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U.S. Citizenship  
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FILE: LIN 03 003 52195 Office: NEBRASKA SERVICE CENTER Date: **AUG 15 2005**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

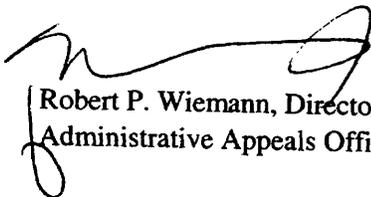
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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

According to the documentary evidence contained in the record, the petitioner was established in 2002 and claims to be a retail business. The petitioner claims to be a subsidiary of [REDACTED], located in Hatem, Jordan. The petitioner seeks to employ the beneficiary temporarily in the United States as operations manager and president of its new office at an annual salary of \$40,000.00. The director denied the petitioner after determining that the petitioner had failed to submit sufficient evidence to establish: (1) that a qualifying relationship exists between the U.S. entity and the foreign entity; (2) that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity; or (3) that the U.S. entity will be able to support a managerial or executive position within one year of approval of the petition.

On appeal, counsel disagrees with the director's decision and states that the evidence is sufficient to establish the existence of a qualifying relationship between the U.S. and foreign entities; that the evidence demonstrates that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity; and that the U.S. entity will be able to support a managerial or executive position within one year of approval of the petition.

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) states 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.

- (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; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) states that 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; 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 (I)(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 a qualifying relationship exists between the U.S. and foreign entities.

The regulations at 8 C.F.R. § 214.2(1)(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 (I)(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.

The regulations at 8 C.F.R. §§ 214.2(l)(1)(ii) define, in pertinent part, "parent," "branch," "subsidiary," and "affiliate" as:

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operation division or office of the same organization housed in a different location.
- (K) *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.
- (L) *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 the instant matter, the petitioner claims to be a subsidiary of the foreign entity. The petitioner stated in the petition that the foreign entity owns 100 percent of the stock in the U.S. entity. The petitioner submitted as evidence, translated copies of the foreign entity's business registration, employment description, and employment permission issued by the Ministry of Industry and Trade, Department of Trade and Industrial Record. The petitioner also submitted copies of the U.S. entity's Certificate of Incorporation and stock certificate number 1.

The director noted that the stock certificate submitted by the petitioner indicated that 500 shares of stock had been issued to [REDACTED], but did not contain the name of the entity owned. The director subsequently requested that the petitioner submit substantial documentary evidence to establish the qualifying relationship between the United States entity and the beneficiary's foreign employer. The director further requested that the petitioner submit annual reports, statements from the organization's president or corporate secretary, articles of incorporation, financial statements, and/or evidence of ownership of all outstanding stock for both entities.

In response to the director's request for evidence, counsel stated that the name of the petitioning entity on the stock certificate was omitted by error. The petitioner submitted an amended copy of stock certificate number 1, which contained the company name "██████████" was initialed "a.a," and dated October 25, 2002. The petitioner submitted a stock subscriber's agreement dated December 9, 2002, and a letter from ██████████ dated October 12, 2002, which stated that he was the owner of all the common stock of the U.S. entity. The petitioner also submitted a copy of a wire transfer, dated November 4, 2002, from ██████████ ██████████ in the amount of \$109,983.00, and a copy of three Arab Bank checks dated August 1, 2002, September 1, 2002, and October 1, 2002. The checks were made out to ██████████ from the Arab Bank.

The director subsequently denied the petition stating that based upon a review of the amended stock certificate it did not appear that a qualifying relationship legally existed between the U.S. entity and the beneficiary's foreign employer at the time the petition was filed.

On appeal, counsel disagrees with the director's decision and asserts that in the state of Ohio stock certificates are considered internal documents issued in the ordinary course of business. Counsel further asserts that stock certificates in the state of Ohio are neither filed nor otherwise registered, and thus have no bearing on proving ownership. Counsel also asserts, "the ownership relationship is established by showing who has the equitable interest in a res."

