

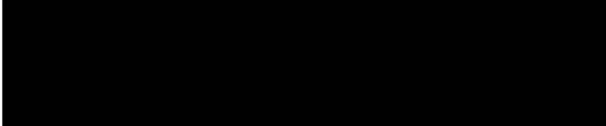


U.S. Citizenship
and Immigration
Services

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FILE: SRC 01 158 51531 Office: TEXAS SERVICE CENTER Date: JUL 07 2006

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

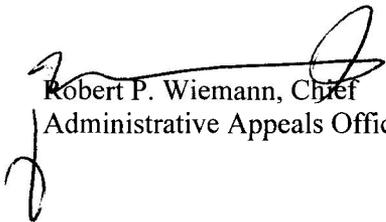
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The petitioner filed a subsequent appeal. The Administrative Appeals Office (AAO) rejected the appeal as untimely filed. The matter is now before the AAO on a motion to reconsider. Upon review, the appeal was correctly rejected as untimely filed since the appeal was received by U.S. Citizenship and Immigration Services (CIS) on Monday, March 11, 2002, which was 36 days after the date of the decision. *See* 8 CFR § 1.1(h). Thus, the motion will be dismissed.

On February 4, 2002, the acting director denied the petition for L-1 nonimmigrant classification. On March 11, 2002, the petitioner's counsel filed Form I-290B and appealed the decision of the director. On April 25, 2003, the AAO rejected the appeal as untimely filed. As a result, on May 23, 2003, the petitioner's counsel filed a motion for reconsideration and claimed that the appeal was timely because the appeal was filed on Saturday, March 9, 2002 which was 33 days from the date of the decision. This assertion is erroneous since March 9, 2002 was in fact 34 days from the date of the decision.

Under the regulations, an affected party has 30 days from the date of an adverse decision to file an appeal. *See* 8 CFR § 103.3(a)(2). If the adverse decision was served by mail, an additional three-day period is added to the prescribed period. *See* 8 CFR § 103.5a(b). The record reflects that the director's decision of February 4, 2002 was sent to the petitioner at its address of record. The appeal was received by the Service Center 36 days later on Monday, March 11, 2002.¹ Thus, the appeal was untimely filed. As counsel indicated in his Motion for Reconsideration dated May 22, 2003, the appeal was filed with CIS on Saturday, March 9, 2002. March 9, 2002 is 34 days after the final decision. Moreover, since CIS is closed on Saturday, the appeal was not received by CIS until Monday, March 11, 2002. Therefore, the appeal submitted by counsel on March 9, 2002 was appropriately rejected as untimely filed.

Moreover, in reviewing the merits of the appeal, this petition was properly denied. The issue in this matter is whether the beneficiary will be employed in a primarily managerial or executive capacity.

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.

The regulations at 8 C.F.R. § 214.2(l)(14)(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;

¹ The AAO decision dated April 25, 2003 incorrectly states that the decision was filed 35 days after the date of the decision. As the record indicates, the appeal was filed on Monday, March 11, 2002 which is 36 days after the February 4, 2002 decision.

(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'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.

(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

(v) 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.

In addition, 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, [REDACTED] claims to be a subsidiary of [REDACTED] located in India. The U.S. entity was incorporated in the State of Georgia on August 11, 1997 and is engaged in the **retail store, investments, and trade business.**² Accordingly, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager for one year. The petitioner seeks to employ the beneficiary's services as a new employee and as the U.S. entity's Vice President of Marketing.

On the Form I-129, the petitioner described the beneficiary's U.S. duties as: "In charge of expanding U.S. operations, including full decision-making responsibilities over financial and marketing operations. Develop markets and market strategy; hire and train employees."

In addition, in an April 17, 2001 supporting letter, the petitioner further described the beneficiary's proposed U.S. duties as:

[S]upervision of all financial and marketing operations for the company, over which he will exercise complete discretionary authority. Ultimately, it will be his responsibility to establish Shamir, Inc. on a sound financial footing. He will recruit and train the staff and have hiring and firing authority over them. Additionally, he will use his marketing skills to develop and execute the company's marketing strategies, including advertising campaigns and company promotions.

On May 30, 2001, the director requested additional evidence. Specifically, the director requested a copy of the U.S. entity's organizational chart and a description of the beneficiary's duties as well as his subordinate employees' duties.

In response, the petitioner submitted a copy of the foreign entity's organizational chart but did not submit a copy of the U.S. organizational chart as requested by the Director on May 31, 2001. Petitioner also submitted additional information as to the beneficiary's duties in the United States. In a letter submitted by Shamir, Inc. dated August 10, 2001, the beneficiary's duties are described as the following:

- He will have total managerial and executive authority over the corporation and all of its activities and employees (subject only to reporting to the Board of Directors, of which he is a member);

² In the December 3, 2001 letter submitted by petitioner, the petitioner claimed that it owned and operated a franchise restaurant, the Philly Connection, and owned "three other wholly and partially owned subsidiaries: [REDACTED] [formerly [REDACTED]] and [REDACTED]" The petitioner claimed that "each of the three subsidiaries own and operate a 'Philly Connection' in Lawrenceville, GA, Suwanee, GA, and Tallahassee, FL."

- Management Decisions: he will possess all rights to execute all the managerial decisions of the Company, including purchasing, marketing, hiring and firing and promotion of employees;
- Company Representation: will act in the name of the Company in all kinds of business contacts and relations;
- Will have supervision of the company's day-to-day operations, including accounting and finance functions;
- Business Negotiations: will have contact with U.S. vendors, suppliers and will prepare and negotiate and execute business contacts in expansion of our business; and
- Organizational Development: projects the Company's future development in connection with our parents strategy and objectives and will execute steps to accomplish the desired growth.

