



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



06 NOV 2004

File: SRC 98 039 52119 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:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wemmann, Associate Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The Associate Commissioner for Examinations dismissed the subsequent appeal. The matter is now before the Associate Commissioner for Examinations on motion to reopen. The motion is granted. The previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner engages in the export business and in the development of investment opportunities. It seeks authorization to employ the beneficiary temporarily in the United States as its president and "new business opportunities" manager. The director determined that the petitioner had not established that the beneficiary would be employed in an executive or managerial capacity. In addition, the director determined that the petitioner had not provided evidence that the beneficiary would be employed in the United States temporarily.

On appeal, the petitioner claimed that the beneficiary would be employed in a primarily managerial capacity because the beneficiary manages the essential new business opportunities function of the company. The petitioner also indicated that the beneficiary would be employed in the United States temporarily.

On October 27, 1999, the Associate Commissioner dismissed the appeal determining that the record did not support a finding that the beneficiary would be employed in a primarily managerial or executive capacity. The Associate Commissioner also determined that certain information submitted by the petitioner in response to the director's request for evidence could only be considered in an amended petition. The Associate Commissioner indicated that agreements used to establish the eligibility of the beneficiary had to be effective at the time the original extension petition was filed. In the decision, the Associate Commissioner also found that the petitioner had not submitted sufficient evidence to establish that the beneficiary would be employed temporarily. Finally, the Associate Commissioner noted, beyond the decision of the director, that there was insufficient evidence to establish that the foreign entity continued to do business, or that a qualifying relationship existed between the United States and foreign entity. The Associate Commissioner observed that the beneficiary's claimed temporary employment and the qualifying relationship between the United States company and the foreign entity would not be examined further because the appeal was dismissed on the basis of failure to establish the beneficiary's managerial or executive capacity.

On motion, counsel for the petitioner asserts that the Associate Commissioner's decision improperly construed and disregarded evidence submitted by the petitioner. Counsel further asserts that the Associate Commissioner improperly addressed issues that had not been raised in the director's decision.

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.

8 C.F.R. 214.2(1)(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.

The United States petitioner was incorporated in August of 1994. The petitioner engages in the export business and in the development of investment opportunities. The petitioner seeks to employ the beneficiary as president and manager of new business opportunities. The petitioner filed the original request to employ the beneficiary in October of 1994. The petition was approved in January of 1997 and the beneficiary was accorded L-1 status through November 1, 1997. The petition requesting the extension of the beneficiary's employment as an L-1 intracompany transferee was filed November 20, 1997. At the time of filing the extension petition the petitioner employed the beneficiary. It appears a vice president was also employed on a part-time basis. The petitioner also provided two letters appointing two individuals to act as sub-agents to distribute key cards for the petitioner, though no documentation of remuneration to any of these individuals was provided.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial 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.

Counsel asserts on motion that the extension petition was filed specifically to classify the beneficiary as a manager of an "essential function." Counsel describes the "essential function" as the "new business opportunities" function. Counsel emphasizes that the beneficiary manages the essential new business opportunities function of the petitioner by securing franchise and other agreements, investigating market opportunities, developing and managing each opportunity, appointing sales agents and exercising discretion over the day-to-day operations of the new business opportunities function of the petitioner.

Counsel's assertions are not persuasive on this issue. To qualify as a manager of an essential function within the organization, the beneficiary must manage the essential function of the company rather than perform the day-to-day operations of the essential function. It is apparent that the beneficiary performs tasks that are essential to the operation of the petitioner. The petitioner, through its vice president, indicates that it was not operational in the years 1994, 1995 and 1996 while waiting for the original approval of the L-1 visa of the beneficiary. It appears from this information that the petitioner could not operate without the day-to-day performance of the beneficiary. To emphasize, the evidence indicates that the beneficiary was necessary to perform the essential day-to-day duties of the petitioner or it could not operate. Once the beneficiary's initial petition was approved, the petitioner hired the beneficiary and apparently one part-time employee. It also entered into two agreements with two individuals to act as sub-agents to distribute key cards. However, the record does not demonstrate the part-time employee and agents were performing the

new business opportunity function thereby freeing the beneficiary to manage this essential function.

Counsel refers to an unpublished decision of the Administrative Appeals Office in a case involving an employee of the Irish Dairy Board to support his assertion that the beneficiary is carrying out the petitioner's major function through other employees. Counsel asserts that the duties of the other employees are not clerical or auxiliary in nature but constitute the essential functions necessary for the successful operation of the business. This assertion is not supported in the record. There is little information on the duties of the vice president and the record does not contain evidence to substantiate his employment. It appears that this position is in title only. The duties of the sub-agents are limited to the distribution of key cards and do not contribute to the day-to-day operations of the petitioner. Counsel has not furnished evidence that establishes the facts of the instant petition are analogous to those in the Irish Dairy Board case. Moreover, unpublished decisions are not binding on Service Officers in the administration of the Act. See 8 C.F.R. 103.3(c).

On review, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly performing the operations of the organization, that is, entering into agreements to export goods and trying to find new businesses. The petitioner has not provided evidence that the beneficiary's day-to-day activities include managing, rather than performing an essential function. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. For these reasons, the petition may not be approved.

Counsel further asserts that the director and the Associate Commissioner erred in not considering the contributions of the two direct employees and the six independent contractors hired by the petitioner after the extension petition was filed.

Counsel's assertions are not persuasive. To reiterate the Associate Commissioner's previous decision on this point, 8 C.F.R. 103.2(b)(13) states, in pertinent part: "An application shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." Information about employees and contractors hired subsequent to the filing of the petition is not relevant to the decision at hand because this information does not contribute to establishing the beneficiary's eligibility at the time the petition was filed.

Counsel claims that the Associate Commissioner erred by addressing issues not initially raised by the director. Courts have long held that the Associate Commissioner through the Administrative Appeals Office has *de novo* review of petitions denied by directors. Dor v. District Director, INS, 891 F.2d 997, note at 1002 (2d Cir., 1989). It is within the discretion of the Associate Commissioner to raise issues not discussed by the director. In the case at hand, the Associate Commissioner indicated that the issues not raised by the director did not ultimately form the basis of the dismissal of the appeal. Instead the appeal was dismissed and the petition not approved because the petitioner did not establish that the beneficiary was a manager or executive as defined by the Act. However, the issues raised by the Associate Commissioner are still relevant and counsel's assertions on motion do not overcome the reasoning set forth in the Associate Commissioner's decision dated October 27, 1999.

Finally, beyond the decision of the director, a petition to extend the L-1 status of a beneficiary may be filed only if the validity of the original petition has not expired. 8 C.F.R. 214.2(l)(14). The L-1 status approved in the original petition expired November 1, 1997. The petitioner filed a petition requesting an extension of the L-1 status for the beneficiary on November 20, 1997. The text of 8 C.F.R. 214.2(l)(14) is not discretionary. An extension petition not timely filed 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.