



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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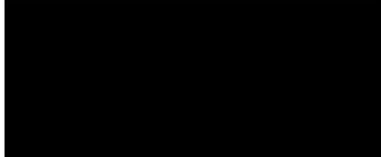


File: LIN 00 097 53054 Office: NEBRASKA SERVICE CENTER Date: 15 NOV 2001

IN RE: Petitioner: [Redacted]
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:



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. Weimann, 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 is described as an importer of jewelry and diamonds for resale in the United States. The petitioner seeks to employ the beneficiary in the United States as its president. The director determined that the petitioner had failed to demonstrate that the beneficiary has been functioning and will continue to function in a primarily managerial or executive capacity.

On appeal, the petitioner disagrees with the director's determination and states that the beneficiary is performing primarily in an executive and managerial 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, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The United States petitioner was incorporated in April of 1996 and is 90 percent owned by Pink Stars Diamond Exporters and Importers, Inc., an Indian corporation. The petitioner declared two employees and a gross income of approximately \$1,358,467 for the year of 1999. The petitioner seeks to continue the employment of the beneficiary as its president.

The issue in this proceeding is whether the petitioner has established that the beneficiary 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:

The term "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:

The term "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

iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the February 11, 2000 petition, the petitioner described the beneficiary's job duties as follows:

The focus of the [beneficiary's] present position has been on the development of business relationships with buyers and sellers of diamonds in the U.S., negotiating on behalf of petitioner, ordering and arranging for the shipment of diamonds from India, and ensuring the collection of payments from customers. This includes attending conventions for the diamond industry and meeting with prospective customers referred by business associates. [The beneficiary] is responsible for managing direct and indirect exports by the company to the U.S. and all contacts with buyers. [The beneficiary] is responsible for promoting petitioner's diamond and jewelry business in the U.S. and ensuring customer satisfaction.

On March 22, 2000 the director requested that the petitioner provide an organizational chart for both the petitioner and the foreign entity, including a detailed description of the beneficiary's position in both organizations and the name, positional title and duties of each of the beneficiary's immediate subordinates. In addition, the director requested a description of the beneficiary's day-to-day tasks and the percentage of weekly hours expended on each task. Finally, the director requested information about the beneficiary's day-to-day tasks that had been performed for the foreign corporation and the percentage of weekly hours spent on each task.

In reply, the petitioner submitted the organizational charts requested. The petitioner also noted that a clerical worker was no longer employed and that temporary workers performed the clerical duties on an as needed basis. The petitioner also indicated that an accountant had been employed. A brief description of the accountant's job duties was also provided. The petitioner included a description of job duties of two employees located in India whom it claimed the beneficiary supervised. Finally, the petitioner provided a breakdown of the beneficiary's job duties and percentage of time spent on the job duties. The petitioner noted that the beneficiary spent 35 to 40 percent of his time managing customer relations, 35 to 40 percent of his time on duties relating to the receipt and processing of orders from customers in the United States and 20 to 30 percent of his time on duties relating to the operations of Pink Stars USA.

The director determined that the information provided by the petitioner was insufficient to show that the beneficiary would be employed in a managerial or executive capacity. The director also found that the beneficiary had not been employed in a position that was primarily executive or managerial in nature, in any of the three years immediately preceding the beneficiary's entry into the United States.

On appeal, counsel asserts that the beneficiary as the president of the petitioner oversees and directs the company's operations and manages an essential function of the petitioner and thus is

acting in a managerial and executive capacity. Counsel further asserts that the Service failed to give meaningful consideration to the stage of development of the petitioner and the reasonable needs of a jewelry and diamond wholesaling company in making its determination. Finally, counsel maintains that the beneficiary managed an essential function of the foreign company or served the foreign company in a specialized knowledge capacity prior to entering the United States.

The record does not support the assertion that the principal duties of the beneficiary are executive and managerial in nature. The record reflects that the beneficiary is primarily performing the necessary tasks to sell diamonds and jewelry. Counsel's assertion that an accountant and two individuals employed in India are performing the necessary operational functions of the petitioner thereby leaving the beneficiary free from performing non-qualifying duties is not persuasive. As noted by the director, the documentary evidence indicates that the accountant is a part-time employee at best. The record fails to demonstrate that the accountant is doing more than assisting in the filing of tax documents. The record does not support a finding that the accountant contributes to the performance of tasks that relieve the beneficiary from non-managerial day-to-day operations. The record also does not support that the two individuals located in India contribute to the day-to-day operation of the petitioner. The exact status of these two individuals is also confusing. The petitioner indicates that the two individuals are employed by the petitioner on the provided organizational chart but then identifies only the accountant and the beneficiary as its employees. On review, the record as constituted does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization or managing an essential function of the petitioner.

Counsel refers to an unpublished decision to support the claim that the beneficiary is managing an essential function of the petitioner. However, the record does not provide detailed information that demonstrates the facts of the instant petition are analogous to those in the unpublished decision. Counsel instead has recited the language used in the unpublished decision to conclude that the beneficiary is managing an essential function without providing distinct detail. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

On review, the record demonstrates that the beneficiary is primarily performing the function of the petitioning organization as opposed to primarily directing, or managing the function through the work of others. The record as constituted does not substantiate that the beneficiary's duties are the duties of one who functions or will function at a senior level within an organizational hierarchy other than in position title.

Counsel correctly 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 in nature, rather than relying only on staffing levels. However, 8 C.F.R. 214.2(l)(3)(v)(C) allows the United States entity one year within the date of approval of the petition to support an executive or managerial position. As counsel noted, the petitioner in this case had been in business for two and one-half years at the time of filing the petition. Accordingly, at the time the petitioner filed the petition, the petitioner is required to provide evidence that it can support an executive or managerial position. In the case at hand, the petitioner has not provided sufficient evidence to demonstrate that it can support such a position.

Finally, counsel's assertion that the position the beneficiary held abroad prior to entry into the United States was executive and managerial in nature, is not substantiated by the record. The record reveals that the beneficiary was primarily engaged in processing orders for diamonds. The beneficiary also engaged in contacting potential customers, collecting bills, purchasing diamonds and entertaining customers. The beneficiary was engaged in office management less than 10 percent of the time. Counsel's assertion that the beneficiary was employed abroad in a specialized knowledge position is also not supported by the record. Counsel asserts that the beneficiary had extensive knowledge about the company and that he was involved in all aspects of the parent company's business activities in international trade, including strategic planning and the development of business relationships with customers abroad. However, the assertions of counsel do not constitute evidence. Matter of Obaiqbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). The record does not substantiate the beneficiary was engaged in a specialized knowledge capacity or a managerial or executive capacity while employed by the foreign entity.

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.