PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, DC 20536

[redacted]

File: WAC 01 180 56255 Office: CALIFORNIA SERVICE CENTER Date: MAR 10 2004

ON RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an international trading organization that seeks to continue to employ the beneficiary temporarily in the United States as its president. The director found that the petitioner had not established a qualifying relationship with the foreign entity. The director also found that the petitioner had failed to establish that the foreign entity had sufficient funds to support the U.S. entity's operational costs. Additionally, the director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel states that the director erred in applying the law and regulations. Counsel further states that the petitioner has retained him as new counsel in connection with this matter because of some apparent irregularities and negligence committed by previous attorneys. Counsel indicates that that one of the petitioner's previous attorneys may have altered Zain, Inc. stock certificate number 1 to meet regulatory requirements by showing Moon Travel, India as being the 100% owner of the corporation. Counsel explains that he discovered this document when he received a copy of the petitioner's file from previous counsel. Counsel forwards a copy of share certificate number 1 showing that Moon Travel, India owns 100% of the 10,000 shares issued for Zain, Inc. Counsel also submits another set of stock certificates for the record to establish that the beneficiary holds 55% of Zain, Inc., a percentage of ownership consistent with the corporation's income tax returns for 1999 and 2000 that were cited by the director in his order. Counsel indicates that this 55% ownership combined with the beneficiary's 100% ownership of Moon Travel India, the parent company of Zain, Inc., establishes the proper affiliate relationship between the two entities. Counsel also explains and provides documentation to show that Zain, Inc. was dissolved by the Arizona Corporation Commission and has been subsequently reinstated. Counsel indicates that this dissolution of the corporation and reinstatement occurred due to neglect by the petitioner's previous counsel.

Counsel also forwards a translation of the registration certificate of establishment issued under the Bombay Shops and Establishments Act of 1948 showing the beneficiary as being the employer for Moon Travel. Counsel also forwards a translation of a statement of total income for 1999-2000 for Moon Travel in India showing the beneficiary as the proprietor.

Counsel argues that the petitioner established the size of the U.S. investment and the foreign company's financial ability to remunerate the beneficiary, argues that the petitioner has established it is doing business in the United States and that the

petitioner has established that the beneficiary is performing in a managerial or executive position.

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 petitioner is a corporation that originated in the State of Arizona on December 24, 1998. The petitioner filed its petition on April 26, 2001. Since the petitioner had been doing business for more than one year at the time the visa petition was filed, it shall not be considered under the regulations covering the start-up of a new business.

The first issue to be discussed in this proceeding is whether the petitioner and the foreign entity are qualifying organizations. The petition indicates that the U.S. corporation is the parent of the beneficiary's sole proprietorship in Italy.

The 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.

The 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.

The 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.

The 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.

The 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.

Based upon the record and the documentation submitted on appeal, it is determined that the petitioner has established that the beneficiary is the sole owner of Moon Travel, the claimed parent company of the petitioner in India. However, the record contains two separate and conflicting presentations of corporate stock certificates concerning the ownership of Zain, Inc. Counsel argues that the first presentation showing Moon Travel in India as being the 100% owner of the petitioning entity should be disregarded because of negligence of previous attorneys working for the petitioner. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Based on the evidence submitted, it is determined that the petitioner has not established the actual ownership of Zain, Inc. Therefore, the petitioner has not shown that a qualifying relationship between the United States corporation and a qualifying foreign entity exists. For this reason, the petition may not be approved.

Based upon the additional information provided on appeal, it is determined that foreign had sufficient funds to support the U.S. entity's operational costs thereby overcoming the director's second reason for denying the petition.

The next issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in the United States 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's descriptions of the beneficiary's projected job duties are fully described in the director's decision dated July 17 2002, and will not be repeated here. No further evidence concerning the beneficiary's job duties was provided on appeal.

The Petitioner's U.S. Corporate Income Tax Return, (IRS Form 1120), for 2000 provided for the record shows that the petitioner achieved total sales of $611,345 and earned taxable income of $8,116. The corporation paid only $9,800 in officer compensation and $6,160 in salaries and wages during the entire year.

The petitioning entity was incorporated on December 24, 1998. On April 26, 2002, the date the visa petition was filed, the petitioning corporation had a staff of two employees, the beneficiary and an executive officer. It also employed a CPA on a contractual basis. The petitioner indicated that it intended to hire additional staff in the future.

The petitioner's intention to hire additional employees in the future does not enhance the beneficiary's eligibility for this classification. 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.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The record does not clearly show that the petitioner had any staff that would relieve the beneficiary from performing non-qualifying duties. 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). Consequently, the petition may not be approved for this additional reason.

Furthermore, the petitioner's description of the beneficiary's job duties are vague and fail to reveal what the beneficiary will don on a day-to-day basis. 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).

The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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.