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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: SRC 01 215 50463 Office: TEXAS SERVICE CENTER Date: FEB 11 2003

IN RE: Petitioner: [redacted]
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 [redacted]

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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 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Acting Director, Texas Service Center. The matter is now before the Administrative Appeals Office ("AAO")on appeal. The appeal will be dismissed.

The petitioner is engaged in the distribution of plastic, aluminum and metal products. It seeks to continue to employ the beneficiary temporarily in the United States as its general manager for a three year period. The acting director determined that the petitioner had not established that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel states that the beneficiary assumed the duties as general manager of Cosmo International, Inc. in November 2000. Counsel further states that prior to the commencement of his employment in the U.S. operation, the beneficiary had undertaken the process of hiring a replacement for his position at the parent company in India. Counsel indicates that the beneficiary remained on the payroll at the parent company in India until the end of October 2000 and was put on the payroll at the U.S. company in November 2000 and has remained on it since that date. Counsel argues that these facts clearly demonstrate that the U.S. company has supported an executive or managerial position within one year of the approval of the initial petition.

Counsel indicates that during the initial months of operation, the beneficiary hired outside independent contractors and agents to perform functions such as accounting, document preparation, and logistics. Counsel cites Matter of Irish Dairy Board, Inc. Counsel states that on July 1, 2001, after six months of doing business with independent contractors and appointed agents, the beneficiary hired a logistics manager. Counsel states that this person was hired to take over logistics functions for the import and export of materials, including shipments, clearance of customs, tax approvals, and preparation of bills of lading. Counsel indicates that the firm is currently interviewing to fill an administrative manager position.

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(l)(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 (l)(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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in the United States 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.

On appeal, the petitioner's president describes the beneficiary's proposed job duties as follows:

> Manages the overall operation of Cosmo International, Inc.; supervises and controls the work of Logistics Manager and Administrative Manager; hires, trains, motivates and fires personnel; exercises the discretion over day-to-day operations such as approval of expenses, selection of suppliers and granting of the time off to the employees; directs the logistics, sales, finance and administration functions of the company; establishes a business philosophy consistent with the company's short-term and long term objectives; exercises discretionary decision making based on market conditions, currency exchange rates, customs regulations and tax laws in various countries; receives only general direction from higher executive level by reporting directly to the company president.

The petitioner was incorporated on December 11, 1997. On July 3, 2001, the date the visa petition was filed, the firm employed two persons. The beneficiary and a logistics manager who had been recently hired.

Counsel refers to an unpublished decision involving an employee of the Irish Dairy Board. In the Irish Dairy Board case, it was held that the beneficiary met the requirement of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee of the petitioning organization. However, counsel has furnished no evidence to establish that the facts of the instant case are in any way analogous to those in the Irish Dairy Board case. Simply going on record without supporting documents is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

In this case, the description of the beneficiary's job duties is

insufficient to warrant a finding that the beneficiary has been or will be employed in a primarily managerial or executive capacity. At the time of filing, the beneficiary was essentially operating the corporation as its sole employee. It appears that the beneficiary has been and will be performing operational rather than managerial duties. The petitioner has provided insufficient evidence to establish that the beneficiary has been or will be managing or directing the management of a function, department, subdivision or component of the company.

Based upon the record, the petitioner has provided insufficient evidence to establish that the beneficiary has been or will be managing a subordinate staff of professional, managerial or supervisory personnel who relieve him from performing non-qualifying duties. It appears the beneficiary is the individual performing the necessary tasks for the ongoing operation of the company, rather than primarily directing or managing those functions through the work of others. Consequently, the petitioner has not demonstrated that the beneficiary has been or will be employed in the United States in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

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.