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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.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 01 144 51330 Office: VERMONT SERVICE CENTER Date: FEB 27 2003

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 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

for Myra L. Rosenberg

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. Subsequently, a motion to reopen was filed with the director. The director granted the motion to reopen, and found that the grounds of denial had not been overcome. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as an international diamond and jewelry-trading firm. The record indicates that the beneficiary originally was granted L-1 classification as a manager or executive. Currently, the petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States in the capacity of a manager or executive, namely as its president and chief of its New York City office. The director determined that the petitioner had not established that the beneficiary would be employed in a qualifying managerial or executive capacity. On motion, the director found that the grounds for his denial had not been overcome.

On appeal, counsel presents a brief and additional documentation.

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 his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and seeks to enter the United States temporarily to continue to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

To obtain an extension of a visa petition's validity, 8 C.F.R. § 214.2(l)(4)(i) states, in pertinent part:

> *Individual petition.* The petitioner shall file a petition extension on From I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

The issue in this proceeding is whether the beneficiary will be employed 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.

The Form I-129, Petition for a Nonimmigrant Worker, for an

extension, was filed on March 30, 2001. The petitioner has indicated that the beneficiary will be paid $35,000.00 per year. The last petition for extension was approved and valid for one year through March 31, 2001.

The articles of incorporation indicate that the petitioner was established in the State of New York on June 11, 1999. At the time that the petitioner filed the initial petition upon which this extension is based, the petitioner was considered a "new office." Therefore, the following provisions at 8 C.F.R. § 214.2(l) (14)(ii) also shall apply:

> *New offices.* 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)(iii)(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.

The petition indicates that the petitioner employs two individuals in the United States. On review, the director found that counsel and the petitioner later indicated that there were three employees in addition to the beneficiary, then four. In a letter dated July 11, 2001, counsel stated that the beneficiary did not begin to develop the business until after his arrival in the United States in L-1 status.

On motion, counsel stated that the petitioner's staff has now increased and that the business continues with the beneficiary serving in a managerial role in an "international organization." The petitioner also has submitted numerous receipts, invoices, tax returns, and other miscellaneous documents.

A letter from an accountant dated October 16, 2001, indicates that the petitioner employs a total of five employees, including the beneficiary. Occupations are listed as president, general manager, sales representative, secretary, and diamond selector/grader. An organizational chart depicting this same assertion is also included in the record. In this depiction, the beneficiary is listed as second-line management to the marketing and sales representative, the diamond selector/grader and the secretary. The petitioner also includes the position descriptions of all positions. The duties of the beneficiary are indicated as:

> 1) He takes full responsibility to manage and operate the day to day activities of Nilprakash Diamonds Inc [sic] on a daily basis by managing the office through the help of General Manager & Sub-ordinate Staff.
> 2) He defines goals and develops marketing strategy for improvement of the business in the precious stone trade i.e. to create a niche in the industry, make the long term [sic] and short-term goals as to how to reach a certain level of business.
> 3) He will hire, select and supervise market & Sales related employees, through his General Manager, by coordinating their activities & giving instructions.
> 4) He follows the market trend in the Precious Stone industry by attending the various exhibitions, reading manuals and survey reports of the industry so as to be one up on our competitors.
> 5) He also coordinates with the principal in Bombay, India and assess [sic] them of our business in the United States, the amount of business turnover on a monthly basis, the orders that had been procured, the amount of risk involved, the profit margin in a particular transactions [sic], etc.

In letters dated March 23 and July 10, 2001, the beneficiary (who is also the petitioner's representative) indicates his duties for the petitioner:

> I continue to survey and study the markets for our products, confer with major customers and potential customers on their requirements as to quality, size and cost of goods, plan and direct the selection of goods for sales presentation and direct the fulfillment of orders. I set and revise prices based on my knowledge of our costs and market demand. I also establish fulfillment schedules. I have met with and retained the services of customhouse brokers and reviewed and assessed their work for us. I also work with our

> manufacturing manager in India, to meet U.S. market demand.

Simply 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).

The beneficiary states that it was decided to expand sales in the United States and that his office is the sales, marketing and distribution facility for the foreign entity's special lines in the United States. The beneficiary also states that in addition to establishing the company, finding the appropriate business premises, and obtaining the services of accountants, lawyers, and customs brokers, he has continued with general export, sales, and marketing management duties for the foreign entity. The beneficiary states that he directs all steps of the ordering process through final delivery to customers. The beneficiary indicates that his role is crucial to the petitioner's continuing success in the United States, and that he has been responsible for an increase in sales. He indicates that staff has increased and that the general manager, who is in charge of all routine office work, now assists him. The beneficiary states that he also continues to play the leading role in the foreign entity's organization as its chief executive, reviewing and approving the work of subordinate managers in India and relying on them as support staff in production and fulfillment of orders for the United States entity.

