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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



Identifying data exists to
prevent clearly unwarranted
invasion of personal privacy

File: EAC-99-128-52132

Office: Vermont Service Center

Date: JAN 03 2002

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:



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. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion. The motion will be granted. The decision of the Associate Commissioner for Examinations will be affirmed.

The petitioner engages in the business of importing textiles and garments. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserted that the beneficiary's duties are primarily administrative and executive in nature.

The Associate Commissioner dismissed the appeal reasoning that the evidence submitted by the petitioner had not shown that the beneficiary had been or would be employed in the United States in a primarily 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 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)(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 U.S. petitioner states that it was established in 1997 and that it is a wholly-owned subsidiary of [REDACTED], Inc. The petitioner declares five employees and a gross annual income of 1 million dollars (projected). It seeks to extend the petition's validity and the beneficiary's stay for three years at an unspecified annual salary.

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.

The Associate Commissioner addressed the petitioner's descriptions of the beneficiary's duties in the previous appellate decision. Those descriptions need not be repeated in this decision.

On motion, counsel argues that the beneficiary is currently employed in a managerial or executive capacity and that the petitioner has submitted sufficient documentation to establish the beneficiary's eligibility for the benefit sought.

Counsel states, in part that:

After the initial period of establishing Janki in the U.S., and at the request and petition of Janki, [the beneficiary's] nonimmigrant status was changed from that of a visitor to that of an intracompany transferee.

Janki's operations in the U.S. were dependent upon [the beneficiary's] guidance and managerial expertise...

The Immigration Service denied Janki's petition to grant [the beneficiary] an extension of his L-1A nonimmigrant visa classification as an intracompany transferee based upon its belief that [the beneficiary] has not been nor will be employed in a primarily managerial or executive capacity. Specifically, the Immigration Service states that it has based the denial of [the beneficiary's] visa extension on the fact that we had elected not to provide

the Service with a complete position description and hourly breakdown for all of the employees of the U.S. office, that it seems that our company's executives and managers have been providing the goods and services to our customers, and that the size of the U.S. office has not grown to a point where services of an individual primarily engaged as an executive or manager would be required.

To the contrary, Janki has fully satisfied the requirements for L-1A classification...

Counsel asserts that "Janki, through its submissions, has provided voluminous evidence to counter the INS factually baseless assertions". Counsel submits a copy of Janki Overseas, Inc.'s "Financial Statements as of December 31, 1999."

The record reflects that, on appeal, counsel submitted an "original" letter describing the specific job duties of the beneficiary and his subordinate employees as well as a breakdown of hours spent performing specific job tasks on a weekly basis, an "original Organizational Chart," an "original Financial Statement" as of June 30, 1999, "photocopies of all of the company's sales invoices from January through of 1999" and "original" letters from U.S. business partners as well as photocopies of previously submitted evidence. However, this "original" evidence was requested on April 6, 1999, and may not be considered in this proceeding. Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

A petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the petition is filed. 8 CFR 103.2(b)(12).

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. The petitioner has not sustained that burden.

ORDER: The decision of the Associate Commissioner for Examinations dated April 10, 2000, is affirmed.