



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 97 190 53714

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)

Public Copy

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. A subsequent motion to reopen and reconsider was granted by the Associate Commissioner for Examinations, and the previous decision of the Associate Commissioner was affirmed. A second motion to reopen was dismissed by the Associate Commissioner for Examinations. A third motion was also dismissed by the Associate Commissioner for Examinations. The matter is again before the Associate Commissioner for Examinations on a fourth motion. The motion will be dismissed.

The petitioner, [REDACTED] Inc., an import/export company, 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 the United States in a primarily managerial or executive capacity.

On appeal, counsel stated that the beneficiary is employed in a managerial or executive capacity.

The Associate Commissioner dismissed the appeal, reasoning that the petitioner had submitted insufficient evidence to establish that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On first motion, the petitioner provided documents to show that it has been doing business, but did not address the issue of the beneficiary's managerial or executive duties with the petitioning entity.

On second motion, the petitioner stated that the beneficiary is employed in a managerial or executive capacity. The petitioner again submitted additional evidence that it is doing business, but did not submit a description of the beneficiary's proposed duties or other evidence addressing the issue of whether the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On third motion, the petitioner stated that the beneficiary is currently employed in a managerial or executive capacity. The petitioner states that it will be setting up additional operations and will lose "big money" and "waste life" if the petition is denied. The petitioner submitted additional documentation, but again failed to submit a description of the beneficiary's proposed duties or other evidence addressing the issue of whether the beneficiary had been or would be employed in the United States in a primarily managerial or executive capacity.

On fourth motion, the petitioner states that the Service should consider the actual "business facts of beneficiary's function in nature of managerial or executive" and not rely only on the regulations. The petitioner submits that business documents for the period February 2000 to September 10, 2000, consisting of orders, invoices, bills of lading, shipping documents, insurance policies, telephone records and other evidence of doing business. It is noted that a significant number of the aforementioned 500 plus documents were signed by the beneficiary.

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

The petition requesting an extension of authorization to employ the beneficiary was filed on July 8, 1997. On July 29, 1997, the petitioner was requested to submit a complete position description for all of its U.S. employees, including the beneficiary, and a breakdown of each of its employees' job duties on a daily basis. The petitioner failed to submit the requested information. 8 C.F.R. 103.2(b)(12) 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."

On motion, the petitioner claims that the beneficiary has been and will be employed in a primarily managerial or executive capacity, but fails to submit evidence in support of this claim. The petitioner submits documentation showing that it has been doing business from February 2000 to September 10, 2000. Further, the information submitted on appeal does not demonstrate the beneficiary's eligibility at the time the petition was filed and may not be considered.

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 motion may not be granted.

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.

Beyond the director's decision, the petitioner has submitted insufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities. As the motion will be dismissed on the grounds discussed, this issue need not be examined further.

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