



U.S. Department of Justice

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OFFICE OF ADMINISTRATIVE APPEALS
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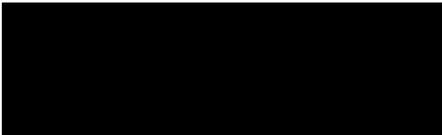


File: EAC 98 129 52374 Office: VERMONT SERVICE CENTER Date: **DEC 17 2001**

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)

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. Weimann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a second motion to reopen and motion to reconsider. The motion will be dismissed.

The petitioner is engaged in the import, export and sale of clothing. It seeks to employ the beneficiary temporarily in the United States as its executive director. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity. The Associate Commissioner affirmed this decision on appeal on October 12, 1999. The petitioner filed a motion to reopen and reconsider dated November 10, 1999 that was received by the Service on November 22, 1999. The Associate Commissioner found that the motion was untimely filed and dismissed the motion on February 29, 2000.

On the second motion to reopen dated March 24, 2000 and received by the Service March 30, 2000, the petitioner submits the postmarked envelope containing the Associate Commissioner's dismissal of the appeal. The postmark shows the mailing date of the dismissal of the appeal as October 19, 1999. 8 C.F.R. 103.5a(a)(3)(b) states in pertinent part that:

whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.

Based upon the postmarked envelope and the regulation, the motion to reopen is considered timely filed. The Associate Commissioner's dismissal of the first motion to reopen is withdrawn. The documentary evidence and the assertions of the petitioner set forth on motion will be reviewed for adequacy to reopen in this proceeding.

The issue in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed 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.

On motion, the petitioner submits a letter, copies of cancelled checks and invoices. The petitioner also submits partial uncertified translations labeling photographs that were previously submitted with the petition. In addition, the petitioner submits partial translations of documents apparently relating to an overseas entity. Further, the petitioner submits a letter from an accountant dated November 11, 1999 indicating that the petitioner employs a store manager, an assistant to the store manager and an independent consultant. The petitioner submits payroll tax returns and its general ledger through December 30, 1999 with the second motion to reopen. The general ledger shows that two

employees received compensation from the petitioner in the year 1999 in the amounts of \$6,250 and \$3,650.

A review of the evidence that the petitioner submits on motion reveals no pertinent fact that could be considered "new" under 8 CFR 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. It is noted that the later entries in the petitioner's general ledger and the subsequent payroll tax returns would not have been available to the petitioner prior to the decision of the director or the Associate Commissioner. However, the later entries and documents serve only to underscore that the beneficiary is not acting in a managerial or executive capacity, the pertinent issue in this case. The letter submitted simply indicates that the photographs have been labeled in English and notes that the petitioner has moved. The information submitted on motion is not new under the regulation.

In addition, the petitioner has not submitted certified translations of documents. 8 C.F.R. 103.2(b)(3) states:

Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Without the complete certified translation of the documents and photographs submitted, the Service cannot make a determination regarding the merit of those documents and photographs.

Finally, it should be noted for the record that, unless the Service directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 CFR 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. 8 CFR 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the Associate Commissioner will not be disturbed.

ORDER: The motion is dismissed.