

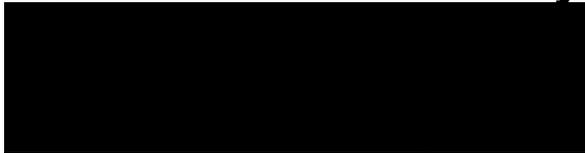
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U.S. Citizenship
and Immigration
Services



DM

FEB 07 2005

FILE: SRC 02 089 51386 Office: TEXAS SERVICE CENTER Date:

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)

IN 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 as a nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability corporation organized in the State of Georgia that is operating as a software company. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Hungary. The petitioner now seeks to employ the beneficiary as its chief executive officer for two years.

The director determined that the petitioner had not established that a qualifying relationship exists between the U.S. business entity and the foreign business entity. The petitioner did not show it had obtained sufficient premises for the new business. Additionally, the director determined that the petitioner had not established that the beneficiary's duties are primarily managerial or executive in nature. Finally, the director concluded that the petitioner did not demonstrate that the foreign business was currently doing business.

On appeal, the petitioner states that it submits new evidence regarding the ownership of the company, new evidence of continuous activities of the foreign entity, new evidence of physical premises for the U.S. entity, and evidence of the executive and managerial position of the beneficiary.

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)(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 (l)(1)(i)(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.

The regulation at 8 C.F.R. § 214.2(l)(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 (1)(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 petitioning company and the claimed foreign company.

Bureau regulations at 8 C.F.R. § 214.2(l)(ii)(G) define the term "qualifying organization" as follows:

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 (1)(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.

8 C.F.R. § 214.2(l)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. § 214.2(l)(ii)(J) states:

Branch means an operating division or office of the same organization housed in a different location.

8 C.F.R. § 214.2(l)(ii)(K) states:

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.

8 C.F.R. §214.2(i)(ii)(L) states, 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.

The petitioner, [REDACTED], located in Atlanta, Georgia, stated in its initial petition that it is a subsidiary of the company [REDACTED] located in Hungary. The petitioner stated that the foreign entity was founded in 2000 with co-ownership and co-management control by the beneficiary. Documents submitted by the petitioner state three persons and perhaps a fourth person had purchased membership in the foreign LLC. A "modified partnership agreement" submitted by the petitioner indicated that on May 8, 2000, [REDACTED] (the beneficiary), and [REDACTED] became new members of [REDACTED] and [REDACTED] joining [REDACTED] and possibly [REDACTED] (whose name was removed from the text but who signed the agreement with [REDACTED]). The possible four individuals are:

1. [REDACTED] paid 150,000 huf for membership interest
2. [REDACTED] paid 150,000 huf for membership interest
3. [REDACTED] paid 2,200,000 huf for membership interest (one million of this was apportioned according to an appendix to the contract that was not submitted.)
4. [REDACTED] (possible limited partner whose name was removed from the text but who signed the agreement with (ES).)

The petitioner submitted the following documents regarding the ownership of the U.S. entity:

1. a certificate of organization for the U.S. company as a limited liability company under the laws of Georgia effective October 12, 2001 and an Employer Identification Number (EIN) notice dated October 29, 2001;
2. Articles of organization that stated the management was vested in two (2) managers but listed three: the beneficiary, [REDACTED] and [REDACTED] and
3. an LLC agreement listing the three managers named above as initial managers, and indicating that voting would be based on the percentage interest owned by each member.

Additionally, the petitioner submitted a "contract of assignment" from the foreign company. This contract states that the managing director for the foreign company, [REDACTED], designates [REDACTED] and [REDACTED] to start business activity in the United States in which "they will manage the economic leadership including financial decision making of the newly established business entity as sovereign decision-makers."

On March 11, 2002, the director requested additional evidence of the ownership of [REDACTED] Inc. Additionally, the director requested evidence of funding or capitalization of the U.S. company. Also the director requested evidence that the foreign employer is currently engaged in business operations.

In response to the request for evidence dated March 28, 2002, the petitioner resubmitted the certificate of organization, the first page of the articles of incorporation and the modifications to the foreign partnership agreement. The petitioner resubmitted a wire transfer statement dated August 23, 2001 as evidence of funds committed by the foreign entity to the U.S. entity. However, this wire transfer was dated more than a month before the U.S. entity was incorporated and did not contain the name of the U.S. entity. The director determined that this information was insufficient to establish a qualifying relationship between the U.S. company and the foreign entity.

