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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC 00 284 51173 Office: VERMONT SERVICE CENTER Date: 27 FEB 2002

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)

IN BEHALF OF PETITIONER: [redacted]

PUBLIC COPY

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a limited liability company engaged in retail sales. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its vice 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.

On appeal, counsel asserts that the INS erred in its denial of the petition and argues that the beneficiary was primarily acting in the capacity of an executive.

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 U.S. petitioner states that it was established in 1999 and that it is an affiliate of Kailashpati Steel Traders, located in Ahmedabad, India. The petitioner declares two employees and $750,000 in gross revenues. The initial petition was approved and was valid from November 17, 1998 to September 30, 1999, in order to open a new office. The petitioner subsequently obtained extensions of the petition's validity and the beneficiary's authorized stay until October 1, 2000. The petitioner now seeks to extend the petition's validity and the beneficiary's stay for an additional three years at an annual salary of $55,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a 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
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> 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-
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> i. directs the management of the organization or a major component or function of the organization;
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> 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 support of the petition, the petitioner submitted, in part, a letter explaining that due to a lack of success with the initial business venture, the petitioner underwent a change, within eight months of its inception, from corporate status in the state of California to status as a limited liability company (LLC) in the state of Connecticut. The following description of the beneficiary's duties was given:

> Directing and coordinating the activities of the U.S. Corporation. Will formulate and administer organization policies; Participate in formulating and administering company policies and developing long range goals and objectives; Direct and coordinate activities of department or division for which responsibility is delegated to further attainment of goals and objectives. Will review analysis of activities, cost operation and forecast data to determine department or division progress toward stated goals and objectives. Confer with Chief administrative officers and other administrative personnel to review achievements and discuss required changes in goals and objectives for the 1-year as requested.

The petitioner also submitted a number of tax returns regarding both the corporation initially set up in California and the LLC which replaced the corporation in January 2000, as well as certificates pertaining to the beneficiary's membership in the LLC, and a filing form recognizing the petitioner as an LLC established with Connecticut's Secretary of State in September 1999 for the purpose of conducting its business as a retail liquor store. It is noted that the petitioner's tax returns for the first and second quarters in the year 2000 identify the beneficiary as its only employee.

In a notice dated November 20, 2000 the Service requested additional information, partially in regards to the beneficiary's employment duties, in order to determine whether the beneficiary would be primarily acting in a managerial or executive capacity. In response to that request the petitioner submitted another description of the beneficiary's duties stating that the beneficiary will be responsible for the following:

> . . . formulating and administering company policies and developing long-range goals and objectives for further investments. He also oversees the operations of the

business properties, makes financial decisions, and assists in the human resources functions.

According to a chart of the petitioner's work force, the beneficiary's subordinates include one manager with a high school education and seven years of experience managing a small business, and two part-time sales people both of whom are college students working towards their respective degrees. In a subsequent breakdown of duties, the petitioner added that the beneficiary "is also involved in negotiating and purchasing other investments within the United States" and that the manager is responsible for overseeing operations (presumably of the liquor store), supervising the sales staff and controlling the inventory.

The director subsequently concluded that the petitioner did not submit sufficient evidence to establish that the beneficiary would be acting primarily in the capacity of manager or executive and further stated that based on the duties performed by the beneficiary's subordinates it cannot be said that the beneficiary managed individuals who are professional, supervisory, or managerial.

On appeal, counsel asserts that the beneficiary has been acting in an executive, rather than a managerial, capacity and therefore the petitioner need not demonstrate that the beneficiary supervised professionals. Counsel then outlined the beneficiary's duties under each of the four prongs that define executive capacity (listed on pages four and five of this discussion). In regards to the second prong, establishing the goals and policies, the petitioner claims that the beneficiary fulfills this requirement by planning the management strategy, exploring new business ventures, formulating and administering "organization policies," planning the petitioner's overall direction, and establishing the long and short term goals. These descriptions, while lengthy and seemingly complex, are broad and do not in any way identify what the beneficiary actually does on a day-to-day basis. Furthermore, in the petitioner's response to the Service's request for additional information, the petitioner specified that among the beneficiary's duties, he "assists in the human resources functions." While it is unclear what the beneficiary actually does in executing this function, it can be concluded that by virtue of assisting, the beneficiary was actually performing rather than overseeing or managing this function. The petitioner claims that the beneficiary negotiates new investments, and negotiates and finalizes all agreements, thereby demonstrating wide latitude in discretionary decision making, prong three in establishing executive capacity. Again, by virtue of actively taking part in a variety of negotiations the beneficiary performs rather than oversees the performance of the petitioner's main function, thereby going beyond the scope of what is considered managerial or executive capacity.

In the appellate brief counsel drew on the distinction between a

manager and executive, claiming that the beneficiary qualifies as an executive rather than a manager. On review, counsel's argument is not persuasive. The beneficiary's two positions involve operating small business ventures such as a liquor store and, more recently, a restaurant. Both businesses involve supervising store managers. The petitioner has not established that the beneficiary's duties have been or will be primarily directing the management of a business organization, in contrast to primarily producing its product or performing its services. A first-line supervisor is not considered to be acting in a managerial capacity. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner has not argued in the alternate that the beneficiary qualifies as the manager of an essential function within the organization, or that he functions at a senior level in an organizational hierarchy. Counsel's additional statements which simply paraphrase the statutory definitions of managerial and executive are not sufficient to meet the burden of proof. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this additional reason, the petition may not be approved.

Beyond the director's decision, the evidence submitted does not establish that a qualifying relationship exists between the petitioner and the foreign entity. In the Service's correspondence of November 20, 2000, the petitioner was asked to provide additional information to establish the existence of a qualifying relationship with a foreign organization.

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:
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> (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 operation 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
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> (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.

The petitioner's response to the Service's request for additional information included a membership interest transfer ledger which indicates that the beneficiary owns 60% of the petitioning firm, while his partner owns 40% of that entity. The petitioner indicated in the original petition that the qualifying relationship between it and its foreign counterpart was that of an affiliate. Since there is no claim that the foreign corporation owns any part of the LLC formed in the U.S., the petitioner is left with the burden of establishing that it and its claimed affiliate are both owned by the same individuals with similar controlling interests. In the instant case, this burden was not met. While the beneficiary himself owns similar controlling interests in both the U.S. and foreign entities, the partnership agreement regarding the foreign entity indicates that it is owned by three, rather than two, individuals and that neither of those individuals is the same as the beneficiary's partner in the U.S. entity.

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.