



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

[Redacted]

File: EAC 98 129 51825 Office: Vermont Service Center

Date: JAN 18 2001

IN RE: Petitioner:
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:

[Redacted]

Public Copy

Identifying data removed to prevent disclosure of information

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

M. C. Mulrean, Acting Director
Administrative Appeals Unit

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

The petitioner, a trader of porcelain equipment and porcelains, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chairman. 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 argues that the director's decision was erroneous and that the beneficiary is employed in a 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(l)(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 (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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 1996, and states that it is a wholly-owned subsidiary of [REDACTED] located in China. It claims a projected employee count of five by years end and a projected gross annual income of \$750,000.

At issue in the proceeding is whether the beneficiary has been or will be employed in a 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 a letter dated August 3, 1998, the petitioner describes the beneficiary's duties as follows:

[The beneficiary] will continue to be Chairman of the company, and as such an executive employee. He is charged with further establishing the company and increasing trade in the United States. [The beneficiary] has unfettered discretion in setting goals and policies for the U.S. company. He reports to the Board of Directors of the parent company in China. He has final authority on all matters of business management, financial affairs, daily business, human resources and strategic decisions. He currently supervises the two employees. It is the goal of the company to increase its trade and hire additional U.S. workers. It projects an ability to have 5 or more U.S. employees within the year. Please note that [the beneficiary] is the Chief person in the company and the company could not begin business significantly without his being here. He was only granted the L-1A visa in September 1997. He entered the U.S. in October, but as [the beneficiary] is also Deputy Director of the parent company in China, he needed to return in December. Nevertheless, he has been able to engage in substantive trade and is seeking to more firmly establish the company.

In response to a request for additional information, the petitioner provides a description of duties of the following employees:

██████████ - General Manager - negotiating and reviewing import agreements for 6 to 8 hours every week; reviewing outlays on a weekly and monthly basis for approximately 3 hours every week; evaluating staff and planning operational changes in our store for 2 to 4 hours every week. ██████████ meets with and deals with import brokers to meet our clients orders for 4 to 5 hours per week. ██████████ arranges for shipments and receiving of our porcelain material and deals with brokers for 10 to 12 hours per week. He inspects all merchandise for quality and makes deals for items after

reviewing his decisions with me. Inspection takes about 3-4 hours each week. [REDACTED] helps decide what to import based on market information provided by our New York and wholesale sales and marketing managers, [REDACTED] and [REDACTED].

[REDACTED] - Customer Service and Salesperson for New York - manages sales activity for clients in New York, studies the market and canvasses other dealers and reports to [REDACTED] for 12 to 15 hours every week, contacts potential clients and former clients and promotes sales 10 to 12 hours every week, helps [REDACTED] decide on purchases for clients in New York and what we sell best in order for [REDACTED] to assist me with business strategy for about 8 to 10 hours each week.

[REDACTED] - Customer Service and Salesperson for wholesale and areas outside New York - contacts and promotes sales with buyers and galleries outside New York such as in Philadelphia and New Jersey for nearly 18-20 hours per week, establishes and runs auctions, finding space, organizing merchandise, preparing information on the pieces and publicizing the auctions, these are held every other week or once a month and if broken down to a weekly basis would take 8 hours per week; travel to meet potential clients for 6 to 8 hours per week.

[REDACTED] - staff assistant - assists with packaging shipments for delivery, insuring delivery, and delivering packages in the New York City for 6 to 8 hours per week, arranges displays and opens and closes store for 8 hours every week, keeps the facility clean and helps with stocking the warehouse for 5 to 6 hours every week, assists with customers and keeps sales records and paperwork for approximately 20 hours per week.

On appeal, counsel argues that the beneficiary has been and will be acting in a managerial and executive capacity, and that the directors decision was in error. Counsel further argues that:

[The beneficiary] is a chairman with executive duties and responsibilities. He has built a company that is doing well, earning money, hiring employees and paying taxes. This is not a case in which a company is established that does little or no business, and serves as a shell company for immigration purposes. A case such as that is properly deniable. However, in this case where a small but growing business requires its chairman for leadership, denial is inappropriate.

Counsel notes that the overall purpose and stage of development of the United States organization should be taken into consideration when determining whether the beneficiary's position is managerial or executive, rather than relying solely on staffing levels. It is reasonable for a company to employ a staff of an appropriate size to meet the needs of the enterprise. However, 8 C.F.R. 214.2(l)(3)(v)(C) allows the United States operation one year within the date of approval of the petition to support an executive or managerial position. In the case at hand, the petitioner has been established for more than one year. Accordingly, the petitioner remains required to establish that the beneficiary will be primarily employed in a managerial or executive position.

Counsel refers to an unpublished appellate decision in a case involving an employee of the [REDACTED]. In that decision it was held that the beneficiary satisfied the requirements of acting primarily in a managerial capacity because his primary assignment was the management of a large organization using multiple subcontractors to carry out its functions, even though he was the sole direct employee of the petitioning organization. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the Irish Dairy Board case. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly performing the operations of the organization, that is, importing and exporting and marketing commodities on behalf of the foreign organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. For this reason, the petition may not be approved.

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.