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U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC-97-221-52659

Office: Vermont Service Center

Date: JUN 11 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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

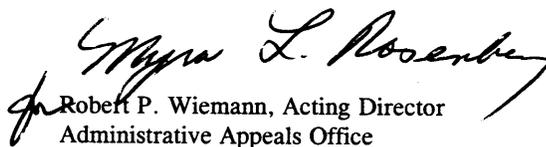
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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


Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. An appeal was denied by the Associate Commissioner for Examinations. A subsequent motion to reopen was also dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on a second motion to reopen. The motion will again be dismissed.

The petitioner is a company engaged in trading garments, textiles, auto parts, and decorating materials between China and the United States, and seeks to employ the beneficiary temporarily in the United States as "president/executive" of its new office. The director determined that the petitioner had not demonstrated that the proposed employment involved executive or managerial authority over the new operation. The director also determined that the petitioner had not demonstrated that the intended United States operation, within one year of the approval of the petition, would support an executive or managerial position.

On the appeal, the petitioner argued that the beneficiary spends 70% to 80% of his time managing the company, has four employees under him, and in all other ways meets the requirements for a manager/executive.

The Associate Commissioner dismissed the appeal because the record did not demonstrate that the beneficiary would be employed primarily in a qualifying managerial or executive capacity or that the petitioner would support such a position within one year of operation. The Associate Commissioner also found that another issue, not raised by the director, was that the petitioner had not obtained sufficient physical premises to house its new offices.

Regulations pertaining to a new office and managerial and executive capacities were cited by the Associate Commissioner in his decision dated September 3, 1998, and will not be restated here.

On the first motion, submitted on October 5, 1998, the petitioner stated that the United States office had eight employees, including a secretary, a bookkeeper, and four sales representatives. The petitioner further stated that the beneficiary managed three departments, had authority to hire and fire managers, and supervised the performance of managers and staff.

On August 25, 1999, the Associate Commissioner found that the information submitted demonstrated a change of circumstances, but did not show that, as of the date the petition was filed, the beneficiary was eligible for the benefit sought. As such, the matter submitted on that motion would have been correctly considered pursuant to an amended petition, but not on motion. The Associate Commissioner also noted that the motion to reopen was not timely, and dismissed the motion.

On the second motion, dated September 27, 1999, the petitioner provided the names and job descriptions of the United States office's eleven employees, including the beneficiary. The beneficiary also submitted a copy of the United States office's Form 1120 corporate income tax return. Among the expenses reported on that tax return are the beneficiary's \$36,000 salary, and \$193,700 salaries and wages paid to the remaining ten employees, including nine sales representatives and the single person simultaneously working as Sales and Marketing Manager and as Vice President of the corporation. The taxable income reported on that return was \$98,702.

While the information submitted on the second motion may again demonstrate that the beneficiary is currently employed in a primarily managerial or executive capacity, it still does not demonstrate the beneficiary's eligibility at the time the petition was filed. As previously advised on the first motion, such evidence may be considered in an amended or new petition and not on motion. For this reason the motion may not be granted.

Further, although not discussed by the Associate Commissioner in his dismissal of the motion, the petitioner provided no evidence to demonstrate that it had obtained sufficient physical premises to house its new office. Again, as the motion will be dismissed for the reason stated above, 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 motion is dismissed.