D7

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: EAC-98-068-53294 Office: Vermont Service Center Date: MAY 03 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: This is a motion to reconsider the Associate Commissioner for Examination's decision dismissing the appeal of the denial of the nonimmigrant visa petition. The motion to reconsider will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is engaged in the wholesale and distribution of fitness and weight equipment. Information contained in the record shows that the beneficiary was granted L-1 classification from January 31, 1997 until January 30, 1998. The beneficiary's I-94 Departure Record indicates that the beneficiary was admitted to the United States as an L-1 intracompany transferee on December 23, 1997 until January 30, 1998. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president for two years. The director determined that the petitioner had not established that the beneficiary has been and will continue to be employed in the United States primarily in a managerial or executive capacity. The director's decision was affirmed by the Associate Commissioner for Examinations on appeal.

In the present motion, counsel states that the Administrative Appeals office overlooked the additional evidence submitted that explained the duties of the beneficiary.

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 regulations at 8 C.F.R. 214.2(l)(14)(ii) state 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.

At issue in this proceeding is whether the beneficiary has been and will continue to be employed in the United States 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

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 1997 U.S. Corporation Income Tax Return shows its date of incorporation as October 24, 1996. The petition indicates that it is a wholly-owned subsidiary of Hong Kong Heng Shan Company, Ltd., located in Wanchai, Hong Kong. The petitioner seeks to extend the employment of the beneficiary for a two-year period at an annual salary of $36,000.

The petition extension which was filed on January 5, 1998 was initially approved. Upon further review, the director determined that the beneficiary was not clearly eligible for the benefit sought. After properly serving the petitioner with notice of his intent to revoke approval of the petition, the approval of the petition was revoked. A subsequent appeal has also been dismissed.

Upon review of the record, the petitioning entity's organizational chart shows that the beneficiary's subordinate staff consists of a vice president and operations manager, sales manager, market research analyst, import coordinator, accountant and sales assistant. The actual duties of these employees as described in the letters dated December 31, 1997, and December 9, 1999, demonstrate that the managers are actually performing the services of the organization as opposed to performing as subordinate managers.

On motion, counsel has not submitted any additional evidence which demonstrates that the beneficiary has been and will continue to be employed in a primarily managerial or executive capacity. There is no sufficient evidence to establish that the petitioner employs a subordinate staff of professional, managerial or supervisory personnel in the United States who relieve the beneficiary from

performing nonqualifying duties. For this reason, the petition may not be approved.

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 January 18, 2001 is affirmed. The petition is denied.