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Immigration and Naturalization Service

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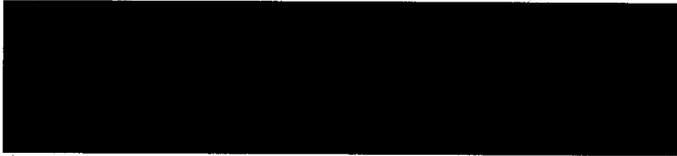


File: EAC 01 105 51239 Office: VERMONT SERVICE CENTER Date: 27 FEB 2002

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:



PUBLIC COPY

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, Director
Administrative Appeals Office

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

The petitioner is described as a wholesale distributor and importer/exporter of leather goods. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager. 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 asserts that the conclusion reached by the director was erroneous and expressed his intent to submit a brief.

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.

8 C.F.R. 214.2(1)(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 (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 incorporated in the year 2000 and states that it is a subsidiary of Indo-MAK, located in Calcutta, India. The petitioner declares that the beneficiary is one of three employees and that it generates \$920,000 in gross revenues. The initial petition was valid from March 1, 2000 until February 14, 2001. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily 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 support of the petition, counsel submitted a description of the duties of the beneficiary and the two employees he supervised. Counsel's description of the beneficiary's duties included the following:

The beneficiary is the Executive Manager who is responsible for directing and managing the overall administrative and financial operations of the company including developing and implementing marketing, sales and promotion policies, strategies, programs and goals. He is also responsible for handling all personnel decisions including hiring and termination. Further, he is engaged in developing, formulating, establishing, and implementing plans for long term growth. He has been vested with broad discretionary power and has very limited supervision from the overseas entity. In point of fact, Mr. [REDACTED] has been instrumental in regard [sic] to successfully launching the petitioner's operations within a relatively brief period of time.

The applicant also directly supervised a sales and marketing analyst and a "manager-export" [sic]. The duties of the former consisted in part of "handling orders, contacting customers and suppliers, making appointments" The duties of the latter

focused more on the international aspect of the petitioner's business and included "[negotiating] settlements between foreign and domestic shippers."

The Service concluded that the above descriptions were insufficient to support the conclusion that the beneficiary has been and will be primarily performing duties of managerial or executive capacity. Therefore, on March 1, 2001, the Service sent the petitioner a notice requesting that additional information be submitted, including evidence that the beneficiary has been and will be performing duties of managerial or executive capacity. Counsel submitted a written response describing the beneficiary's duties as "prima facie executive and managerial in nature." It is noted that a beneficiary cannot act in both an executive and managerial capacity. He is either one or the other. Counsel failed to make that distinction, and instead used those terms interchangeably. He divided the beneficiary's duties into two categories: general functions, which required 15 hours per week, and specialized functions, which required 25 hours per week. The general functions were described as follows:

Directs operations, personnel and administration functions (7hrs/week).

Actively participate in planning, approving, revising and implementing overall corporate growth strategies and personnel activities (5hrs/week).

Provides staff support services to operating groups in the areas of operations, distribution, personnel, and corporate office administrative services, and participate as a member of the Executive Committee in planning and controlling corporate growth and evaluating performance against objectives: Select, develop and motivate necessary management talent (3hrs/week).

The beneficiary's specialized functions were described as follows:

Directs and prepares financial analysis of operations for guidance of management. Plans and directs new operational procedures to obtain optimum efficiency and reduced costs. Establishes extensive line of credit: Directs receipt, disbursement, and expenditures [sic] of money or capital assets. Approves and signs documents effecting monetary transactions. Directs preparation of budgets and financial forecasts. (15hrs/week)

Estimates market values & conditions. Investigates market conditions and facilities to determine time, place, type of sales. Prepares advertising material and selects media for its release. Assigns and directs activities of sales personnel. Determines method of

display and sets prices of items to be sold in conformity with value and market. (10hrs/week)

Counsel claimed that the beneficiary has been managing a subordinate staff and "performs functions that are at a senior level with regards to the organizational hierarchy" However, the director denied the petition mainly concluding that the beneficiary has been and will be directly involved in the day-to-day financial and marketing operations of Elegance USA, Inc. The director further stated that, unlike a functional manager who manages an essential function within a company, the beneficiary has been performing and would continue to perform the duties of a financial and/or marketing analyst. The director also determined that the petitioner failed to submit information to explain the wage discrepancies between the petitioner's internally generated financial statements and federal tax return.

