



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



File: EAC 98 086 50959

Office: Vermont Service Center

Date: SEP 11 2000

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.

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrence M. O'Reilly, Director
Administrative Appeals Office

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

The petitioner engages in the importing, exporting and sales of textiles and garments. The beneficiary is currently employed in the United States as sales manager of [REDACTED] an affiliated company. The petitioner seeks to transfer the beneficiary from [REDACTED] to the petitioning company, [REDACTED] to be employed as its vice president. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel argued that the petitioner was acting in a 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 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.

The Associate Commissioner dismissed the appeal reasoning that the evidence submitted by the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. Beyond the director's decision, the Associate Commissioner found that the petitioner had not demonstrated that a qualifying relationship existed between the beneficiary's current U.S. employer, [REDACTED] and the petitioning company, [REDACTED]. The Associate Commissioner further found that there was conflicting evidence regarding the employment of the beneficiary with the U.S. entity, [REDACTED].

On motion, counsel states in part that:

A. Job description of President's Position--the petitioner has now submitted a complete job description which includes all of the duties which the beneficiary is performing as president of the corporation (**appendix II**).

B. Description of Total Number of Contractors' Employees Under the Control of the Petitioner, Their Positions, and Duties--the petitioner has submitted such complete

information in its above attached statement (*supra*, **appendix II**).

C. A qualifying Relationship Exists Between the Petitioner and the U.S. entity the Beneficiary Worked for Prior to Working for the Petitioner--the petitioner is resolving this question with submission of its stock certificate showing that all 200 shares of the corporation are owned by the [REDACTED] (b) (7) (C) (**appendix III**), a statement dated April 5, 1999, from its CPA, [REDACTED] (b) (7) (C) confirming that the company is still owned by the [REDACTED] (b) (7) (C) (**appendix IV**), a copy of the beneficiary's prior L-1A approval with [REDACTED] (b) (7) (C) (**appendix V**), a copy of portions of the L1-A petition for the beneficiary by [REDACTED] (b) (7) (C) including form I-129, I-129 supplemental form L, statement of corporation outlining relationship of companies, and an organizational structure chart of the corporation--(we note that the original petition with original forms, statement and proof is available to the Service) (**appendix VI**), a statement by the petitioner that the [REDACTED] (b) (7) (C) and [REDACTED] (b) (7) (C) are the same company (**appendix VII**), and a transfer authorization notice of the parent company transferring the beneficiary from [REDACTED] (b) (7) (C) to [REDACTED] (b) (7) (C) (**appendix VIII**).

D. Conflicting Information Concerning the Employment of Beneficiary--the petitioner is submitting a statement explaining its petition process for its former president, affirming that it is no longer pursuing an appeal on his behalf, and withdrawing such appeal (**appendix IX**).

The first issue in this proceeding is whether 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:

"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:

"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 Associate Commissioner noted that the record contained conflicting evidence regarding the beneficiary's employment. The Associate Commissioner stated that the beneficiary had been promoted from vice president to president of the U.S. entity because the current president, [REDACTED], had been transferred back to [REDACTED] however, a petition had been submitted and denied and is now on appeal for Mr. [REDACTED] as president of the U.S. company.

On appeal, counsel submits a letter from the manager of [REDACTED], which states that the beneficiary is the president of the company due to the "inability of the our former president, Mr. [REDACTED] to obtain an extension of his status from your agency." The manager further requests a formal withdrawal of the appeal on behalf of Mr. [REDACTED]. The petitioner has therefore overcome this portion of the Associate Commissioner's objections.

As already discussed extensively by the director and the Associate Commissioner, the record indicates that as of the filing date of the petition, the U.S. entity had four employees, one of whom was the U.S. entity's president. In light of its organizational hierarchy at the time of the filing of the petition, the U.S. entity does not contain the organizational complexity to support a second managerial/executive position. Although counsel now argues that the president of the U.S. entity has been replaced by the beneficiary, Title 8 C.F.R. 103.2(b)(12) states that an application or petition 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.

On motion, counsel asserts that the beneficiary makes all business development objectives and plans for the company, implements decisions related to business matter of the company, negotiates and signs legal and commercial agreements on behalf of the company, and manages the activities of the company through a manager, business associates, and a secretary.

The record does not sufficiently establish that the beneficiary functions or will function at a senior level within an organizational hierarchy other than in position title. There is no comprehensive description of the beneficiary's duties that persuasively demonstrates that the beneficiary will be performing in a primarily managerial or executive capacity. The record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. For this reason, the petition may not be approved.

The second issue in this proceeding is whether a qualifying relationship exists between the petitioning U.S. company, [REDACTED], the beneficiary's current U.S. employer, [REDACTED], and the foreign entity, [REDACTED].

8 C.F.R. 214.2(1)(1)(ii)(G) states:

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(1) (1) (ii) (I) states:

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

8 C.F.R. 214.2(1) (1) (ii) (J) states:

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

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

In this case, the petitioner has submitted a copy of stock certificate number 1 which indicates that the foreign company,

[REDACTED] owns 200 shares of the U.S. petitioning company, [REDACTED], and a letter from the petitioner's CPA which states that "all of the 200 authorized shares of the common stock of [REDACTED] was issued to [REDACTED] on August 6th of 1996 and, to the best of our knowledge, there has not been any ownership changes since then."

The petitioner has established that a qualifying relationship exists between the foreign company, [REDACTED], and the U.S. petitioning company, [REDACTED], however, no evidence of a qualifying relationship between the beneficiary's current U.S. employer, [REDACTED] the petitioning entity, [REDACTED] and the foreign organization, [REDACTED] has been submitted. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The decision of the Associate Commissioner dated March 9, 1999, is affirmed.