

U.S. Department of Homeland Security

Citizenship and Immigration Services

Identification of the related to
invasion of personal privacy

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ADMINISTRATIVE APPEALS OFFICE
AAO, 20
451 Street N.W.
Washington, D.C. 20536

[Redacted]

FILE: SRC 02-046-53049

Office: TEXAS SERVICE CENTER

Date: **JAN 07 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).

IN BEHALF OF PETITIONER:

[Redacted]

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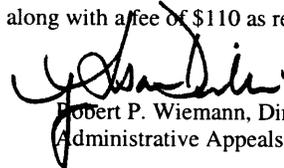
INSTRUCTIONS:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Jelkh Business International, LLC, claims to be a subsidiary of Grupo Consultor Andino Ltda, located in Colombia. The petitioner is engaged in the investment business and seeks to change the beneficiary's status from an H-1B to an L1-A and extend his stay temporarily in the United States. The petitioner intends to employ the beneficiary as its director of operations for a period of two years at \$45,000 per year. The petitioner was incorporated in the State of Florida in June 1999 and claims to have three employees including the beneficiary.

Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). On May 22, 2002, the director denied the petition and determined that the petitioner had been operating for more than one year and had not established that the beneficiary will be primarily performing duties in a managerial or executive capacity for the United States entity.

On appeal, the petitioner's counsel submitted a brief with additional evidence. Counsel asserts that the petitioner has not been doing business for more than one year and that the beneficiary is not engaged in the day-to-day clerical functions of the business and supervises and controls two other employees.

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 meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

Pursuant to 8 C.F.R. § 214.2(1)(3), 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.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

(v) 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;

(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 first issue in this proceeding is whether the petitioning organization has been doing business less than one year to qualify as a new office.

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(F)&(H) states:

(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.

(H) Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In his decision, the director determined that the U.S. entity is not a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F). The director found that the U.S. entity has been doing business for more than one year because the entity has been active since June 25, 1999. See 8 C.F.R. § 214.2(1)(1)(ii)(H). However, counsel, on behalf of the petitioner, claims that the U.S. entity has not been doing business for more than one year because, even though the U.S. entity was organized in 1999, a new investment that the

beneficiary had been assigned and transferred to was acquired in July 2001, less than one year from the date of filing.

Upon review of the record, the evidence indicates that the U.S. entity has been doing business for more than one year and does not qualify as a new office. See 8 C.F.R. § 214.2(1)(1)(ii)(F) and (H). The evidence that the petitioner submitted includes a letter from Prudential Securities Inc., dated September 25, 2001, stating that the beneficiary has been a client of Coral Gables, Florida since September 1999 and has maintained an account in good standing. The account was in the name of Jelk Business Intl. The petitioner also submitted several financial statements and income taxes that were filed indicating that the U.S. entity started operating its business on June 25, 1999. In relation to the income taxes, on April 14, 2001, the beneficiary received a copy of Form 1065. This form included a distributive share of income, deductions, credits, and taxes that the beneficiary utilizes in preparing his individual income tax return. In addition, counsel asserted that "in light of the fast pace operations of the US [s]ubsidiary, the [p]etitioner wishes to assign [the beneficiary] to its next business venture." This assertion indicates that the petitioner has been operating and acquired the "next" new business venture. Therefore, the evidence in the record establishes that at the time of filing, the U.S. entity had been doing business for more than seventeen months.

Further, counsel has erroneously interpreted the law. The regulation at 8 C.F.R. § 214.2(1)(1)(ii)(H) defines doing business to mean the regular, systematic, and continuous provision of goods or services by a qualifying organization. See *id.* If the organization has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year then it is considered a new office. See 8 C.F.R. § 214.2(1)(1)(ii)(F). However, counsel has interpreted the regulation at 8 C.F.R. § 214.2(1)(1)(ii)(H) to mean that one may select a new business venture within an ongoing business operation to determine when an entity has commenced doing business. Counsel asserted that the petitioner has been doing business for less than one year because "even though the U.S. entity was organized in 1999, a new investment that the beneficiary had been assigned and transferred to was acquired in July 2001." Counsel's assertion is unpersuasive because the statutory language must be given conclusive weight unless the legislature expresses an intention to the

contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, A.F.L.-C.I.O. v. N.L.R.B.*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), cert. denied, 112 S. Ct. 416 (1991). Therefore, since the plain meaning of the term "doing business" does not appear to be at odds with the intent of the drafters, the AAO concludes that the petitioner has erroneously interpreted the meaning of the term "doing business" and concurs with the director's decision that the petitioner has been doing business for more than one year.