In this matter, the submission of an amended stock certificate and two personalized letters of stock ownership are insufficient to establish the existence of a qualifying relationship between the U.S. and foreign entities as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). Further, there has been no evidence presented to demonstrate that the monies sent to ██████████ were in payment for shares of stock in the U.S. entity, and the amendment to the stock certificate was made subsequent to the filing of the petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner has failed to submit sufficient evidence to establish that a qualifying relationship exists between the U.S. and foreign entities. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity 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 described the beneficiary's proposed duties in a letter dated September 26, 2002, as:

[The beneficiary] will join [the U.S. entity,] on a temporary assignment to fill the position of president. In this position he will be responsible for implementing plans and policies to conduct a viable business, negotiate, bid and enter into sales contracts, interview, hire, supervise, discipline, and fire, if necessary, employees. He will oversee expansion of the company and will exercise complete discretion as to all aspects of the business operations of the US company.

In response to the director's request for evidence on this subject, counsel described the beneficiary's proposed duties as:

The proposed duties of the beneficiary are to analyze the retail market industry in the United States, establish company marketing plans and policies to effectuate entry into the U.S. market, to implement said plans and policies to initiate a viable business, negotiate, bid and enter into sales contracts, interview, hire, supervise, discipline, and fire, if necessary, employees, oversee acquisitions and expansion of other companies, and exercise complete discretion with regard to all aspects of the business operations of the US subsidiary. The beneficiary will spend 10% of his time in analyzing, researching and negotiating the contracts to purchase the viable US retail business. He will spend 70% of the time in managing the day to day [sic] operations of the US entity and 20% of the time to communicate and implement the decisions and business plans for the US entity directed by the foreign entity.

The petitioner submitted a response letter, dated October 3, 2002, written by the beneficiary to the foreign entity, in which he described his efforts to locate investments for the foreign entity. The letter also contained a list of possible business opportunities in the Cleveland, Ohio area that the beneficiary had researched.

The director stated that it appeared that the beneficiary was the sole employee of the U.S. entity, and that the petitioner's primary purpose in transferring the beneficiary from abroad may have been in the nature of a general speculative investment venture. The director further stated that as such, the U.S. entity would constitute a mere agent or office. The director also stated that the record demonstrated that the beneficiary would be primarily involved in the day-to-day business activities of the organization.

On appeal, counsel argues that the U.S. entity's Articles of Incorporation include a broad description of authority to allow the company to realize growth. Counsel further argues that although the beneficiary is the sole employee, it is anticipated that he will hire a supporting staff as the business progresses. Counsel concludes by asserting that the business is a start-up business, and as such, must begin its operation in order to hire additional employees.

In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties 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.* Further, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions, and that the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9<sup>th</sup> Cir. July 30, 1991). Although the regulations do not require proof that the duties performed by the beneficiary in the first year were entirely managerial or executive, there must be some evidence of managerial or executive activity to substantiate the hierarchical position. In the instant matter, there is insufficient evidence to show that the beneficiary will perform the high-level responsibilities as defined, or that he will primarily perform those duties rather than spending the majority of his time performing day-to-day functions of the organization.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include implementing plans and policies, analyzing the retail market industry, exercising complete discretion over the U.S. entity's business operations, and overseeing the acquisition and expansion of other companies. The petitioner did not, however, define the petitioner's plans and policies, clarify the company's analysis processes, or demonstrate the acquisition and expansion of other companies. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For instance, the petitioner depicted the beneficiary as directing the

management of the organization, establishing the company's plans and policies, and exercising discretionary decision-making authority. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd.* at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). The petitioner has failed to submit sufficient evidence to establish that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity. For this additional reason, the petition may not be approved.

The third issue in this proceeding is whether the petitioner has submitted sufficient evidence to show that the U.S. entity will be able to support a managerial or executive position within one year of operation.

In response to the director's request for additional evidence, counsel inferred that the foreign entity would be able to provide financial support to the U.S. entity. The petitioner submitted copies of wire transfers and bank drafts made out to [REDACTED] by the foreign entity in support of its claim.

The director determined that, absent a comprehensive business plan it could not be shown that the U.S. entity would be in a position to support a managerial or executive position within one year of approval of the petition.

