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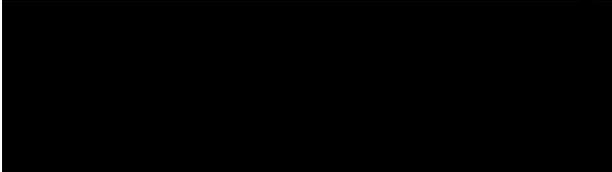
U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

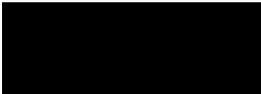
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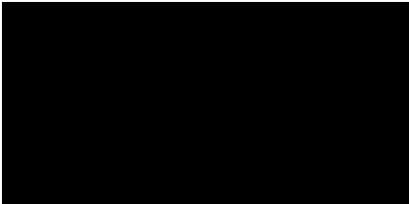
File: LIN 02 151 53763 Office: NEBRASKA SERVICE CENTER Date:

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
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 on appeal. The appeal will be dismissed.

The petitioner is an environmental engineering firm that seeks to continue to employ the beneficiary temporarily in the United States as its president. The director concluded that the petitioner had failed to demonstrate that the United States company was doing business. The director also found 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 petitioner is engaged in the regular, systematic, and continuous provision of goods and/or services in the United States. Counsel also states that Dr. Monu's employment as president and CEO of Intecy, Ltd. qualifies as executive or managerial under applicable regulations. Counsel notes that the petitioner managed to generate gross sales of over \$1,000,000 in spite of the beneficiary's unexpected absence from the United States due to the September 11 terrorist attacks severely inhibiting his ability to conduct business for more than a quarter of that year.

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 corporation that originated in the State of Washington on November 22, 2000. The petitioner filed its petition on April 4, 2002. 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 has established that it was doing business as defined in the regulations prior to April 4, 2002, the date this visa petition was filed. On appeal, counsel submits documents to prove that the petitioner filed a tax return for fiscal year 2001. This documentation consists of an unsigned copy of the first page of the petitioner U.S. Corporation Income Tax Return for 2001 and four pages of correspondence from the Internal Revenue Service. The IRS documents indicate that after review of the return that it received from the petitioner, the corporation owed \$1,372.96 which included penalties and interest. Counsel argues that these returns confirm the accuracy of the financial statements previously provided and document U.S. sales for the company in excess of \$1,000,000.

Review of the submitted documents show that the petitioner forwarded a tax return to the IRS and that the petitioner had not paid the taxes shown as being due on that tax return. It is determined that the copy of the front page of the unsigned return and the collection documentation from the IRS is not sufficient to confirm the accuracy of financial statements previously provided and document the U.S. sales for the company in 2001. It is determined that upon review of the record and the additional documentation provided on appeal, the petitioner has not established that it was engaged in the regular, systematic, and continuous provision of goods or services at the time of filing. See 8 C.F.R. § 214.2(1)(1)(ii)(H).

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.

The petitioner's descriptions of the beneficiary's projected job duties are fully described in the director's decision dated October 8, 2002 and will not be repeated here. No further evidence concerning the beneficiary's job duties was provided on appeal.

The record reveals that the petitioner compensated the beneficiary but paid no salary and wages to any other employee during 2001. On April 4, 2002 when the petition was filed, the record shows that the United States corporation employed two persons, the beneficiary and an office manager. The record does not clearly show that the petitioner had sufficient staff to relieve the beneficiary from performing non-qualifying duties. Without more compelling evidence, the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization, and that he is not directly providing the services of the business. Furthermore, the evidence indicates that the beneficiary is directly providing the services of the petitioning company. 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). Consequently, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner's Internal Revenue Service (IRS) Form 1120 corporate tax returns reveal that it is not a subsidiary and is not affiliated with any other entity. The tax returns further indicate that the beneficiary owns 50 percent of the petitioning company, thus directly contradicting the claim that the beneficiary wholly owns the petitioner and qualifies as an affiliate of the Nigerian company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Consequently, it cannot be concluded that the petitioner is a qualifying organization doing business in the United States and at least one foreign country, or that it has a qualifying relationship with a foreign entity. See 8 C.F.R. § 214.2(l)(1)(ii)(G).

In addition, the regulation at 8 C.F.R. § 214.2(l)(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 matter, 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, these issues 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.