

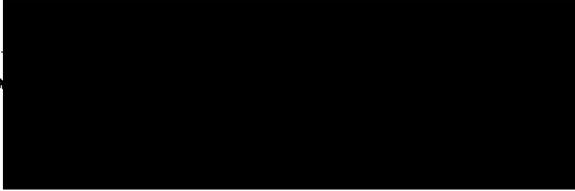


U.S. Department of Justice

Immigration and Naturalization Service

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



File: LIN-98-105-50236

Office: Nebraska Service Center

Date:

JAN 11 2000

IN RE: Petitioner:
Beneficiary:

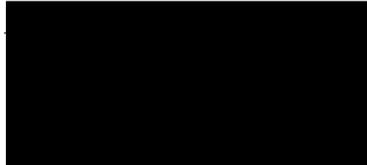


Public Copy

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)

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER:



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

Terrance M. O'Reilly, Director
Administrative Appeals Office

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

The petitioner, a retail, international trade and real estate development business, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its vice president/chief financial officer. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel submits a brief in rebuttal to the director's findings.

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(l)(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 (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(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 United States petitioner was established in 1994 and states that it is a majority-owned subsidiary of Good Smart Development

Co., Ltd., located in Hong Kong. The petitioner seeks to extend the employment of the beneficiary for a two-year period at an annual salary of \$20,000.

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.

In his decision, the director noted that the evidence demonstrated that the beneficiary was operating a small, oriental grocery store which showed a \$20,000 loss on its 1997 tax return. The director concluded that the beneficiary's position would primarily be that of a shopkeeper attempting to make a small living.

On appeal, counsel submits three invoices/sales contracts, one of which was dated after the filing date of the petition for an extension, and an amended tax form reflecting corrections on the 1997 tax return. Counsel argues that the beneficiary oversees and directs three direct employees, as well as a number of outside individuals such as an accountant, several bankers, a law firm to handle bookkeeping/accounting matters, financial transactions, and general corporate, litigation, and regulatory-compliance matters. Counsel further argues that the U.S. entity's operational tasks are not performed by the beneficiary, but rather by his subordinate employees, independent contractors, and other entities with which the U.S. entity conducts its business. Counsel describes the beneficiary's duties (which are identical to the president's duties) as follows:

...establishing corporate policies and procedures;

evaluating and integrating market research and financial data into short- and long-term corporate financial goals;

establishing corporate guidelines in hiring, terminating, disciplining and compensating employees;

maintaining Highland-US as the liaison office of [REDACTED] in Hong Kong;

developing and maintaining business relationships;

negotiating and executing contracts and leases;

overseeing, reconciling and negotiating quality control problems.

The record indicates that the petitioner was incorporated on December 30, 1994, and the present petition was filed on March 2, 1998. The record further indicates that the U.S. entity has the following five employees: the president; the vice president; an administrative assistant/secretary; and two sales associates. Although counsel argues that the U.S. entity did not actively conduct business until mid-1997, the U.S. entity's president stated in his letter dated June 10, 1998, that the U.S. entity commenced "substantive business operations" in March 1997, upon the arrival of the president and vice president. 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 for an extension. Service regulations require a new office to demonstrate viability after the initial one-year period. 8 C.F.R. 214.2(l)(14)(ii).

Counsel cites an unpublished AAU decision, which has no precedential effect in this proceeding. See 8 C.F.R. 103.3(c). Counsel states that the beneficiary oversees an accountant, several bankers, and a law firm, and argues that the utilization of these services should be construed as the use of contracting services akin to that discussed in the unpublished decision. However, the record does not persuasively establish that these outside positions are under the direct control of the beneficiary. Rather, the record indicates that they are under the direction of other companies and merely utilized by the U.S. entity. It has also not been shown that the level of the petitioner's business activities warrants comparison with the business in the decision cited by counsel. In the present case, the U.S. entity submitted tax records reflecting a negative income of \$20,000, while the gross profits of the U.S. entity in the decision cited by counsel was \$40 million. This does not compare to the level of business activities which the executive mentioned in the decision cited was required to oversee.

In the aforementioned letter from the U.S. entity's president, the duties of the beneficiary's subordinate employees are as follows:

Administrative Assistant/Secretary...Mr. [REDACTED] has been and will continue to be responsible for the day-to-day business activities of the company, including the following: assisting the President and Vice President with correspondence; collecting accounts receivable, paying accounts payable, bookkeeping, typing, photocopying, and attending to other administrative and operational details.

Sales Associate...Mr. [REDACTED] has been and will continue to be responsible for retail sales and clerking, including store opening/closing, cash in/cash out registers, general clean-up, replenishing shelves, bins, and racks, and minor bookkeeping.

Sales Associate...Mr [REDACTED] has been and will continue to be responsible for retail sales and clerking, including store opening/closing, cash in/cash out registers, general clean-up, replenishing shelves, bins, and racks, and minor bookkeeping.

The duties reflected above indicate that the two sales associates primarily perform the duties of cashiers/clerks, and the administrative/secretary primarily performs secretarial duties. As such, the record demonstrates that the beneficiary is primarily a first-line supervisor over nonprofessional employees. The evidence does not establish that the U.S. entity contains the organizational complexity to warrant the executive services of a president and vice president. Further, the duties described for the beneficiary such as maintaining Highland-US as the liaison office of GoodSmart-HK in Hong Kong, developing and maintaining business relationships, and overseeing, reconciling and negotiating quality control problems, are too general to convey any understanding of exactly what the beneficiary's actual daily activities have been and will be. It is also noted that as the same description of duties is reflected for the U.S. company's president, its reliability and sufficiency is questioned. When seeking classification of an alien as a manager based on managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function. The record does not reflect that the beneficiary functions or will function at a senior level within an organizational hierarchy. For this reason, the petition may not be approved.

Beyond the decision of the director, the record contains insufficient evidence to demonstrate that the U.S. entity is engaged in the regular, systematic, and continuous provision of goods and/or services. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

In visa petition proceedings, the burden of proof 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.