While counsel claims that the U.S. entity's Articles of Incorporation include a broad description of authority to allow the company to realize growth, the record does not support a finding that the U.S. entity will be able to support a managerial or executive position within one year of operation in compliance with the regulatory requirements for a "new office." See 8 C.F.R. § 214.2(1)(3)(v)(C). The petitioner claims that the U.S. entity is a newly established retail business. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(1)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Further, the record does not demonstrate that the U.S. entity will contain the organizational complexity to support the proposed managerial or executive position. Although the petitioner anticipates hiring additional employees in the future, this anticipated activity has not been substantiated by independent documentary evidence. In addition, the petitioner failed to submit a business plan that shows, in detail, how the new business will be fully operational within one year, with employees in place and doing business by providing a product or service. Although the evidence demonstrates that the petitioner intends to hire new employees it has not provided detailed position descriptions to show that they will be employed in other than non-professional positions. There has been no evidence presented that details the time frame in which new employees will be hired, what the new hires duties will consist of, or how the beneficiary's duties will interrelate with that of the new hires. There is no evidence to show that the beneficiary will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. Furthermore, the petitioner's evidence is not sufficient in establishing that the beneficiary will be directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization;

exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher-level executives.

Rather than the beneficiary functioning at a senior level within the organizational hierarchy within one year of operation in the United States, it appears from the record that he will continue to perform the day-to-day services of the business. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has failed to submit sufficient evidence to show that the U.S. entity will be able to support a managerial or executive position within one year of operation.

Although not directly addressed by the director, another issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary had been employed by the foreign entity in a qualifying managerial or executive capacity for one continuous year within three years preceding the filing of the petition.

The petitioner initially stated in the petition that the beneficiary had been employed by the foreign entity in the capacity of operations manager from July 1999 to January 2001. The petitioner described the beneficiary's duties at the foreign entity as: "in charge of business operations, implemented plans and policies to conduct a viable business, negotiated, bid and entered into sales contracts, interviewed, hired, supervised, disciplined, and fired, if necessary, employees and personnel. He exercised complete discretion as to all aspects of the business operations of the parent company." In response to the director's request for evidence, counsel described the beneficiary's job duties abroad as:

The beneficiary[']s qualifying employment abroad was in an executive/managerial capacity, he was serving as the director/manager of operation since July 1999 until January 2001. . . . [The foreign entity] employs 20-30 people depending on the season. . . . The beneficiary's duties as a manager of operations of the foreign entity have been to conduct and supervise the day to day [sic] operations of the company, he was authorized to hire and fire the employees, he supervised the foreman and other workers and has the authority to create production incentives and he made the decision for work improvements if needed.

Counsel further stated that the foreign entity employs four drivers, twelve cement machine operators, two managers, one architect, one construction engineer and builder, and three to nine construction workers-laborers on an as needed basis.

There is insufficient evidence in the record to demonstrate that the beneficiary has been employed by the foreign entity primarily in a managerial or executive capacity. The job descriptions given are insufficient to demonstrate that the beneficiary directed the management of the organization, established goals and policies, exercised a wide latitude in discretionary decision making, supervised the work of other supervisory, professional, or managerial employees, or managed an essential function within the foreign entity. There is no evidence to show that the beneficiary supervised a subordinate staff of professional, managerial, or supervisory personnel who relieved the beneficiary from performing non-qualifying duties. Further, the petitioner's compliance with the director's request for evidence is marginal, at best. It appears from the evidence that the beneficiary performed the day-to-day functions of the organization, and perhaps supervised non-managerial subordinates. For this additional reason, the petition may not be approved.

Although not directly addressed by the director, another issue in this proceeding is whether the petitioner had secured sufficient physical premises to house its new office at the time the petition was filed. It is noted for the record that the petition was filed October 3, 2002. The petitioner initially submitted a lease agreement entered into on July 27, 2002, by [REDACTED] and the U.S. entity, for the premises known as [REDACTED]

In the request for evidence, the director requested the petitioner to submit evidence to establish:

- (1) Sufficient physical premises to house the new office have been secured; (**Although you have submitted a copy of a lease, the lease does not state what kind of property is being leased. In addition, please submit photos of the physical premises of the plant/office building in the United States . . . .** (Emphasis in original.)

In response to the director's request for evidence, the petitioner submitted a copy of a commercial lease agreement entered into on October 15, 2002, by [REDACTED] and the beneficiary, for the premises known as [REDACTED]. The petitioner also submitted photographs of the premises interior and exterior.

There has been insufficient evidence submitted to demonstrate that the petitioner had secured sufficient physical premises to house the new office at the time the petition was filed. The petitioner failed to respond to the director's requests concerning the initial lease agreement filed. The commercial lease agreement entered into on October 15, 2002, only after the director pointed out the deficiencies in the initial lease agreement and subsequent to filing the petition, will not be considered for purposes of eligibility. 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). For this additional 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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.