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U.S. Department of Justice

Immigration and Naturalization Service

identification 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: WAC-99-206-51795 Office: California Service Center Date: 8 MAR 2002

IN RE: Petitioner: [redacted]
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)

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

Myra L. Rosenberg

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petition indicates that the petitioning entity is engaged in the import, export, sales and marketing of polyurethane leather products and related business. On appeal, counsel states that the petitioner is actually engaged in the importation of leather. Counsel also states that the beneficiary's prior periods of stay in L-1 classification are from December 3, 1996 until present.

The Petition for a Nonimmigrant Worker (Form I-129) was filed on July 20, 1999. The petition indicates that the beneficiary was authorized to remain in the United States until August 16, 1999. Counsel states that the petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president, as the beneficiary had been promoted in August 1998. The petition indicates that the dates of intended employment are for an additional two years. The director determined that the petitioner had not established that the beneficiary would continue to be employed primarily in a managerial or executive capacity.

On appeal, counsel states that the utter incompetence of the previous law office resulted in incorrect information being given to the Service. Counsel asserts that the corrected information is included in the brief and accompanying exhibits.

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 issue in this proceeding is whether the beneficiary will continue to 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-
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> > 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.

The petitioning entity's 1998 California Corporation Franchise or Income Tax Return shows its date of incorporation as April 25, 1996. The petitioner seeks to extend the employment of the beneficiary for a two-year period at an annual salary of $48,000.

Counsel explains on appeal that the description of duties and proposed duties were wrong because the previous law office never inquired if the beneficiary held the same position. In his letter dated February 23, 2000, counsel states that the beneficiary is the only management level personnel employed by the company. Counsel goes on to state that the beneficiary is the only person responsible for hiring and firing personnel, developing and directing the business, giving the employees their work assignments and for entering into contracts. Counsel asserts that when the petitioning entity first opened its office and had only three employees, they sub-contracted the manufacturing to Best Vinyl & Fabrics and other companies.

In 1997, the record indicates that [redacted] was the president of the petitioning entity and that the beneficiary held the position of vice president. The petitioning entity's 1997 U.S. Corporate Income Tax Return shows that $40,000 was paid out as compensation to [redacted] who counsel claims did not work for the petitioner in 1999 or 2000, and $81,000 was paid out in salaries and wages. The beneficiary's 1997 Wage and Tax Statement shows that $54,000 was paid to him during that tax year.

The petitioning entity's 1998 U.S. Corporate Income Tax Return shows that there was no compensation paid out to officers and $82,600 was paid out in salaries and wages. The record, as it is presently constituted, does not contain evidence of who received the salaries and wages shown on the petitioning entity's 1997 and 1998 tax returns. Further, the record does not contain evidence of the beneficiary being paid for his services in the 1998 tax year.

Upon review of the record, the petitioner has not presented convincing evidence to show that the beneficiary will continue to be employed in a managerial or executive capacity and that subcontractors were hired to perform the services of the company. There is no evidence to establish that the petitioner employs a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing the day-to-day functions of the petitioning entity. The responsibilities of the beneficiary demonstrate that the position is supervisory in nature, not managerial. Both the Act and the Service regulations state that 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)(A)(iv).

In conclusion, the petitioner's description of the beneficiary's duties and asserted staff have not demonstrated that the beneficiary functions or will function at a senior level within the organizational hierarchy other than in position title. The description of the beneficiary's duties do not demonstrate that the beneficiary will be managing or directing the management of a

department, subdivision, function, or component of the petitioning organization. Based on the evidence submitted, it cannot be found that the beneficiary will continue to be employed primarily in an executive or managerial capacity. For this reason, the petition may not be approved.

Another issue in this proceeding, not raised by the director, is whether a qualifying relationship exists between the United States and foreign entity. The petition indicates that the foreign entity, [redacted] Chemical Company, Ltd. has 60% and [redacted] others have 40% of common stocks issued. The record as it is presently constituted does not contain evidence of such ownership. As this matter will be dismissed on the grounds discussed, these issues 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.