



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 98 143 52259 Office: Vermont Service Center Date: **DEC 19 2001**

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

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. Wiemann, Director
Administrative Appeals Office

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

The petitioner is described as engaging in the international trade of jewelry. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary had been and would be employed in a primarily managerial or executive capacity.

On appeal, the beneficiary provided additional information in support of the appeal.

The Associate Commissioner dismissed the appeal reasoning that the petitioner had not demonstrated that the beneficiary had been and would be employed in a primarily managerial or executive capacity.

On initial motion, the beneficiary submitted additional documentation, but failed to demonstrate that the beneficiary had been and would be employed in a primarily managerial or executive capacity. The motion was dismissed and the decision of the Associate Commissioner for Examinations was affirmed.

On current motion, the beneficiary submits additional financial documentation, but fails to address the fundamental reason(s) for the denial of the petition, whether or not the beneficiary had been and would be employed in a primarily 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.

8 C.F.R. 214.2(1)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The United States petitioner was established in 1997 and states that it is a wholly-owned subsidiary of Shanghai Orient Jewelry Co., Ltd., located in Shanghai, China. The petitioner seeks to extend the employment of the beneficiary for a three-year period at an annual salary of \$28,000.

At issue in this proceeding is whether the beneficiary has been and 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:

"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.

In his decision, the director noted that the petitioner's description of duties for its staff, which included a trade department manager, a sales marketing manager, two salespersons, and a secretary, was insufficient to establish that the beneficiary's position had been and would be executive or managerial in nature. The director also noted the petitioner did not provide the names of the employees so it was not clear from its financial information just who was employed in the U.S. organization.

On appeal, the beneficiary had argued that he supervises a trade department manager, a sales manager, and managed the essential function of the day-to-day operation as well as the development plan of the U.S. organization.

In dismissing the appeal, the Associate Commissioner noted that the duties of the Manager of the Trading Department appeared to be operational in nature and basically the same as the duties described for Salespersons I and II. The Associate Commissioner also concluded that the record indicated that the managers and salespersons are performing the day-to-day operational duties of

the U.S. company and that the beneficiary is performing the duties of a first-line supervisor.

On the initial motion, the petitioner claimed that the beneficiary's duties consisted of the following:

...is authorized to plan, develop and establish policies and objectives for the company in accordance with Board of Directors...Confer with the company officials to plan business objectives, to develop organizational policies...to coordinate functions and operations between divisions and departments...maximize return on investment...Evaluate the performances of managerial and professional staff of 4 and exercise wide latitude in hiring and firing...

On current motion, the petitioner has failed to state any new facts or to provide new evidence regarding the *beneficiary's duties* with the U.S. entity as of July 8, 1997, the filing date of the petition. For this reason, the petition may not be approved.

It should be noted that even if the petitioner were to establish on motion that the beneficiary has been and will be employed in a primarily managerial or executive capacity, the petition may not be approved. In a letter dated July 29, 1997, the petitioner was requested to submit information concerning its employees' duties but failed to submit the requested evidence. Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). This also applies to evidence submitted on motion.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, *supra* at 323 (citing INS v. Abudu, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, *supra* at 110.

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 motion is dismissed.