In a request for additional evidence, the director requested a complete copy of Form 941, Employer's Quarterly Tax Return, for the first quarter(s) of calendar 2001. The director also stated:

> The Service notes that you have indicated on your petition that the United States organization employs two workers. However, the 2000 tax return for the U.S. entity shows that wages of only $4,000 were paid to workers other than the $24,108.00 that was paid to the beneficiary. Therefore, it does not appear that the U.S. organization employs any workers other than the beneficiary on a full-time basis and that the beneficiary has been relieved from performing non-managerial duties.

Additional evidence was furnished in response to the director's decision. In a letter dated September 28, 2001, the foreign entity's representative reiterates previous statements made by the beneficiary. The representative also indicates that the petitioner now employs a total of five individuals with three reporting to an individual subordinate to the beneficiary. Other statements submitted mirror the language in these attestations.

The petitioner's unsigned Form 941, Employer's Quarterly Federal Tax Return, indicates that the petitioner employed a total of five individuals during the quarters ending September 30, 2001 and December 31, 2001, with four employees during the second quarter of 2001, and a total of only three employees during the first quarter. The petitioner's pay records indicate that the diamond selector/grader was not employed until July 31, 2001, with the secretary not hired until April 30, 2001.

The petition for the extension was filed on March 30, 2001. Therefore, this evidence cannot be considered, as a petitioner must establish eligibility at the time of filing. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The organizational chart of the foreign entity indicates that the beneficiary is also the general manager and export manager of the foreign entity, reporting only to the owner. In that role, he, in turn, oversees the actions of the purchasing and manufacturing manager, the fulfillment manager, and the chief accountant, who each supervise one to three individuals. The petitioner also submits a translation of a listing of the foreign entity's employees dated May 24, 2001.

On appeal, counsel states that the Service continues to ignore the explanation of the beneficiary's role in the petitioner's "international operations," and that the beneficiary also has directed the 15 regular and 40-50 contract employees of the foreign entity throughout this time. Counsel states that the beneficiary is relieved of the basic duties of production and service by the staff in the foreign country, as well as by the staff in the United States. Counsel also states that while the foreign entity currently employs a "Chief Operating Officer" in charge of the day-to-day activities, the organization remains under the beneficiary's general direction. Counsel states that the beneficiary relies on the support of the foreign entity's marketing manager, export supervisor, and chief operating officer for the organization and production of goods for the American market. Counsel also asserts: "All of these supervisory and professional level workers are under the direction of the beneficiary."

The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1990). Further, for purposes of this petition, the assertion that the beneficiary continues in a managerial or executive role with the foreign entity does not support a finding of qualification as a manager or executive in the United States.

The petitioner has provided insufficient evidence to demonstrate

that the beneficiary's duties will be primarily managerial or executive in nature. A manager or executive may manage or direct the management of a function of an organization. However, it must be clearly demonstrated that the function is not directly performed by the manager or executive. The petitioner has not established that the beneficiary functions at a senior level within an organizational hierarchy. The petitioner has not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The petitioner has not established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing the services of the corporation. The evidence in the record does not demonstrate that the beneficiary will be involved in something other than performing the day-to-day functions and operational activities of the company. Upon review, it cannot be found that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the documentation contained within the record raises the question of whether a qualifying relationship exists between the United States entity and the foreign entity. The Articles of Incorporation indicate that only 200 shares of the petitioner's stock were to be sold. The petitioner has submitted a stock certificate to indicate that these 200 shares of stock were sold to the foreign entity [Dipak Gems] on January 31, 2000. However, Schedule J of Form 1120, U.S. Corporation Income Tax Return, for 2000 and 2001, indicates that only 80 percent of the petitioner's stock is owned by a foreign person and that there are two shareholders. This is in contradiction with other assertions made in establishing the qualifying relationship between the foreign entity and the petitioner through the petitioner's statements and evidence that 100 percent of the petitioner is owned by only the foreign entity. No other documentation of ownership, stock ledgers, or proof of purchase of the petitioner's stock is included in the record. The discrepancies noted call into question the petitioner's ability to document the requirements under the statute and regulations. Doubt cast on any aspect of the evidence as submitted may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582. (Comm. 1988).

It also is noted that the petitioner's lease for space is for "one room" of undesignated proportions to be used for "Wholesale Diamond business only." Another lease for two "rooms" indicates that these are to be used for "jewelry repairs." It is not clear

from the evidence presented whether the petitioner has obtained space appropriate to the business endeavor. As the appeal 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.