On appeal, counsel argued that the Service "relied on material that was not factual in making its decision." He did not, however, identify any factual mistake(s) or explain, with any specificity, his assertion that the director's "conclusion is not supported by the regulations and the definition of Executive." Although counsel indicated his intent to submit a brief within 30 days of the appeal, neither a brief nor any supplemental information has been submitted.

Furthermore, as concluded by the director, it does not appear that the beneficiary has been or will be managing a supervisory or professional staff. While the titles of both employees imply supervisory or professional roles and while their credentials may include bachelor degrees, these facts alone do not make the beneficiary's subordinate staff supervisory or professional if the duties they perform are not actually supervisory or professional in nature. In the instant case the sales and marketing analyst apparently carries out all customer service-related duties, and the export manager arranges the shipping details. While both employees carry out duties that are important to the petitioner's operations, such duties are not supervisory or professional. Thus, it cannot be concluded that the beneficiary supervises or controls the work of supervisory, professional, or managerial employees. Further, the petitioner has not specified exactly what is involved in "actively" participating in planning, approving, revising and implementing overall corporate growth strategies and personnel activities; preparing financial analysis; or estimating market values and conditions and investigating market conditions and facilities. However, it is clear that the beneficiary does not merely supervise while others perform these functions. Rather he is actively involved in executing these functions himself. The evidence of record indicates that the beneficiary participated in providing prices for customers, using different job titles, and that he signed shipping and sales documents. None of these tasks are managerial or executive, nor can a conclusion be made that the

beneficiary managers the performance of an essential function.

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 petitioner is a small trading company with three employees. The petitioner asserts that it is engaged in market research and general trading of leather goods on behalf of the foreign parent company. The record does not establish that the beneficiary has been or will be primarily managing the organization, or a department, subdivision, function, or component of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has submitted evidence which raises questions as to whether it is doing business as a corporation. Namely, instead of a corporate tax return, Form 1120, the beneficiary has filed a Form 1040 Schedule C indicating that Elegance USA, Inc. is a sole proprietorship owned by the beneficiary rather than by Indo-MAK, the foreign parent organization. Although the record contains a stock certificate indicating that the parent company owns 200 shares of the U.S. entity's stock, there is no information indicating the overall number of shares issued so that a determination can be made as to who has controlling interest in the U.S. entity. Thus, it cannot be concluded that a qualifying relationship exists between the foreign and U.S. entities pursuant to 8 C.F.R. 214.2(1)(1)(ii)(G).

In addition, the record remains void of any explanation as to why Schedule C of Form 1040 for the year 2000 does not indicate the amount of wages paid even though the petitioner's payroll break-down, and accompanying beneficiary's salary break-down, both specify salaries purportedly paid to the beneficiary and the two employees he claims to have supervised. Furthermore, though not addressed in the director's decision, Schedule C for the year 2000 also indicated that the petitioner grossed \$30,000, the amount claimed to have been the beneficiary's annual salary. Contrary to that figure, the beneficiary claimed only \$19,525 as his income for the year 2000 on his tax return for that year and petitioner's internal income and expense statement (submitted with Form I-129) for the year 2000 indicated that the total revenue for that year

was \$119,000, nearly four times the amount indicated on the Schedule C portion of the tax return. And a much higher figure of \$920,000 was given as the petitioner's gross annual income on the actual petition, Form I-129. There is no explanation, nor has petitioner even acknowledged the extremely wide discrepancy among those three figures. It is incumbent upon 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, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Id.

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.