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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



FEB 11 2003

File: EAC 01 190 51933 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
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 that 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 that 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 that 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
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 Administrative Appeals Office ("AAO") on appeal. The appeal will be dismissed.

The petitioner is primarily engaged in cell phone sales. It seeks to extend its employment of the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner had not provided evidence that the beneficiary had been or would be employed in the United States in a managerial or executive capacity.

On appeal, counsel states that the director erred in adjudicating this petition.

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.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been or 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:

The term "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:

The term "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
- iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The record shows that the primary business activity of the petitioner was the sale of telecommunications products, but that the company was in the process of expanding and shifting the nature of its business activity to the import and sale of fine Indian rugs. Counsel submits documentation including contracts showing the firm is engaged in the sale of carpets as well as telecommunications equipment.

In a letter dated September 24, 2001, counsel for the petitioner described the beneficiary's proposed job duties as chief executive officer as follows:

- Executive and managerial oversight of day-to-day operations
- Negotiation of all client agency agreements
- Signature of all client agency agreements
- Negotiation of all purchase agreements for goods with suppliers
- Negotiation of all legal matters, on behalf of the company
- Recruitment and discharge of labor

- Corporate training of lesser managerial subordinates
- Development of marketing and distribution plans
- Development of daily, weekly, and monthly financial reports
- Distribution and authorization of employee payroll
- Establishment of long and short term company objectives
- Acting as the sole point of contact linking the parent organization in India to the US subsidiary
- Establishment and revision of corporate policy
- Solidification of corporate image
- Registration and establishment of company operations and formalities
- Design, development, and revision of employee handbook/company viewbook

Counsel argues that Rug by Design is a well-established and successful business venture with an annual revenue of \$750,000, a figure greater than that of most American companies. Counsel argues that the company meets all requirements for extension and remains a qualifying organization. Counsel argues that by stating that Rug by Design is too small a company for the beneficiary to possibly function in an executive capacity, the Service has demonstrated an unjust bias and prejudice against smaller, developing companies. Counsel indicates the director should have looked to the structure, nature, success and extent of business activity in order to decide this question but instead, the director denied Mr. Puri his due process rights on the grounds that the company employs only 3 individuals. Counsel indicates that the number of employees is not an appropriate marker against which to gage whether or not the beneficiary functions in an executive capacity.

Counsel argues that the Service should not adjudicate a petition based on the size of the petitioning company. Counsel states that the reviewing officer's quickness to discredit Mr. Puri's occupation as non-executive in nature based solely upon the size of the business establishment is a dangerously discriminatory practice, illustrative of this Service's bias against smaller more intimate establishments. Counsel further states that small wholesale locations such as convenience stores, telecommunications outlets, and town delicatessens, have no less a right to exist and employ qualified individuals than do large, corporate entities. Counsel also cites *Young China Daily v. Chappel*, 742 F. Supp. 552 (N.D. Cal. 1989) as standing for the proposition that INS should not adjudicate a petition on the basis of the company's size.

This case is easily distinguished from the above cited case, as the petitioner was seeking to employ a graphic artist as a person of distinguished merit and ability and not a manager or executive. Also, *Young China Daily* was a Chinese language newspaper that served the Chinese community of the entire State of California

with a circulation of 23,000 readers. In the newspaper's case, the court found that the size of the enterprise could be a factor when considering the question of the need of the newspaper for a full-time graphic artist. In this case, the size of the petitioner's operation is relevant because the number of employees and scope of the operation are factors that are relevant in determining whether a beneficiary will actually be performing managerial or executive duties in the context of the future operation of the entity. It is noted that although the number of employees of Young China Daily is not specified in the Court's decision, a daily Chinese newspaper serving 23,000 readers throughout the State of California is a large firm when compared to the petitioning enterprise.

The petitioning entity was incorporated on November 5, 1999. On May 29, 2001, the date the visa petition was filed, the petitioning corporation had a staff of three persons including the beneficiary. Devender Sing is listed as being second in command to the beneficiary and manages the business and staffing operations of the company in the beneficiary's absence. Devender Sing's assistant is Rimpool Sing who performed clerical duties for the firm. The petitioner's profit and loss statement shows that the firm had gross receipts of \$410,911 from sales in 2000, and a gross profit of \$65,738. The firm paid only \$22,144 in salary and wages for the entire year and showed a net income of \$21,825 for that period.

Counsel's assertions concerning the managerial and executive nature of the beneficiary's future duties are not persuasive. The petitioner's descriptions of the beneficiary's proposed job duties are not sufficient to warrant a finding of managerial or executive duties. It is noted that the assertions of counsel do not constitute evidence. Matter of Obaiqbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

It appears that the beneficiary would be performing the necessary operations of the petitioner. The petitioner has provided no in-depth description of the beneficiary's duties that would demonstrate that the beneficiary will be managing or directing the management of a function, department, subdivision or component of the company. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy. For this reason, the petition may not be approved.

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.