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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



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invasion of personal privacy

File: EAC 99 093 50847 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:

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. Wjemann, 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 dismissed.

The petitioner is described as a printing company, which 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 or would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserted that the beneficiary is directly responsible for the overall operations and management of the U.S. subsidiary. Counsel further claims that the number of employees supervised is not determinable and that a person may be a manager or executive even if he is the sole employee.

The Associate Commissioner for Examinations dismissed the appeal reasoning that the petitioner had failed to establish that there is a qualifying relationship between the U.S. and foreign entities, or that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On motion, counsel requests that the dismissal of the appeal be reopened and reconsidered based on the fact that the beneficiary's petition was approved in April 1998 and the beneficiary is entitled to file for an extension.

8 C.F.R. 103.2(b)(13) states, in pertinent part: "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."

8 C.F.R. 214.2(l)(7)(i)(C) states:

The petitioner shall file an amended petition, with fee, at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

In a letter dated February 5, 1999, the Service requested that the petitioner submit additional evidence to establish that the beneficiary is employed in a primarily managerial or executive capacity.

In response, the petitioner stated that it had hired a new employee, [REDACTED] to be president of the U.S. entity, as well as three employees to work in the graphic design department, printing department, and to perform general office administration duties. The petitioner provided the following description of the beneficiary's duties:

Mr. [REDACTED] is directly responsible for the overall operation of [the] US subsidiary. He not only interview[s], hire[s], supervise[s], promote[s], and discharge[s] employees but also make[s] direct business contacts to procure orders from the potential customers such as Industrial Houses, Business Houses, and Publishing Industries on his own and also through our business references in India. He not only negotiates and finalizes contracts, define[s] the goals as envisioned by him but also develop[s] business strategies to expand our business in this competitive market. He coordinates with the principal in India.

We are no longer a one employee company. Besides Mr. [REDACTED] we have Mr. [REDACTED] who is on the board for full time. In addition, we have three more employees working for us who are handling Graphic Designs Dept., Printing Dept. and General Office Administration.

As of the filing date of the petition, the beneficiary was the petitioner's sole employee. The president and three additional employees were hired after the petition was filed on February 5, 1999. 8 C.F.R. 103.2(b)(13) states, in pertinent part: "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."

The Service Center Director and the Associate Commissioner for Examinations found that the foreign entity had failed to demonstrate that the petitioner is employed in a primarily managerial or executive capacity. On appeal, counsel states that the beneficiary was transferred to the United States entity to serve as its president and has continually served in that capacity. Counsel claims that the U.S. and foreign entity are doing business, and that the beneficiary has been and will continue to be employed in a managerial or executive capacity. Counsel submits a profit and loss statement for the period August 1999 through March 2000, inclusive; the U.S. entity's 1998 Form 1120 Corporation Income Tax Return; a 1998 Form 7004 Application for Automatic Extension of Time; a 1998 Form 4562 Depreciation and Amortization; a 1998 New York State Form CT-4 General Business Corporation Franchise Tax Return Short Form; a 1998 New York State Form CT-5 Request for Six-Month Extension to File; a 1998 New York City Form NYC 3L; a 1998

New York City Form NYC 6 Application for Automatic Extension; a Form 941 Employer's Quarterly Federal Tax Returns for the first, second and fourth quarters; and, the U.S. entity's bank statements covering the period(s) April 15, 1999 to March 14, 2000, inclusive.

The petitioner did not submit any evidence to address the 1997 tax returns which show that [REDACTED] owns the petitioner, as raised by prior AAO decision.

The evidence submitted on motion to demonstrate that the foreign entity is doing business may be considered in an amended petition and not on motion. For this reason, the motion may not be granted.

8 C.F.R. 103.5(a)(2) states, in pertinent part, that a motion to reopen must state new facts to be provided and be supported by affidavits or other documentary evidence.

8 C.F.R. 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

8 C.F.R. 103.5(a)(4) states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

Counsel's motion fails to state the new facts to be provided regarding the beneficiary's employment with the U.S. entity, and is not supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. For this additional reason, the motion will 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 motion is dismissed.