The second issue in this proceeding is whether the beneficiary will be primarily performing managerial or executive duties for the United States entity. 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.

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(1)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity.

On November 27, 2001, the director received the petition for L-1A classification. Counsel, on behalf of the petitioner, described the beneficiary's proposed U.S. duties as:

The presence of the [beneficiary] would be strategically beneficial for the parent Company, since his invaluable knowledge, managerial experience and corporate insight, will guarantee the success of

the venture. [He] will be in charge of organizing the US Company, negotiating contracts, with business partners, suppliers, and distributors, staffing and executing any other agreements necessary in order to start the operations of the company. He will also prepare the annual report and define strategies and the expansion plans, develop business objectives and the time-frame within which they are to be completed, coordinate the work efforts and communications.

In addition, the petitioner submitted a letter of support, dated October 5, 2001, and signed by a member of the U.S. entity. The letter describes the beneficiary's proposed U.S. duties and states, "the position that [the beneficiary] is being offered is both executive and managerial."

On January 12, 2002, the director requested that the petitioner submit additional evidence to assist in determining whether the beneficiary will be employed in a qualifying managerial or executive capacity. In particular, the director requested that the petitioner submit evidence showing:

- How the beneficiary meets the criteria of either a manager or executive when there is only one employee.
- If there are any other employees explain what their duties are and their educational background[s].
- Explain how the beneficiary will not engage in the day-to-day operations of the business.

On April 10, 2002, the petitioner responded to the director's request by submitting a quarterly tax return indicating that the beneficiary was not the only employee working for the U.S. entity. The petitioner submitted a description of the employees' duties and the bilingual executive secretary's resume. The petitioner submitted the following job descriptions for the prospective U.S. entity employees:

- Initial President and Managing Director: [the beneficiary] in charge of closing all major contracts, meetings with actual and potential

clients, general supervision of our activities and employees in the U.S.

- General Manager: in charge of the international department of the company including closing of major contracts in the absence of the beneficiary. Coordinate documentary compliance and business law regulations.
- Office Manager: will report to the general manager-prepares/prints reports, orders office supplies, office furniture and equipment, verifies signatures, document preparation, workflow in general. In charge of employee benefit coordination, vacation, holiday scheduling, etc.
- Bilingual Secretary: give support to President and General Manager. Type, computer entry, correspondence sorting, telephone answering, preparation of letters, memos, etc. Also act as receptionist as needed. Make appointments, general office work filing.

In addition, the petitioner described the beneficiary's proposed U.S. duties as:

[H]e will develop business objectives and the time-frame within which they are completed, coordinate the work efforts between the Florida corporation, the Colombian Parent Company and our related business alliances, also serving as a liaison with our local, U.S. and other worldwide clients, and suppliers, as well as develop new markets throughout Latin America. The beneficiary will continue hiring additional personnel, as the phases of the business plan are accomplished.

On May 22, 2002, the director determined that the record was insufficient to demonstrate that the beneficiary will be employed primarily in an executive or managerial capacity. The director found that the beneficiary is not managing other professionals or managers and that the beneficiary was engaged in day-to-day activities because two employees could not perform all the duties associated with the company.

On appeal, counsel, on behalf of the petitioner, asserts that the beneficiary does not perform day-to-day clerical functions of the business. The petitioner employs Ms. [REDACTED] whose responsibilities are performing the day-to-day business of the company. Ms. [REDACTED] reports to the general manager, Mr. [REDACTED] who performs administrative and commercial functions. Mr. [REDACTED] reports to the director of operations, the beneficiary. Counsel also asserts:

- [T]he fact that the company has two other employees that are under the supervision and control of the beneficiary is sufficient evidence that the company intends to grow at a level to justify the L1-A status of the beneficiary.
- Please note that this venture is still in [the] organizational stage. . . . he will continue to design the policies and carry out the business plan of the petitioner. The beneficiary needs to continue to finalize the start-up process of the US subsidiary that has been delayed for circumstances out of his control.
- [The beneficiary] presently continues closing important business deals . . . monitoring operations, advising shareholders, generating new business and managing the corporate policies. He is also involved heavily in the hiring of necessary staff and professionals that will help accomplish the corporate business plan.

Upon review, the beneficiary's title and duties are described utilizing phrases as "define strategies and expansion plans," "develop business objectives," and "monitoring operations." These phrases are vague and general. The petitioner fails to elaborate what strategies the beneficiary will define, and what plans, objectives, and operations the beneficiary will expand, develop, and monitor. The petitioner also describes the beneficiary's proposed U.S. duties as designing and managing the "policies," and "carry[ing] out" the business plan. However, these duties are generalities that fail to enumerate any concrete policies that the beneficiary will design and manage or concrete business plan that the beneficiary will carry out. In addition, the petitioner claims that the beneficiary has "invaluable knowledge, managerial experience and corporate insight that will guarantee the success of the

U.S. operation." However, it fails to identify how the beneficiary will specifically draw upon his knowledge and experience.

