing the proposed staff positions of the new business during the first year of its existence.

The petitioner's assignment letter lists the beneficiary job duties as follows:

- To manage sales and purchase of jewelry items and guide and instruct the personnel in the Sale and purchase of goods.
- Overall control of cash and accounts, oversee the maintenance of proper books of account, bank account, cash in hand and profit and loss account etc., to be checked for their proper maintenance and up keep, opening of L/C etc.
- At the end of every month summary of sales, purchases, bank account, cash in hand etc. to be reported to Headquarters.
- Mr. Rayaz is empowered to hire and fire required staff for establishing the new office on firm grounds. He is also empowered to do all that is necessary to run the office with minimum reference to the Parent company.

The petitioner states that while he is working in the United States, Mr. Rayaz will be paid an annual salary of \$60,000.00. In addition, he will be entitled to a company car, cell phone and other normal paraphernalia to enable him to function efficiently.

The petitioner submitted a business plan for the first year for the new enterprise as follows:

Immediately on arrival

Sales person-cum-personal secretary less than \$8.00 per hour	1	Salary	not
Cashier-cum-security less than \$10.00 per hour	1	Salary	not

In three months

Sales persons	2
Cashier	1

In six months

Sales persons	3
Cashier	1
Jewelry repair technician-cum-Security	1

In one year

Office Assistant (import-export)- Secretary	1
Sales persons	4
Cashier/Accountant	1
Jewelry repair-cum-security	1

Please note that we are not familiar with the wage structure in the U.S. We will pay the employees better than they get locally to attract good people to work for us.

The petitioner also submitted a statement in reply to the director's request for evidence indicating the following:

As stated, the staff position envisioned in the one-year business plan clearly indicates that the beneficiary will not be bound down by day to day running of the business but will be free to handle, promote business contacts and conduct market survey, which will facilitate the business to expand. The Office Assistant position in the business plan is in fact a managerial position. It is the Office Assistant who would be expected to handle the day-to-day operations under policy guidelines laid down by the CEO. This, the CEO will not be burdened with any of the daily operations.

The director determined that the record did not establish that the petitioner would support an executive or managerial position within one year of the potential approval of the petition. The director, relying on the business plan submitted by the petitioner, determined that even if the petitioner's hiring projection were to occur and that seven individuals were employed after one year, the petitioner's expansion plans did not indicate that the operations would grow sufficiently to warrant an executive or managerial position. The director determined that the operation would remain sufficiently small so that the beneficiary would continue to engage in doing the work of the petitioner, not managing the work.

On appeal, counsel's argument relies, in part, on a federal district case involving an immigrant petition, *Mars Jewelers, Inc. v. INS.*, 702 F. Supp. 1570 (N.D. Ga. 1988). Although the reasoning will be considered when it is properly before the AAO, a federal district court case has no binding precedential value in the instant matter. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Moreover, the statute has since been amended and sets forth explicit definitions of managerial and executive capacity on which the director relied. Also, counsel refers an unpublished decision and argues that a case was approved in 1994 where an executive or manager managed only secretarial and clerical employees. However, counsel has furnished no evidence to establish that the facts of the instant case are in any way analogous to the unpublished case cited. Simply going on record without supporting documents 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 the regulations at

8 C.F.R. § 103.3(c) provide that CIS precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

On appeal, counsel for the petitioner asserts that the beneficiary will exercise full management control of the company, and will be responsible for all of its executive decision making. Counsel further asserts that the beneficiary will be accountable only to the board of directors of the company, based in the United Arab Emirates.

Based on the petitioner's business plans, the beneficiary will be acting as a first-line supervisor of non-professional retail sales persons at the end of one year. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, an executive's duties must be the critical factor. However, if CIS fails to believe the facts stated in the petition are true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel's assertions are not persuasive. The business plan submitted in response to the request for evidence envisions a small eight-person office when the beneficiary is included. In addition, based on the business plan it appears that the beneficiary, necessarily, will be providing services to the petitioner rather than primarily directing the management of the petitioner. 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).

Although the petitioner has described the proposed nature of the office concerning its hiring plans and its organizational structure, it has not adequately described its financial goals and the size of the United States investment. See 8 C.F.R. § 214.2(1)(3)(v)(C)(1) and (2). Furthermore, the petitioner has not submitted sufficient evidence to establish that it has acquired sufficient physical premises, as required by 8 C.F.R. 214.2(1)(3)(v)(A). Although the petitioner submitted a copy of a lease, the petitioner has not described the premises or explained how it is suitable for an eight person retail sales facility.

On review of the complete record, the petitioner has not sufficiently established the scope of the business and thus has not established that the petitioner will support a managerial or executive position within one-year of the potential approval of the petition.

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.