

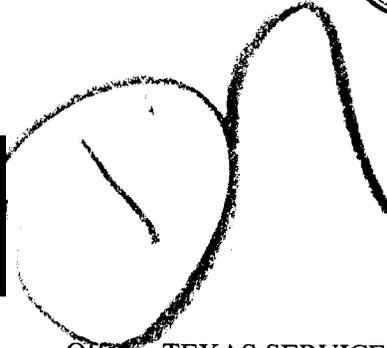
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U.S. Department of Homeland Security
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Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**



FILE: SRC 03 109 52643 Office: TEXAS SERVICE CENTER Date: **OCT 01 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: SELF-REPRESENTED

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, Texas 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 filed this nonimmigrant petition seeking to employ the beneficiary in the position of building restoration director in the capacity of an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Delaware and claims to be a bloodstock breeding farm. Although the petitioner initially stated that it is a subsidiary of a company located in Ireland, a follow-up statement in the supplement to Form I-129 states that Tony Ryan owns and controls Taylor and Carr, Ltd., located in Ireland, and the U.S. entity. This statement suggests that the petitioner and foreign entity may have an affiliate relationship, rather than a parent/subsidiary relationship. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L). The AAO intends to explore this issue further in this decision. The petitioner seeks to employ the beneficiary for an initial period of nine months.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity. The director also determined that the record lacks evidence to indicate that either the foreign entity or the U.S. petitioner are doing business.

On appeal, the petitioner submits an additional statement disputing the director's findings.

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) 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.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that 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.

The first 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 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.

In the I-129 petition, the petitioner stated that the beneficiary's proposed duties would consist of overseeing the restoration of buildings. Specifically, the beneficiary would direct the grounds restoration and building

restoration of a mansion built in the 1800's. No additional information was provided regarding the beneficiary's proposed job duties.

On March 21, 2003, the director issued a request for additional evidence. The petitioner was asked to provide information about its current staffing levels, including the position titles and job duties of all of its employees. The petitioner was also asked to provide a description of the beneficiary's job duties, indicating the percentage of time that would be spent performing each duty.

The petitioner's response included the following description and percentage breakdown of the beneficiary's proposed duties:

1. Overseeing Specialist Carpenters/Painters/Moldings specialists on there [sic] work to ensure it is in keeping with the work of the early 1800's house[.] 30%
2. Source and order specialist materials from around the US and Europe that match the original fittings and materials used on the original construction in the 1800's[.] 30%
3. Research other period houses in the region for ideas and practical examples of original works that can be incorporated into the houses [sic] restoration. 10%
4. General management of all facets of the restoration project and paperwork documenting the restoration[.] 30%

The petitioner also provided a letter from an executive assistant at [REDACTED] stating that the beneficiary has been employed by that company since 1996. In addition, the petitioner submitted the beneficiary's foreign tax return for 2002 indicating that the beneficiary's employer for that year was "Declan, Cathal, [REDACTED] The name "Lyons Demesne," the beneficiary's claimed overseas employer, does not appear anywhere on the attached tax statement.

On April 4, 2003, the director denied the petition concluding that the evidence submitted was not sufficient to establish that the beneficiary's duties in the United States would be in a managerial or executive capacity.

On appeal, the petitioner stresses the beneficiary's appointed role as the person heading a large restoration project. The petitioner discussed the beneficiary's discretionary authority in hiring and firing personnel, as well as his direct supervision over construction specialists that will actually be doing the restoration work. The petitioner asserts that only an employee at the executive level could be entrusted with such a high degree of authority.

It is noted that 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(I)(3)(ii). Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. In the instant case, the description of the beneficiary's duties suggests that a significant portion of the beneficiary's time would be spent supervising non-professional, non-managerial, and non-supervisory employees. The beneficiary's job description also indicates that a portion of his time would be spent seeking out appropriate material for the restoration project. It is noted that 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner has indicated in a number of statements that the beneficiary would head a large restoration project where he would supervise employees and perform some of the tasks essential for the completion of the project. Thus, the record does not establish that a majority of the beneficiary's duties would be primarily directing the management of the organization. Rather the record indicates that a preponderance of the beneficiary's duties would require him to directly provide the services of the business and supervise a subordinate staff of individuals that cannot be deemed professional, managerial, or supervisory. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary would primarily manage, rather than perform, an essential function of the organization. Although the petitioner suggests, through the descriptions of the beneficiary's duties, that the beneficiary would be at the top of the organizational hierarchy, none of the organizational charts submitted, either for the foreign entity or for the petitioner, indicate where in that hierarchy the beneficiary's position falls. 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). Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the foreign entity and the U.S. petitioner are doing business.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state the following:

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 the director's request for evidence, the petitioner was instructed to submit documentation to establish that the petitioner and the foreign entity have been engaged in the regular, systematic, and continuous provision of goods and/or services.

The petitioner's response contained incorporation documents indicating that Taylor & Carr Estates, Ltd. was incorporated in Ireland and that the petitioner was incorporated in Delaware. The petitioner also submitted Schedule K of its 2001 tax return. However, none of these documents even remotely suggest that either the foreign or U.S. entity has been providing its services on a regular, systematic, and continuous basis. Although the petitioner also submitted what appears to be a list of workers in the field of agriculture, there is no indication that any of these employees work either for the foreign or U.S. entity. As stated previously, 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.

On appeal, the petitioner submitted the foreign entity's financial statements for 1994, 1995, and 1996. The petitioner also submitted its own financial statement for 2001. In regard to the foreign entity, even if financial statements were an accurate indicator of on-going business, the latest financial statement was for 1996, seven years prior to the filing of the instant petition. However, regardless of how recent either company's financial statements are, such documents are not proper indicators of on-going business. They do not reveal the consistency of a company's transactions. As such, the record lacks evidence to enable the AAO to conclude that either the foreign or U.S. company is engaged in the regular, systematic, and continuous provision of services.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has a qualifying relationship with the foreign entity. See 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, *supra* at 595. In the instant matter, while the petition indicates that ~~Tony Ryan~~ owns the U.S. entity and Taylor & Carr Ltd., there is no indication that ~~Tony Ryan~~ also owns the beneficiary's foreign employer Lyons Demesne. As the petitioner has failed to submit evidence to show that the U.S. entity and the beneficiary's foreign employer are similarly owned and controlled, the AAO cannot conclude that the petitioner has established the requisite qualifying relationship. It is noted that 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). As such, due to the additional grounds discussed in this paragraph, this petition cannot 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.