



U.S. Department of Justice

Immigration and Naturalization Service

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



JAN 8 2008

File: SRC 01 120 52745 Office: TEXAS SERVICE CENTER Date:

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: [Redacted]

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

Megan L. Rosenberg
for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner sells food, gasoline and household products on a retail basis. It seeks to employ the beneficiary in the United States as a vice president and general manager. The director determined that the petitioner had not provided evidence that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel states that the corporate objective of Platinum Marketing's shareholders and directors is to become one of the leading chains of retail stores by investing primarily in retail gas stations and convenience stores throughout the nation. Counsel indicates that the beneficiary will be employed at the highest position within the U.S. company and will supervise other managers who run the day-to-day operations of the retail gas stations. Counsel submits documents to show that the petitioner will acquire 51% of the shares of a corporation named Silver Jubilee, Inc. as soon as Mr. Dharamshi's visa petition is approved.

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.

8 C.F.R. 214.2(1)(1)(ii), in part, states:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. 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 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.

For the purposes of this proceeding, the beneficiary must have been eligible for the benefit sought at the time of the filing of the petition. Therefore, although the petitioner's potential

acquisition of Silver Jubilee, Inc. is of interest, the fact of a potential transaction does not compel approval of this petition. The petitioner was established in 1994. At the time of filing on March 8, 2001, the firm employed two persons and had a gross annual income of \$108,220 earned through the operation of the Austin Food Store.

The petitioner describes the beneficiary's prospective job duties in the United States as follows:

- (i) Identifying, recruiting, and building a management team and staff with background and experience in the U.S. market (40%);
- (ii) Hiring appropriate personnel and leasing equipment and retail distribution facilities (10%);
- (iii) Negotiating and supervising the drafting of purchase agreements (10%);
- (iv) Overseeing the legal and financial due diligence process and resolving any related issues (5%);
- (v) Developing trade and consumer market strategies based on guidelines formulated by Platinum Marketing (20%); and
- (vi) Developing and implementing plans to ensure Platinum Group's profitable operation (20%).

Counsel's assertions concerning the managerial and executive nature of the beneficiary's future duties are not persuasive. The petitioner's descriptions of the beneficiary's proposed job duties are not sufficient to warrant a finding of managerial or executive duties. 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). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Only two persons were employed by the corporation at the time of filing. Based upon the record, even if the two employees are working on a full-time basis, the petitioner has not provided evidence that the beneficiary will be managing a subordinate staff of professional, managerial or supervisory personnel who relieve him from performing non-qualifying duties. It appears that the beneficiary is performing the necessary tasks for the ongoing operation of the company, rather than primarily directing or managing those functions through the work of others.

The petitioner has provided no persuasive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing or directing the management of a function, department, subdivision or component of the company. The petitioner has not shown that the beneficiary will be functioning at a qualifying senior level within an organizational hierarchy. For these reasons, the petition may not be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that the beneficiary has been employed in a qualifying managerial or executive capacity abroad. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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.