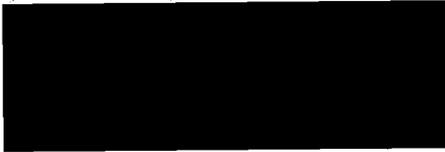




U.S. Department of Justice
Immigration and Naturalization Service

D7

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



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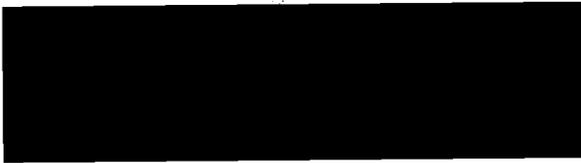
File: LIN 99 061 50835 Office: Nebraska Service Center Date:

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:



Identification data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

Mary J. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a diamond wholesale company, seeks authorization to employ the beneficiary temporarily in the United States as branch manager of its Chicago office. The director determined that the petitioner had not established that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, the petitioner argues that the beneficiary will be employed in a primarily 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 and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, a managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States.

The U.S. petitioner states that it was established in 1996 and that it is a wholly-owned subsidiary of [REDACTED] Ltd., located in India. The petitioner declares nine employees and a gross annual income of approximately \$397,027.90. It seeks authorization to employ the beneficiary for one year at an annual salary of \$24,000.

At issue in this proceeding is whether the beneficiary will be employed by the U.S. entity 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 petitioner describes the beneficiary's proposed duties as follows:

He will be responsible for supervising the day to day operations of the business, reviewing the financial status of the company and developing marketing strategies.

In a letter dated February 10, 1999, the director cited the above Service regulations and requested that the petitioner respond to the following:

[S]ubmit evidence to establish that the beneficiary qualifies under all four criteria stated above for either a Manager or Executive. Submit a statement signed by an authorized official of the prospective employer describing the alien's employment for one continuous year abroad within the three years immediately preceding the filing of this petition, or if the alien is already in the U.S., immediately preceding his/her entry as a nonimmigrant, and describing the intended employment in the U.S. The statement should include information concerning the dates of employment, job titles, specific job duties, types of employees supervised, if any, titles, specific job duties, types of employees supervised, if any, level of authority, and title and level of authority of the alien's immediate supervisor. The statement should not merely repeat the regulations cited above.

Also submit an organizational chart showing the alien's current and proposed positions in relation to others in the company.

In response the petitioner submitted the same description of the beneficiary's proposed duties cited above. Counsel explains why

the above description establishes that the beneficiary will be employed in a managerial capacity:

The first element of the "managerial" capacity test is that the alien's job duties must involve management of the organization or a department, subdivision, function or some component of the organization....[The above description] states that the beneficiary will be responsible for "supervising the day to day operations of the business, reviewing the financial status of the company and developing market strategies." Therefore, the alien's job duties satisfy the first element of the "managerial capacity" requirements since it involves the management of the branch office of the subsidiary, Avani, Inc.

The second element is satisfied given the Beneficiary/Manager is involved in the management of an essential function of the organization. [REDACTED] was incorporated in 1996 and the Petitioner states in its letter on page 2 of TAB 2 that "Due to the increase of business of our parent company in India, and our subsidiary in California, we have decided to expand into other markets. This was the determining factor in the opening [of] a new location in Chicago for our subsidiary.

The Beneficiary meets the third requirement of the managerial capacity definition since he has the authority to execute or recommend personnel actions. Petitioner states, "Mr. [REDACTED] also supervises our professional staff and has authority to recruit, promote, and terminate our personnel."

Finally, the beneficiary satisfies the four elements to establish managerial capacity in that he supervises the "day to day operations." (See Supplement L- to I-129). Since the manager of the Chicago office engages in such activity, it is apparent that the Beneficiary's job duties fits squarely within the definition of managerial capacity.

Counsel also argues that the beneficiary will be employed in an executive capacity because the petitioner stated that the beneficiary will establish the goals and policies of the Illinois office. According to the petitioner's organizational chart, the beneficiary will be the sole employee of the Illinois office.

It should be noted that the above description cited by counsel regarding the beneficiary's supervision of personnel relates only to his employment with the foreign entity. There is no evidence

that the beneficiary will be supervising any employees at the U.S. entity.

On appeal, counsel resubmits the above descriptions of the beneficiary's duties and claims the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

In review, the record as presently constituted does not contain persuasive evidence to demonstrate that the beneficiary has been or will be employed in a primarily executive or managerial capacity. Counsel's restating portions of the definitions of a manager and executive is not sufficient in demonstrating the beneficiary's managerial or executive duties. The definitions of a manager and executive were merely provided as guidelines and not to be restated as evidence of duties performed and to be performed by the beneficiary. The petitioner has provided no comprehensive description of the beneficiary's duties that would persuasively demonstrate that the beneficiary has been and will be primarily engaged in managing or directing the management of a function, department, subdivision or component of the company. Simply stating that the beneficiary will be responsible for supervising the day-to-day operations of the business, reviewing the financial status of the company, and developing marketing strategies, is not sufficient in demonstrating the beneficiary's managerial and executive responsibilities. The evidence of record is not convincing in establishing that the beneficiary will not be primarily involved in performing the day-to-day functions of the company.

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. According to the petitioner's organizational chart, the beneficiary will be the sole employee of the Chicago office.

Based on the evidence furnished, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has submitted insufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities. The U.S. petitioner claims to be a wholly-owned subsidiary of the foreign entity, [REDACTED] Share certificate number 1 shows that as of April 19, 1996, [REDACTED] Ltd. owns 1,000 of 25,000 authorized shares of the U.S. entity's stock. However, according question T of a 1997 California Corporation Franchise or Income Tax Return, no single interest owns more than 50 per cent of the U.S. entity's voting stock. This conflicting information has

not been resolved. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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 appeal is dismissed.