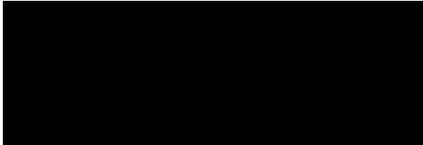


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U.S. Department of Homeland Security
Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, DC 20536



DEC 12 2003

File: SRC 00 075 51410 Office: TEXAS SERVICE CENTER Date:

ON 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)

ON BEHALF OF PETITIONER:



Identifying data deleted to
prevent disclosure of information
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decision of the AAO will be affirmed.

The petitioner is an import/export company that seeks to continue to employ the beneficiary temporarily in the United States as a marketing and business development executive. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, previous counsel argued that the director erred in interpreting the law and the facts surrounding the petition. Counsel contended that the beneficiary had been and would be employed in a primarily managerial or executive capacity. Counsel stated that when the number of subordinates employed is used in determining eligibility, whether the beneficiary manages a major component or function of an organization and any reasonable needs associated thereto must be taken into consideration.

The AAO affirmed the director's determination that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On motion, counsel acknowledges that the beneficiary does not physically supervise any employees. Counsel states that he does, however, provide the parent business in India with business leads, and works up business presentations to be made to potential customers, and does so through workers in India. Counsel further states that these employees are supervised in the sense that the beneficiary provides them with specific jobs and duties to perform so that a full presentation can be made to potential U.S. customers. Counsel indicates that these presentations may come from India directly, or may be made by the beneficiary here in the United States. Counsel argues that this case should not have been decided on the basis of either managerial capacity or specialized knowledge, but solely on the basis of executive capacity.

The petitioner's description of the beneficiary's projected job duties are fully described in the latest AAO decision dated April 15, 2002 and will not be repeated here. On motion, counsel provided the following information concerning the duties of the beneficiary.

This is what the beneficiary does on a daily basis: he wakes up in the morning and goes to an office in Melbourne, Florida. Using a number of methods and means, including the Internet, information available from the U.S. Department of Commerce, from State agencies, Chambers of Commerce and the like, he

identifies, on a location by location basis (such as State by State or metropolitan area by metropolitan area) potential customers in the many, many industries which might have need for the bellows manufactured by the parent company in India. At times, initial contact with such potential customers (is) made by the beneficiary; at other times direction is given by the beneficiary in the United States to a subordinate staff member in India to make the initial contact, typically by e-mail. E-Mail can be sent to a potential customer in the United States from India as well as it can be from Melbourne, Florida.

Counsel's assertions concerning the executive nature of the beneficiary's future duties are not persuasive. The petitioner's description of the beneficiary's proposed job duties in the United States is not sufficient to warrant a finding of managerial or executive capabilities. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec.533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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).

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 decision of the AAO dated April 15, 2002 is affirmed.