

**Identifying data deleted to
prevent identity unwarranted
invasion of personal privacy**

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

D1

PUBLIC COPY

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



MAR 02 2006

File: EAC 02 066 52804 Office: VERMONT 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:



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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a manufacturer and distributor of home furnishings and handicrafts. It seeks to continue to employ the beneficiary temporarily in the United States as its president for a period of three years. 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 states that additional evidence is being submitted to establish the nature and prospects of the petitioner's business. Counsel further states that on appeal, the petitioner is submitting a comprehensive description of the beneficiary's proposed job duties that clearly establishes the executive nature of his position as president of the firm.

The petitioner was incorporated in the State of New York on May 31, 2000. The petitioner filed its petition on December 11, 2001. Since the petitioner had been doing business for more than one year at the time the visa petition was filed, it shall not be considered under the regulations covering the start-up of a new business.

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.

The issue to be addressed 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

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated December 6, 2001, the beneficiary describes his duties in the United States as follows:

As President and Chief Executive of Heritage, I also direct the activities of Avni's support staff working in India to fulfill American orders. I direct our export manager in arranging and scheduling shipments and arranging customs clearance for shipments to America and our production manager in organizing the contract manufacturing of special orders for our American customers. I also consult with our designers on trends in styles in the United States to make sure that they will be designing marketable merchandise. These duties are essentially the same as the duties I exercised in India before transferring to the United

States last year. I have been the main marketing and sales executive in our enterprise since 1997.

On appeal, counsel supplements the beneficiary's duties previously outlined for the record as follows:

Direct the overall management and operation functions of India's Heritage, Inc.:

- The development of the company's marketing strategies for the import/export and distribution of home furnishing products in the United States and overseas market, based on the knowledge of parent company's policies, nature of the market, costs and mark up factors;
- Overall supervision of the company's management staff, including the marketing and sales department to gain information and coordinate with the surveys conducted by the Purchasing and Sales Managers about the new trends and recent products in order to provide authorization to the Web Designer and Marketing Executive publicizing marketing activities to promote the company's products, thus enhancing the sales;
- Coordinate with the office General Manager to oversee the overall operations and management transactions of the company.

Develop various business policies and render effective business for the U.S. venture which comprises the following:

- Meet the consumers to negotiate sales contracts proposed by the Marketing Executive in accordance with the information provided Sales Representatives to determine the priorities, confer with the cost factors; and determine the time factor and financial status of the contracts;
- Innovate new marketing strategies in accordance with the recent market conditions (as surveyed by the Sales Coordinator) to facilitate the imports to enable efficient distribution channels to reach consumers in the specific market;
- Coordinate with the Office General Manager to administer the overall operations of the company, and preside over the receipt of payments and export consignments to ensure compliance with the U.S. Tax and Custom laws;
- Direct and allot managerial responsibilities to the Office General Manager pertaining to the packing procedures, inspection of packed or crated goods for conformance to shipping specifications

to avoid damage, delay or penalties, and watch over the discussions of the General Manager with the shipping brokers concerning import/export papers, docking facilities, packing and marking procedures, filing of claims, etc.

Implement wide latitude in discretionary decision-making, which includes:

- Hire individuals in different qualifying positions as per the business criterion;
- Upgrade positions and assign the desired job title in accordance with the level of responsibility handled by the individuals;
- Release non-essential positions;
- Coordinate with the Marketing Executive and Sales Coordinator to finalize sales contracts proposed by them for corporate and individual clients;
- Create the salary and benefit packages for the company's staff;
- Administer the annual operating budget.

Obtain direction from the Parent Organization pertaining to the overseas manufacturing, recent product trends, availability of the products, etc. and revise the company's corporate policy to implement the same in the foreign organization in order to maintain specific work goals and corporate objectives to ensure smooth business operations and steady growth of the company.

The record reveals that at the time of filing the petition, the petitioner employed three persons: the beneficiary, a sales manager and an accounts manager. The record also indicates that the petitioner utilized the services of nine sales representatives from three companies on a commission basis. The petitioner's U.S. Corporation Income Tax Return for the firm's tax year ending April 30, 2001 shows that the company had gross receipts or sales of \$126,788 and total income of \$47,374. The firm paid no salary and wages and only \$3,000 in officer compensation during that tax year.

The record reveals that subsequent to the date the petition was filed, the petitioner restructured the organization by adding and discharging employees and changing the roles of the individual positions. These changes do not enhance the beneficiary's eligibility for this classification. In this case, the petitioner must establish eligibility at the time of filing; See 8 C.F.R. § 103.2(b)(12); Matter of Izummi, 22 I&N Dec. 169 (AAO 1998).

The record does not clearly show that the petitioner had any staff that would relieve the beneficiary from performing non-

qualifying 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). Consequently, 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.