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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: SRC-01-257-53979 Office: Texas Service Center Date: MAY 29 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)

ON BEHALF OF PETITIONER:

[redacted]

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 Bureau of Citizenship and Immigration Services (Bureau) 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 Myra L. Rosenberg
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Acting Director, Texas Service Center, and is now before the Administrative Appeals Office. The appeal will be dismissed.

The petitioner is a restaurant operation. It seeks to employ the beneficiary temporarily in the United States as its general manager. The acting director determined that the petitioner had not established that the beneficiary had been or would be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel submits a brief and additional evidence in rebuttal to the acting director's findings.

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 United States petitioner was established in 1997 and states that it is a subsidiary of Railway Catering Service, located in Kumbakonam, India. The petitioner claims four employees and seeks to employ the beneficiary for a three year period at an annual salary of $40,000.

At issue in this proceeding is whether the beneficiary has been and 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 petitioner described the beneficiary's duties, in pertinent part, as follows:

Basic information about the proposed employment and employer.

non-technical description:

Direct and coordinate activities of the organization and formulate and administer company policies: In consultation with the management and the Indian Company develop long range goals and objectives of the company. Be responsible for corporate planning, general administration, marketing-sales and purchasing activities for the subsidiary. Direct and coordinate activities of

> managers and employees in the production, operations, purchasing and marketing departments for which responsibility is delegated to further attainment of goals and objectives. Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. Discuss with management and employees to review [sic] achievements and discuss required changes in goals or objectives of the company.

In other documentation, the petitioner described the beneficiary's "proposed duties in the US," as follows:

> Confer with the Indian Company and develop long range goals and objectives of the US Company. Direct and coordinate activities of the organization and formulate and administer company policies: Direct and coordinate activities relating to purchasing, production, operations and sales for which responsibility is delegated and targeted to further attainment of goals and objectives. Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. Discuss with employees to [sic] review achievements and discuss required changes in goals or objectives of the company.

In response to the Bureau's request of October 18, 2001, for additional evidence, in a letter dated January 10, 2002, counsel for the petitioner stated, in pertinent part, that:

> The beneficiary will hold the position of a **General Manager** in the United States Corporation. As General Manager he will perform the following duties:
>
> Direct and coordinate activities of the organization and formulate and administer company policies: In consultation with the management of the Indian Company develop long range goals and objectives of the company. Be responsible for corporate planning, general administration, marketing-sales, and purchasing activities for the subsidiary. Direct and coordinate activities of managers and employees in the production, operations, purchasing and marketing departments for which responsibility is delegated to further attainment of goals and objectives. Discuss with management and employees to review [sic] achievements and discuss required changes in goals or objectives of the company.

The petitioner did not provide job titles or position descriptions for the purported four employees of the United States entity claimed initially on the Form I-129 petition.

In denying the petition, the acting director stated, in pertinent part, that:

> The record does not demonstrate that the beneficiary is employed in a primarily managerial or executive capacity. The regulations defining qualifying organizations specifically exclude the mere presence of an agent or office of the organization. In addition, as the sole employee, his primary assignment cannot be supervising a subordinate staff of professional, managerial or supervisory personnel.

On appeal, counsel restates the aforementioned description of the beneficiary's United States duties. Counsel further states, in pertinent part, that:

> The nature of the above mentioned duties are such that they can only be performed by a person who reports to higher level executives such as the President and Vice President. The beneficiary will be responsible for policy making, which is an "executive" function. We also submit that the Service should not be deciding on the managerial of executive capacity of the beneficiary merely on the basis of the number of employees that the individual supervises or has supervised. The Service states that the petitioner's facility has only four employees. We submit that the introduction of sophisticated automation and computer technologies has eliminated the need for middle management. Due to the ease with which information and communication flows between different layers of personnel in the organizational hierarchy in recent times, small businesses no longer require middle management or supervisory level of personnel. Hence fewer employees than before can now perform the required work.
>
> We have established that the beneficiary will primarily perform managerial duties such as directing the present and future activities of the organization and supervising and controlling the work of other employees. The beneficiary will also have the authority to hire and fire employees or recommend those as well as other personnel actions (such as promotion or leave authorization) and exercise discretionary authority over day to day operations. Accordingly, the position offered to the beneficiary satisfies the "managerial capacity" criteria.
>
> Second, the beneficiary's proposed duties are also "executive" in nature. He will be primarily responsible for directing the management of the organization, consulting with the Indian company to develop and establish the goals and the policies of the organization

> and he will be exercising discretionary decision-making powers. In addition, he will report only to the President of the corporation. Hence, the position offered to the beneficiary satisfies the "executive' criteria as well.

Subsequently, counsel submits a supplemental brief in which he asserts that the beneficiary can "exercise discretion over the day-to-day operations of the activity or function for which the employee has authority."

Counsel further asserts, in pertinent part, that:

> If staffing levels are considered, they should be considered in relation to the needs of the business and the **stage of development** (emphasis added). We submit that the Service did not consider the fact that the parent company has made a new acquisition and that the beneficiary will actually be functioning as a new Executive/Manager for the US company. In addition to his supervisory duties, the beneficiary will perform and manage the organization. We therefore submit that by virtue of heading a newly acquired business, the beneficiary will be performing and managing various executive and managerial functions.

Counsel's statement that the U.S. entity is a "new Acquisition" and therefore would not have subordinate employees at this juncture is contradicted by counsel's letter dated August 20, 2001, in which counsel stated that "Krishna Restaurant, Inc. has been in operation since 1997 and is therefore an already functioning business." Counsel's argument that the beneficiary is functioning as an executive is not corroborated by the record of proceedings.

When seeking classification of an alien as a manager based on managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function. The record must demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing nonqualifying duties. Evidence in the record indicates that the beneficiary will be the only management employee who will be negotiating and executing business contracts in order to achieve the U.S. company's goals. The petitioner has not persuasively established that it will employ a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing nonqualifying duties. Although the petitioner claims to have four other employees, it has not provided a comprehensive description of their duties. Rather, counsel has stated that due to

computerization, this level of middle management, necessary for the beneficiary to qualify as a manager/executive, has been eliminated. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. 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.