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U.S. Citizenship  
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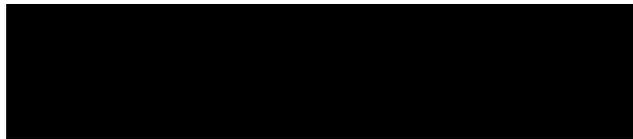
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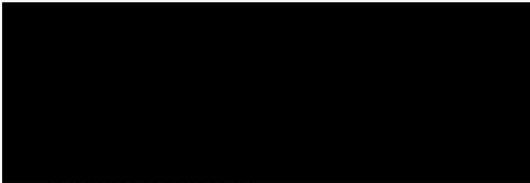
FILE: WAC 03 189 53826 Office: CALIFORNIA SERVICE CENTER Date: FEB 07 2005

IN RE: Petitioner:  
Beneficiary:



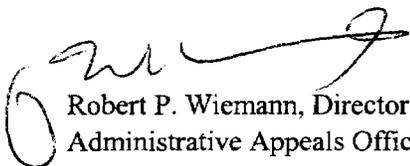
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, California 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 as its executive manager in the nonimmigrant visa category of L-1A 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 Arizona and claims to be engaged in the business of procuring contracts for the manufacture of a patented trash-collecting machine that was designed by the beneficiary. The petitioner states that it is a subsidiary of [REDACTED], located in Australia.

The director denied the petition concluding that the petitioner failed to establish that it would support a managerial or executive position within one year of commencing operations and determined that the beneficiary would not be employed in a qualifying capacity.

On appeal, counsel disputes the director's findings and submits a brief in support of her assertions.

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)(v) state 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 (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.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed 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 Supplement to Form I-129, the petitioner stated that the beneficiary would manage the company; oversee and implement all contracts and licenses; and manage training and customer relations.

On June 18, 2003, Citizenship and Immigration Services (CIS) issued a request for additional evidence. The petitioner was asked to provide a breakdown of costs needed to create and operate the new business, including a hiring plan and a projected income statement.

In response, the petitioner submitted a letter from counsel, dated July 2, 2003. Counsel explained that the beneficiary designed and patented a trash-collecting vehicle, and claimed that the petitioner's sole purpose is to procure contracts from companies who wish to manufacture this new product. Counsel also stated that [REDACTED] holds a patent license to the beneficiary's product and that [REDACTED] is in the process of purchasing [REDACTED] the company that will incur the manufacturing expenses. Counsel provided the following description of the beneficiary's proposed job duties in the United States:

The beneficiary will manage and direct the petitioning U.S. company and actively procure contracts and license agreements for the Pendulum Packer. He will direct the manufacturing process at each of the contracted sites with detailed management and consulting with the company executives. The beneficiary will be solely in charge of hiring or firing of any U.S. employees, which would mainly consist of any clerical staff there is a need for in the future. At the present time, the petitioner is operating out of an office space in Arizona, but the main amount of initial work will be done at the manufacturing plant for [REDACTED] in order to get the Pendulum Packer properly up and running. When the next contract is under way, the beneficiary will then have to travel to procure more contracts and then to oversee and manage the manufacturing process at the future sites as well.

Counsel also claimed that the petitioner's only need is to procure contracts and manage the manufacturing of the patented product. Since the beneficiary fulfills this need, counsel stated that the petitioner requires little capital in order to operate.

On July 21, 2003 the director denied the petition questioning the petitioner's ability to operate a viable business in the United States or to support the employment of personnel in a qualifying managerial or executive capacity. The director determined that record lacks evidence to enable CIS to conclude that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel submits a brief asserting that CIS's decision is refuted by related case law. However, most of the decisions cited by counsel are unpublished and therefore have no weight in the outcome of this matter. See 8 C.F.R. § 103.3(c). Although counsel cites the case of *Matter of LeBlanc*, 13 I&N Dec. 816 (Reg. Comm'r 1971), that case merely makes certain allowances for those beneficiaries who come to the United States to be employed in new office. In the instant case, the director does not object to the petitioner's new office status and places no undue burdens that are not required by statute and regulations. Therefore, the case cited by counsel does not overcome any of the director's objections.

Counsel also cites the case of *Matter of [REDACTED] Miami* (Reg. Comm'r So. Reg. Jan. 26, 1981). However, counsel has not provided the AAO with a copy of this decision to substantiate her interpretation of the ruling of the Regional Commissioner, Southern Region. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, while 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the

administration of the Act, unpublished decisions are not similarly binding. The case cited by counsel is unpublished and, therefore, not binding in the instant matter.

Counsel properly asserts that the amount of capital the foreign entity invests in the new U.S. entity does not determine whether the beneficiary will be employed in a managerial or executive capacity. However, the record and counsel's statements clearly convey the petitioner's plan to contribute no more funds to expanding the petitioner's work force. In light of the regulatory requirement that the beneficiary perform primarily qualifying tasks after the petitioner's first year of operation, the fact that the petitioner does not plan to hire or contract additional personnel strongly negates the notion that the beneficiary will be relieved from having to perform most of the petitioner's operational tasks. 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). In the instant case, despite the petitioner's failure to provide specifics regarding the beneficiary's day-to-day job duties, the petitioner clearly indicates that the beneficiary has been and will be the sole individual in charge of procuring new contracts and developing marketing strategies. As the petitioner has no plans to hire sales or marketing personnel, the AAO must conclude that the beneficiary will perform both sets of duties. 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). Thus, despite the beneficiary's significant role in the petitioner's overall business plan, the fact that the beneficiary would perform all of the petitioner's duties throughout his proposed stay in the United States indicates that the petitioner has no plans to employ the beneficiary in a qualifying capacity. The record is replete with statements that suggest that the beneficiary's primary task throughout his proposed stay would be to sell a product, or at least the idea of the created product, to companies who are willing to manufacture that product. No matter how demanding this job would be, the simple fact remains that the beneficiary would primarily perform the tasks of a sales and marketing representative.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity. The fact that an individual manages a small business where the beneficiary is at the top of the organizational hierarchy does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties would be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties would be directly providing the services of the business. Based on the evidence furnished and the statements made, it cannot be found that the beneficiary would be employed in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Though not directly discussed by the director, the record does not contain sufficient evidence to establish that the petitioner and its claimed foreign parent entity have a qualifying relationship as claimed. The petitioner has submitted no evidence that would allow the AAO to conclude that the foreign entity paid for its ownership of the U.S. petitioner. 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). The regulations 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 visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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*, 19 I&N Dec. at 595. In the instant case, the petitioner has not provided sufficient documentary evidence to determine who owns and controls the petitioning entity.

In addition, the petitioner has not provided sufficient information regarding the beneficiary's job duties abroad. Therefore, the AAO cannot affirmatively determine that the beneficiary was employed in a qualifying position abroad for the required statutory period.

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, based on the additional grounds discussed in the above paragraphs, 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.