U.S. Department of Justice

Immigration and Naturalization Service

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

D7

[redacted]

File: SRC 98 106 52919 Office: Texas Service Center Date: JAN 18 2001

IN RE: Petitioner:
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)

Public Copy

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion to reopen and reconsider. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is a company engaged in retail sales and the repair of computers and related products. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. 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, that the U.S. and foreign entities are doing business, or that a qualifying relationship exists between the U.S. and foreign entities.

On appeal, counsel argued that the beneficiary is employed in a primarily managerial or executive capacity, that the U.S. and foreign entities are doing business, and that there is a qualifying relationship between the U.S. and foreign entities.

The Associate Commissioner dismissed the appeal reasoning that the evidence submitted by the petitioner had not shown that the beneficiary would be employed in a primarily managerial or executive capacity, that a qualifying relationship between the U.S. and foreign entities had not been established, or that the U.S. and foreign entities had been doing business. The Associate Commissioner also noted, beyond the decision of the director, that the record did not demonstrate that the beneficiary's employment in the United States will be temporary.

On motion, counsel submits additional information in rebuttal to the director's and Associate Commissioner'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.

The United States petitioner was established in 1997 and states that it is an affiliate of [redacted] located in Pakistan. The petitioner declares four employees and a gross annual income of approximately $323,703. The petitioner seeks to extend the employment of the beneficiary for a three-year period at an annual salary of $25,000.

The first issue in this proceeding is whether the beneficiary has been employed abroad and 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:

> "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.

As already discussed extensively by the director and the Associate Commissioner, the record indicates that as of the filing date of the petition, the U.S. entity had two employees, the beneficiary as president and a vice president of marketing. In light of its organizational hierarchy at the time of the filing of the petition, the U.S. entity does not contain the organizational complexity to support a second managerial/executive position. Although counsel now argues that the U.S. entity has hired three salespersons, Title 8 C.F.R. 103.2(b)(12) states that an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

On motion, counsel quotes the job description of president from the Dictionary of Occupational Titles and states that:

> It is, of course, recognized that these are "general" job descriptions of "executive capacity", "managerial capacity", and "President" and it is certainly proper for the Service to request more details of the duties of the beneficiary. However, it should be noted that the general job description for [the beneficiary's] job as President as stated by the petitioner (and recited in the dismissal of the appeal) is entirely consistent with the statutory definitions of "managerial capacity" and "executive capacity" and with the definition of "President" formulated by the U.S. Department of Labor.

On motion, the vice president of the petitioning entity describes the beneficiary's executive and managerial duties as well as the duties of the three salespersons as follows:

> EXECUTIVE DUTIES:
>
> As Director/President (he is also Secretary and Treasurer), [the beneficiary] has directed and continues to direct the management of the organization. He has recruited and hired some top people in the computer field (see below). He also has overall responsibility to direct a major component or function of the organization, i.e. Marketing. Marketing was the primary task for the company as it started up. [The beneficiary] immediately hired a V.P. for Marketing - Mr. [redacted] who holds a

Master's Degree. Now having successfully marketed its services, the primary goal of the company has shifted to that of forming affiliations with companies providing services complimentary to those provided by [redacted], Inc.

One of his most recent achievements has been to form an alliance with 2 Infinity.com, a large high-tech company (please see attached letter from [redacted] Chief Technology Officer.

He has established the goals and policies of the organization as well as the Marketing function. Since [the beneficiary] is the sole stockholder in this company, and in the affiliated foreign entity, he establishes all goals of both organizations with, of course, input from his professional staff, contract workers, clients, attorneys and certified public accountants. He reports to no higher authority.

[The beneficiary] exercises widest possible latitude in discretionary decision-making and indicated by the fact that he reports to no higher authority. There are no limits to his discretion.

He is not supervised by any person with the U.S. company or the foreign entity. He also has authority to hire and fire for the entire U.S. company as well as for the affiliated foreign entity, although he often delegates this duty to subordinates. There are no limits to his authority.

[redacted] - V.P. MARKETING

Worked directly under the President who also directed the Marketing function in February, 1998. The President identified possible markets for the goods and services of Alvi, Inc. He also approved the design and pricing of goods and services to offer to different markets. The V.P. Marketing then would call on the potential clients and present the packages and designs of goods and services to them.

[redacted] - SALES

Assisted the V.P. for Marketing in following-up on contacts he had made with specific potential clients. Interfaced with the potential clients to modify designs and packages to meet their needs.

[redacted] - SALES

> Assisted the President in designing packages of goods and services to offer to potential clients and also in designing custom packages tailored to individual client's needs. As a holder of a PhD degree, she is well-qualified for this position.
>
> [redacted] - SALES
>
> Was primarily in charge of implementation of the software and hardware packages purchased by clients. Troubleshooting and modifying templates to meet the client's needs. Handled inside sales.

The record does not sufficiently establish that the beneficiary functions or will function at a senior level within an organizational hierarchy other than in position title. There is no comprehensive description of the beneficiary's duties that persuasively demonstrates that the beneficiary has been and will be performing in a primarily managerial or executive capacity. The record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary has been and will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the foreign and petitioning entities are doing business.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

> *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The record contains sufficient evidence such as invoices, purchase contracts and orders, sales contracts, bank statements, and balance sheets to demonstrate that the U.S. and foreign companies are engaged in the regular, systematic, and continuous provision of goods and/or services. Therefore, the petitioner has overcome this portion of the director's objections.

The last issue in this proceeding is whether a qualifying relationship exists between the U.S. and foreign entities.

8 C.F.R. 214.2(l)(1)(ii)(G) states:

> Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(l)(1)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(l)(1)(ii)(J) states:

Branch means an operating division or office of the same organization housed in a different location.

8 C.F.R. 214.2(l)(1)(ii)(K) states:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns directly or indirectly, less than half of the entity, but in fact controls the entity.

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

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In his decision, the Associate Commissioner concluded that:

> The petitioner claims that the U.S. and foreign entities are wholly-owned by the beneficiary. The petitioner submitted a September 1991 token of payment from the government of Pakistan indicating that the owner/managing partner of the foreign entity is [the beneficiary]. The petitioner also submitted articles of incorporation showing that it had incorporated in the state of Texas in January of 1997, and share certificate number one showing that the beneficiary owns 1,000 shares of the U.S. entity's stock. The share certificate does not indicate the state in which the shares were issued, or how many shares were authorized.

On motion, counsel resubmits the articles of incorporation for [redacted], Inc., a copy of the stock certificate, and a stock transfer ledger. The petitioner has provided no additional evidence to sufficiently establish that there is a qualifying relationship between the U.S. and foreign entities. For this additional reason, the petition may not be approved.

Finally, counsel, on motion, did not address the Associate Commissioner's finding that the petitioner submitted insufficient evidence to demonstrate that the beneficiary's employment in the United States would be temporary. Consequently, the petitioner has not overcome this portion of the Associate Commissioner's objection.

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 decision of the Associate Commissioner dated June 15, 2000, is affirmed.