



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



PUBLIC COPY

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File: SRC-98-023-50271

Office: Texas Service Center

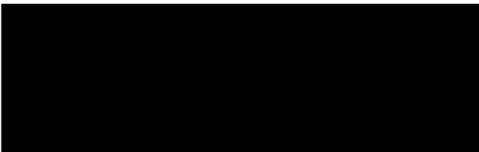
Date:

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:



~~identify the person~~
to prevent clearly unwarranted
invasion of national territory

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
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 granted. Counsel had indicated that additional evidence would be submitted in support of the appeal on or before March 23, 2000. To date, no additional evidence has been received by this office. Therefore, the record must be considered complete. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is engaged in the development of luxury condominium resorts. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its executive president/secretary/CEO. 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, or that the petitioner intended to employ the beneficiary in the U.S. on a temporary basis.

On appeal, counsel argued that the beneficiary had been and would be employed in the U.S. entity in a primarily managerial or executive capacity. Counsel further argued that the record contained sufficient evidence to demonstrate that the petitioner intended to employ the beneficiary in the U.S. on a temporary basis. Counsel had indicated that additional evidence would be submitted in support of the appeal on or before July 9, 1998; however, no such evidence was ever received by this office.

The Associate Commissioner dismissed the appeal reasoning that the record had not demonstrated that the beneficiary had been or would be employed in a primarily managerial or executive capacity, or that the petitioner intended to employ the beneficiary in the U.S. on a temporary basis. The Associate Commissioner also found, beyond the decision of the director, that the record contained insufficient evidence to demonstrate that the U.S. and foreign entities had been doing business.

On motion, counsel states that:

(a) The delay was reasonable and beyond the control of the petitioner; the Decision is dated December 22, 1999, but the envelope is post marked January 5, 2000, which was not received until January 8, 2000 (copy attached).

(b) The beneficiary is in a high level position and manages essential functions (See Letter Attached as Exhibit A).

(c) There is an abundance of additional evidence, which petitioner is obtaining and requires additional time.

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 1989 and states that it is an affiliate of The Life Color Labs Company Ltd., located in Tainan City, Taiwan. The petitioner seeks to extend the employment of the beneficiary for a two-year period at a weekly salary of \$1,500.

At issue in this proceeding is whether the beneficiary has been and will be employed 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.

In his decision, the director noted that as the U.S. entity's only employee, the beneficiary primarily performed its operational duties.

On motion, counsel submits a letter from a law firm dated January 21, 2000, indicating that the petitioner is involved in two litigation matters in Florida. The letter also indicates that the beneficiary "is the President and sole Director of that Florida corporation known as Central Florida Development Group, Inc. ("CFDG")."

As noted in this office's previous decision, when seeking classification of an alien as a manager based on managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function. The record must demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing nonqualifying duties. The petitioner has not submitted evidence to demonstrate that it utilizes contract workers to perform its operational duties, nor has the petitioner submitted evidence to demonstrate whether such positions are under the direct control of the beneficiary, or are under the direction of another company utilized by the petitioner. The record does not reflect that the beneficiary functions or will function at a senior level within an organizational hierarchy. The petitioner has not overcome this portion of the Associate Commissioner's objections.

It is noted that the record as presently constituted contains no evidence that the beneficiary is employed in the U.S. on a temporary basis or that the U.S. and foreign entities are doing business. Counsel has submitted no evidence on motion to address these additional issues. The petitioner, therefore, has not overcome these additional portions of the Associate Commissioner's objections.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The decision of the Associate Commissioner dated December 22, 1999, is affirmed.