Further, it appears that a significant portion of the beneficiary's duties will be directly providing the services of the United States entity as indicated in the record that the beneficiary is "generating new business" and "develop[ing] new markets" throughout Latin America. These duties primarily appear to comprise marketing tasks. Since marketing duties qualify as performing a task necessary to provide a service or product, 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).

In addition, the beneficiary appears to be primarily involved in the daily operations of the United States entity. The petitioner asserted that the beneficiary "needs to continue to finalize the start-up process of the US subsidiary." This assertion indicates that the preponderance of the beneficiary's duties will be directly performing the non-managerial day-to-day operations in an effort to procure business. However, it must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities are managerial or executive in nature. The petitioner submitted no information to establish the percentage of time the beneficiary actually performs the claimed managerial or executive duties. Since the beneficiary is responsible for daily activities then it appears, at most, the beneficiary performs operational rather than managerial or executive duties. Also, the description of the beneficiary's duties does not persuasively demonstrate that the beneficiary has managerial control and authority over a function, department, subdivision, or component of the company.

Moreover, the proposed position of the beneficiary is director of operations of an investment company consisting of the director of operations, general manager, and executive secretary. Counsel asserted that "the company has two other employees that are under the supervision and control of the beneficiary." However, in relation to the number of workers employed by the petitioning entity, the AAO notes that there are some discrepancies in the record.

Although the petitioner claims it has employees, when filing the petition, the petitioner failed to indicate its current number of employees on Form I-129. The petitioner also listed an office manager on its organizational chart; however, no employee occupies the claimed position. In addition, the petitioner submitted quarterly tax returns and claimed that this indicated that the beneficiary was not the only employee working for the U.S. entity. However, the employer's quarterly tax report ending December 31, 2001, indicated that there were two workers employed the first month and one worker employed the second and third months. The employees listed on the report were the beneficiary and Mr. [REDACTED]. The petitioner paid the following gross wages for the quarter:

- The beneficiary: \$6000.
- Mr. [REDACTED] \$2000.

However, there was no indication on the employer's quarterly tax report ending December 31, 2001 that wages were paid for the executive secretary who is claimed to be employed by the U.S. entity. This report also shows that the wages paid to the general manager, Mr. [REDACTED] do not appear to indicate that he is a full-time employee of the U.S. entity. In addition, the employer's quarterly tax report ending September 30, 2001 indicates that there were no employees that were paid wages for the first month and two employees that were paid wages for the second and third months. Mr. [REDACTED] and the beneficiary are listed as the employees and the wages they were paid appear to be altered on this report. Also, analogous to the quarterly report ending December 31, 2001, the executive secretary was not listed as an employee. As a result of these discrepancies, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the petitioner claims that the beneficiary is involved "heavily in the hiring of necessary staff and professionals that will help accomplish the corporate business plan" and that "the beneficiary will continue hiring additional personnel, as the phases of the business plan are accomplished." However, the petitioner must establish eligibility at the time of filing the

nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Moreover, the AAO notes that the petitioner submitted a letter of support, dated October 5, 2001, stating that the beneficiary's proposed U.S. duties are executive and managerial. The petitioner never effectively clarified whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. Regardless, the petitioner must establish that the beneficiary is acting primarily in an executive capacity or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of either of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive-manager" and rely on partial sections of the two statutory definitions. Therefore, after careful consideration of the evidence, the AAO must conclude that the beneficiary will not be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Although not explicitly addressed in the decision, the record contains no documentation to persuade the AAO that the beneficiary has been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated 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 submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign entity employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *See id.*

On October 19, 2001, the petitioner submitted a letter stating that the beneficiary is a key executive who has been working as a general manager for the foreign entity since its inception. However, the petitioner did not submit evidence describing the beneficiary's duties abroad. It is the petitioner's burden to prove eligibility for the benefit sought. *See* § 291 of the Act, 8 U.S.C. § 1361.

Although the foreign entity's organizational chart and the beneficiary's resume were submitted, these documents were not translated. It is incumbent upon the petitioner to translate any foreign language documents submitted by the petitioner. The regulation at 8 C.F.R. § 103.2(b)(3) requires, in pertinent part, that "any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." *Id.* As the appeal will be dismissed on the grounds discussed, this issue 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.