

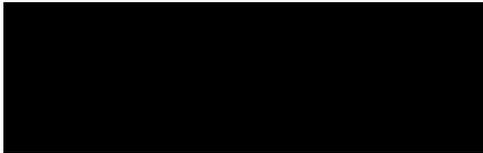
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U.S. Citizenship  
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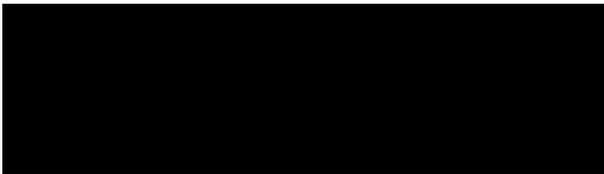
IN RE: Petitioner:

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:



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 nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a Canadian corporation that seeks to employ the beneficiary temporarily in the United States as the managing director of a corporation organized in the State of Florida named Winston's Auto Sales & Service, Inc. The director determined that the petitioner had not established a qualifying relationship with the U.S. entity. The director also determined that the petitioner had not established that the beneficiary had been employed in a primarily managerial or executive capacity.

On appeal, counsel states: "It is submitted that the officer in a managerial capacity in this case, having sole proprietary interest in both the foreign company and the petitioning company meets all of the criteria for an executive manager. That even as a "first line" supervisor the auto mechanics whom he supervises are by definition professionals through experience in their jobs." Counsel submits six documents concerning the U.S. entity, Winston's Auto Sales & Service, for consideration. These documents include a copy of a surety bond, a dealer license, a certificate of registration, a repair shop registration, a Florida annual resale certificate for sales tax and a certificate of insurance.

All of the six documents forwarded by counsel on appeal were issued subsequent to January 24, 2002, the filing date of the petition. They are not helpful in this matter as the petitioner must establish eligibility at the time of filing; See 8 C.F.R. § 103.2(b)(12); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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.

Regulations at 8 C.F.R. § 214.2(l)(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 (l)(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.

Winston's Auto Sales & Service, a Florida corporation, was established on December 13, 2001. As indicated above, this petition was filed on January 24, 2002. The petitioner requests an L-1A nonimmigrant visa for the beneficiary so he may begin operations in the United States.

The petitioner qualifies under the new office definition in 8 C.F.R. § 214.2(l)(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 regulations at 8 C.F.R. § 214.2(l)(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 (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 first issue to be discussed in this proceeding is whether the petitioner and the U.S. entity are qualifying organizations. On appeal, counsel contends that an affiliate relationship exists between the two entities as both are owned and controlled by the beneficiary.

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)(I) state:

*Parent* means a firm, corporation, or other legal entity which has subsidiaries.

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

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

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)(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 this case, the record shows that the present issued capital of a firm named 1043885 Ontario LTD in Canada consists of 100 common shares that are owned by the beneficiary.

The record also shows that the articles of incorporation for Winston's Auto Sales were filed in the State of Florida on January 2, 2002. The record does not contain evidence establishing the ownership of this organization or even that any shares have been issued. No further evidence concerning this ownership issue was submitted on appeal.

Counsel's assertion that 100 percent ownership of the petitioning firm and 100 percent of the U.S. entity are owned by the beneficiary is not substantiated by the record. The petitioner has not established that the entities are owned by the same parent or individual, or by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. Therefore, a qualifying relationship between the U.S. entity and the beneficiary's foreign employer has not been shown to exist. For this reason, the petition may not be approved.

The next issue in this proceeding is whether the petitioner has established that the beneficiary has been employed abroad for one continuous year within the three years preceding the filing of the petition in a primarily managerial or executive capacity by a qualifying organization.

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.

Counsel provided the following statement outlining the foreign employment of the beneficiary:

The beneficiary is the owner and chief executive officer of Winston's Auto Sales in Toronto, Ontario, Canada and his duties are as follows:

1. President of Winston Auto Sales and Services, Ltd.
2. Duties of the officer (president).
  - (A). Oversees the management of the company.
  - (B). Supervises all sales of automobiles.
  - (C). Purchases of all autos for sale.
  - (D). Purchase parts for resale and fore [sic] replacement in used autos.
  - (E). Supervise repairs of automobiles.
  - (F). Supervise repairs of automobiles.
  - (G). Inspect and certify motor vehicles for the government of Onterio [sic].
  - (H). Chief management of the financial operation of Winston's Auto Sales & Services.
  - (I). Makes policy for the operation of the business.

The foreign entity had five employees: the beneficiary as president, three auto mechanics, and an office clerk. The above description lists tasks such as purchasing automobiles and automotive parts and inspecting and certifying motor vehicles that are not managerial or executive duties. Without more compelling evidence, the record does not establish that a majority of the beneficiary's duties have been primarily directing the management of the organization, and that he is not directly providing the services of the business. 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). For this additional reason, the petition may not be approved.

Beyond the findings of the director, as indicated above, the petition was filed on January 24, 2002. To establish that it has obtained the required physical premises, the petitioner submits a copy of a lease dated February 1 with no year specified, (probably 2002), for premises at 1520 N. Dixie Highway, Unit No. 3, Hollywood, Florida 33020. In this case, the petitioner must establish eligibility at the time of filing; See 8 C.F.R. § 103.2(b)(12); *Matter of Michelin Tire Corp.*, supra. The petitioner has not demonstrated that it had secured sufficient physical premises in which to conduct business at the time of filing. For this third reason, the petition may not be approved.

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.