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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

File: EAC 00 127 52243 Office: Vermont Service Center Date: APR 2 3 2001

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]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

Mym L. Rosenberg
for Robert P. Wiemann, Acting Director
Administrative Appeals Office

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

The petitioner, a company that imports and sells leather goods, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel argues that the record demonstrates that the beneficiary is employed in a primarily managerial or executive capacity.

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.

8 C.F.R. 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
>
> (ii) Evidence that the alien will be employed in an executive, a managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
>
> (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition
>
> (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies

him/her to perform the intended services in the United States.

The U.S. petitioner states that it was established in 1997 and that it is a wholly-owned subsidiary of Wenzhou Huafu Trade Co., Ltd., located in China. The petitioner declares eight employees and a gross annual income of over $500,000. It seeks authorization to employ the beneficiary for two years at an annual salary of $30,000.

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 describes the beneficiary's duties as follows:

-managing the overall operations of the company;

-setting up corporate strategies and business goals in import/wholesale/retail;

-controlling its financial affairs, making policy decisions and trading goals in connection therewith;

-hiring, reviewing performance of and terminating the services of employees; reviewing financial, and operational reports;

- conferring with company officials including those at the parent company regarding the international operations of the corporate network of the parent company;

-negotiating with business partners on behalf of the company; conferring with outside legal, accounting and other professionals;

-reporting to the Board of Directors regarding the operations of the company; and

-providing guidance and direction to the professional staff in the international operations of the parent company and resolving any business problems that the company may encounter.

The petitioner submitted an organizational chart showing the following employees as of February of 2000:

President: [redacted]
Sales Assistant: [redacted]
Secretary: [redacted]
Sales Assistant: [redacted]
Warehouse Clerk: [redacted]
Sales Assistant: [redacted]
Sales Assistant: [redacted]
Manager: Bangyou [redacted]

In a letter dated April 3, 2000, the Service requested that the petitioner respond to the following:

> Submit additional evidence to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity in the United States firm.
>
> Submit a complete position description for all of your current employees in the United States, including one of the beneficiary's position. Submit a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.
>
> Submit a copy of your form 941, Employer's Quarterly Tax Return, for the first quarter of 2000, to include the page that lists your employees by name.
>
> It is noted that you have employed the services of a customs broker. If the company has used contractors rather than employees to perform any other functions, submit evidence documenting the number of contractors utilized, the wages paid and the duties performed.

In response, the beneficiary's duties were further described as follows:

> Ms. Xia has been primarily engaged in managerial and executive capacities and has not been engaged in clerical or non-managerial/executive duties. She has been preoccupied with demanding job duties in mailing tough managerial and executive decisions in wholesale, retail and import. Her job duties are typical of a chief executive officer of a company whose business, management and personnel structure is being built upon from [the] ground-up, particularly a business that involve[s] import, wholesale as well as retail. As such[, an] extremely high level of managerial/executive expertise, and highest level of discretionary authority is demanded of Ms. Xia.

The petitioner also submits the following description of the beneficiary's duties:

President [redacted]

* * *

Ms. [redacted] has been and will be responsible for leading the management of the business operations and managing the overall business, financial, personnel and legal aspects of the business operations of the company. As such, Ms. Xia's responsibilities are extremely crucial and demanding including:

Approximately 30% of her working hours or 12 hours each week: setting up corporate strategies and business goals for business operations of the new company; analyzing and forecasting marketing trend and demand in leather products, including men's and women's wears [sic], bags, etc.; making policy decisions and trading goals in connection therewith; reviewing and managing financial affairs, and operational reports; formulating, planning and allocating operations budget; reporting to the parent company regarding the operations of [the] us [sic] subsidiary.

Approximately 20% of her working hours, or approximately 8 hours each week; supervising the management and personnel structure for the new company; hiring, reviewing performance of and terminating the services of employees (Please take note that this area of the beneficiary's job duties could take up more time, particularly in the very early and expansion stage of the operations). Enforcing compliance of operation with Federal and State regulations, disability benefits, worker's compensation, safety procedures and corporation policies.

Approximately 15% of her working hours, or approximately 6 hours each week: conferring with senior company officials including those at the parent company in China regarding the international business development and international operations and expansion of the corporate network of the parent company.

Approximately 30% of her working hours, or 12 hours each week: contracting, negotiating and/or approving major transactions with business partners on behalf of the company; handling banking transactions; conferring with outside legal, accounting and other professionals regarding the operation of the company.

> Approximately 10% of her working hours, or 4 hours each week: resolving any other management and business problems that the company may encounter.

The petitioner also submitted a description of its other employees' duties.

The director denied the petition, noting that "the majority of your support personnel are either employed part-time or earn less than the minimum wage specified by law" and that the petitioner employs aliens without employment authorization from the Service.

On appeal, counsel argues that the Service should approve the instant extension petition because the Service approved the initial petition, the organization has adhered to its original proposal, and "[w]hat was then sufficient is now sufficient." The director's decision does not indicate whether the file relating to the beneficiary's initial petition was reviewed. Copies of the initial L-1A nonimmigrant visa petition and supporting documentation are not contained in the record of proceeding. Therefore, it is not clear whether the beneficiary was eligible for L-1A classification at the time of the original approval, or if the approval of the L-1A nonimmigrant classification involved an error in adjudication. However, if the previous nonimmigrant petition was approved based on the same position descriptions that are contained in this nonimmigrant petition, the approval would constitute clear and gross error on the part of the Service. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. *See e.g.*, Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988); *Matter of Church of Scientology Int'l.*, 19 I&N Dec. 593, 597 (BIA 1988).

Counsel further argues that the beneficiary is employed in a primarily managerial or executive capacity, that she also "directs outside legal and financial professionals in dealing with executive functions of financial and legal issues," including legal planning, financial reporting, financial analysis, budgeting, banking transactions, and accounting. Counsel states that while some of the permanent staff may be part-time, none are paid at a rate below the minimum wage, and all are authorized to work.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. Although the petitioner's descriptions are lengthy, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as managing the overall operations of the company; setting up corporate strategies and business goals; controlling financial affairs; making policy decisions and trading goals; hiring and terminating employees;

negotiating with business partners; conferring with outside legal, accounting, and other professionals; analyzing and forecasting market trends and demands in leather products; and conferring with senior company officials, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as enforcing compliance of operation with federal and sate regulations, disability benefits, worker's compensation, and safety procedures, have not been demonstrated to be managerial or executive in nature. It is noted that the breakdown of the beneficiary's duties inaccurately adds up to "105%" of her workload. The use of the position title of "president" is not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. 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.

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties. Although the petitioner claims it employs outside legal and financial professionals, it has failed to state how many or to provide a comprehensive description of their duties and the number of hours devoted to these duties on a weekly basis.

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.

Beyond the decision of the director, the petitioner has not established that the foreign entity is doing business or that there is a qualifying relationship between the U.S. and foreign entities. The petitioner claims to be a wholly-owned subsidiary of [redacted] Corporation and has submitted several wire transfer statements showing that it received funds from the foreign entity. It is noted that the statements were not written on the bank's letterhead, are unsigned, and contain no information that would identify them as having been generated by a banking institution. Further, the U.S. entity's account number, as provided on the wire transfer statements, is incorrect on at least one of the statements. Further, on at least two of the statements, the petitioner is stated to be located at [redacted] in Brooklyn, New York; however, this is actually the home address of

the petitioner's business manager. Doubt cast on any aspect of the petitioner's proof 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, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

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.