Furthermore, in the December 3, 2001 letter submitted by the petitioner, the author states that "in addition to supervising the three employees at [redacted] location in Alpharetta, GA, [the beneficiary] will have supervision responsibilities over [redacted] subsidiaries' managers, marketing and promotions, finance and accounting functions of the U.S. Companies." The petitioner goes on to state that [redacted] currently has four employees, [redacted] has three employees, and [redacted] has eight employees, including franchise managers and lower-level assistants such as short order cooks, cashiers and clerks.

On November 6, 2001, the director made a second request for additional evidence requesting that petitioner clarify whether the relationship between the foreign entity and the petitioner is that of a franchisee. The director also requested a copy of the franchise agreements.

In a response dated December 3, 2001, the petitioner claimed that it is a subsidiary of the foreign entity and that the petitioner "has invested in the U.S. franchising 'Philly Connection' restaurants through direct ownership by [redacted] [the petitioner] and through [redacted] wholly and partially owned subsidiary relationship with [redacted] and [redacted] (formerly [redacted])." The petitioner also reiterated the beneficiary's proposed U.S. duties. The petitioner submitted the franchise agreements for [redacted] and [redacted], but did not submit a franchise agreement between [redacted] and the Philly Connection franchise.

The director denied the petition on February 4, 2002 on the ground that petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director found that the franchise agreements indicated that the "primary managerial and executive control was not in the hands of the petitioning company or the beneficiary's proffered position." The director also found that the methods and standards of operation were within the control of the franchiser.

On appeal, counsel stated that the "District Director has incorrectly determined that the beneficiary is not acting in a managerial or executive capacity" and that the "franchisor also agrees that beneficiary has this control and supporting letter summarizes these roles." In his March 6, 2002 brief, counsel described the role

of the franchiser stating, “the beneficiary will have significant managerial and executive duties as a licensee of the franchiser.”

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does 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 (9th Cir. July 30, 1991).

A critical analysis of the nature of the petitioner’s business undermines the petitioner’s assertion that the beneficiary will have “supervisory control over the subsidiaries managers, marketing, promotions, finance and accounting functions.” If the beneficiary has supervisory control over such functions, it is unclear who will for example actually develop the marketing and promotion programs and who will handle the day-to-day finance and accounting operations. The record does not provide evidence that the petitioner or its subsidiaries have an accountant, finance manager or marketing manager that the beneficiary will oversee. Therefore, although the beneficiary claims to be in charge of these functions, it must be evident from the record that the beneficiary does not perform the tasks that he has been assigned to oversee. Rather, it appears that the only individual performing any marketing-related functions or accounting and finance operations is the beneficiary himself. In addition, the petition states that the beneficiary “will have contact with U.S. vendors, suppliers and will prepare and negotiate and execute business contacts in expansion of our business.” Based on the record of proceeding, the beneficiary’s job duties are composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Again, 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).

Further, the petitioner has failed to submit convincing evidence to establish that the petitioner ever entered into an agreement with “The Philly Connection Restaurant” franchise business. Thus, the record does not present evidence that the petitioner will supervise the employees of the franchise restaurant. Moreover, the petitioner claimed that it owned “three other wholly and partially owned subsidiaries: [REDACTED] and [REDACTED]. The petitioner claimed that “each of the three subsidiaries own and operate a ‘Philly Connection’ in Lawrenceville, GA, Suwanee, GA, and Tallahassee, FL. The petitioner further claims that the beneficiary will have supervisory responsibilities over the subsidiaries’ managers, marketing and promotions, finance and accounting functions. The petitioner goes on to state that [REDACTED] as four employees [REDACTED] has three employees and [REDACTED] has eight employees.” Although the petitioner claims that the beneficiary will supervise the employees of the franchise restaurants and subsidiaries, the record does not provide any evidence of a relationship between [REDACTED] and the three mentioned subsidiaries and the franchise restaurants. 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). Thus, since the petitioner has failed to submit any evidence of a connection between the petitioner and a franchise and the petitioner and the separate listed subsidiaries, there is no evidence in the record that the beneficiary will supervise any subordinate staff.

Moreover, the petitioner submitted the Articles of Incorporation and franchise agreements for the three other claimed subsidiaries [REDACTED] and [REDACTED] but the documentation

does not provide any evidence of a relationship between petitioner and these entities. In fact, it appears that these companies are separate legal entities operating in the United States. Therefore, this raises an additional question as to whether the U.S. petitioning entity is doing business as required by 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Since the evidence does not establish a relationship between Shamir Inc. and the three listed entities or a franchise, it is unclear as to the type of business Shamir, Inc. is undergoing in the United States. 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). The petitioner has not established that it is doing business in the United States.

Beyond the decision of the director, if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. In a request for evidence dated May 24, 2001, the Service Center asked the petitioner to specify if the petition was for a new office. In the August 10, 2001 response, the petitioner indicated that the petition was in fact for a new office and was requesting the visa to be valid for one year. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner failed to establish that it has secured sufficient physical premises to house the new office, the proposed nature of the office, the scope of the entity, its organizational structure, the size of the United States investment, the financial ability of the foreign entity to remunerate the beneficiary, and the financial ability to commence doing business in the United States. For these additional reasons, the appeal must be dismissed and the petition denied.

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 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).

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 motion is rejected and the underlying appeal should be dismissed.

ORDER: The motion is dismissed.