On appeal, the petitioner states:

The company ownership structure was modified in order to establish a qualifying relationship between the US and foreign business as follows: The Union Trend LTD become a 100% owner of the US business entity on June 4 2002 in order to qualify for US Entity as Subsidiary. Please find attached Ownership Transfer Certificates.

The "Ownership Transfer Certificates" are notarized statements that state [REDACTED] and [REDACTED] respectively, "member and owner of 50% of [REDACTED] hereby sells, assigns and transfers all his shares/membership interest of [REDACTED] to [REDACTED] Hungary for the sum of \$1000 effective on the date signed." The AAO notes that these "certificates" are dated June 3, 2002, which is after the director denied the petition on May 9, 2002.

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). The U.S. company and foreign company were not owned and controlled by the same entity or group of individuals. Consequently, it must be concluded that the petitioner has failed to demonstrate a qualifying relationship with a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G), at the time of filing the instant petition. For this reason, the petition may not be approved.

Additionally, the petitioner submitted a tax return and current balance statement of the foreign entity as evidence that the foreign entity is currently doing business. Doing business means the regular, systematic, and continuous provision of goods and/or services. 8 C.F.R. §214.2(l)(1)(ii)(H). Based on the documents provided the petitioner has not provided sufficient evidence that the foreign entity is currently doing business. For this additional reason, the petition may not be approved.

Another issue in this proceeding is whether the petitioner demonstrated the existence of sufficient premises for the new business. The petitioner submitted a virtual office lease that offered locked mailboxes, personalized answering service and, for an extra charge, telephone lines, voicemail, internet, and office and conference room space. This lease does not allow the lessor to place any signs that would be visible outside of the room the lessor is using. The petitioner's virtual services agreement, which went into effect February 1, 2002, shows that it chose a level one membership without the services of a telephone, mailbox, lobby or phone book listing. The director concluded that the petitioner had not provided evidence that sufficient premises for the new business had been secured.

On appeal, the petitioner states that "the physical premises, namely the leased office space at the address [REDACTED] is the actual place where the company conducts business, welcomes clients and holds meetings." The petitioner did not submit a copy of the lease for the listed place of business. Based on the evidence provided, the petitioner has not demonstrated that it has sufficient physical premises for the new business. 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).

Another issue in this proceeding is whether the beneficiary's duties have been and will be primarily managerial or executive in nature.

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 director requested that the petitioner submit evidence that shows the beneficiary worked abroad for one continuous year between the period of January 22, 1999 and January 22, 2002 in a management position. The director also inquired about the current activities of the petitioner. Finally, the director requested copies of the petitioner's bank account statements with documentation for the source of all bank deposits made from August 2001 through February 2002.

In response to the request for evidence, the petitioner submitted the foreign company's payroll statements for the years 1999, 2000 and 2001. Additionally, the petitioner submitted the most recent translated partnership contract of the foreign entity which the petitioner states demonstrates a membership/management position. The petitioner stated that the beneficiary's current activities included "holding a[n] executive position in [the foreign entity] in Hungary and holding a[n] executive position in [U.S. entity] in the United States as well as with all the activities, duties and responsibilities of the above positions."

Additionally, the petitioner enclosed copies of the beneficiary's personal bank statements. The petitioner stated the source of the monthly deposits is the member's withdrawals of profit sharing from the U.S. entity.

The director noted that though the petitioner submitted more bank statements for the business and provided the beneficiary's personal bank account statement, the statements listed the same address for both accounts. Additionally, the director stated no documentation was submitted to show the source of deposits to the beneficiary's personal account and only the first page showing the transaction summary was submitted. The director noted that though the petitioner submitted payroll records for 2000 and 2001 neither was in the original language and neither identified the employer or the position.

The director determined that the petitioner had not provided sufficient evidence to demonstrate that the beneficiary's duties are primarily managerial or executive in nature. The director found that the petitioner failed to demonstrate that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees.

On appeal, the petitioner simply states "the executive/managerial position of the beneficiary is demonstrated in the Articles of Organization filed with the Secretary of the State of GA." This statement is not sufficient to demonstrate that the alien will be employed in a primarily managerial or executive capacity. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

It is noted that the petitioner does not clarify whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. It appears that the beneficiary may be claiming to be employed as both a manager and an executive. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the petitioner is representing that the beneficiary is both an executive and a manager.

Based on the evidence provided, it cannot be found that a qualifying relationship existed between the U.S. petitioner and the overseas entity at the time the initial petition was filed. The petitioner has not provided evidence that the foreign entity is currently doing business. The petitioner has not provided evidence that sufficient space for the new business has been secured. Additionally, based on the evidence provided, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. The appeal must therefore be dismissed.

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.