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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



Public Copy

FILE: EAC-97-214-51872

OFFICE: Vermont Service Center

DATE: AUG 6 2001

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 USC 1101(a)(15)(L)

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

IN BEHALF OF PETITIONER:



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 decision, 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

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was originally approved by the Director, Vermont Service Center. Upon further review, the director determined that the beneficiary was not clearly eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of his intent to revoke approval of the visa petition, and his reasons for that action, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company engaged in exporting, principally bananas, to China, and seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager.

The director determined that the petitioner had not demonstrated that the beneficiary has been or will be employed in the United States in an executive or managerial capacity.

On appeal, counsel submitted no additional evidence, but argued that the previous submissions establish that the beneficiary has been or will be employed in a managerial capacity. Counsel also argued that the Notice of Intent to Revoke issued in this matter did not give sufficient notice of the basis upon which the director ultimately denied the petition. Finally, counsel argued that denying the petition contravenes public policy.

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.

At issue in this proceeding is whether the beneficiary has been and 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:

"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.

On the petition, when asked to provide a nontechnical description of the beneficiary's duties, the petitioner stated, "Please refer

to petition letter, thanks!" but provided no description of the beneficiary's duties.

The petition was approved on December 16, 1997. On October 27, 1999, the Director, Vermont Service Center, issued a notice of intent to deny, with a request for, among other items, a complete description of the beneficiary's duties. In response to that request, the petitioner described those duties as follows:

(1) Mr. [REDACTED] manages the day to day operations of [REDACTED]. Under [REDACTED] management mechanism, the president has (the) duty to set up corporation goals, plans, policies, and procedures. (The) (g)eneral manager under the supervision of the president is responsible for carrying out those plans, goals and policies through proper means.

To operate the company, Mr. [REDACTED] directs and coordinates (the) activities of (the) departments to obtain efficiency and economy of operations and maximize profits. 8 hours per week.

It is estimated that Mr. [REDACTED] spends . . . 4 to 6 hours per week formulating, overseeing, and implementing the financial programs that fund [REDACTED].

It is estimated that Mr. [REDACTED] spends 8 to 10 hours per week reviewing and following up on the company's activity and financial reports.

(3) (sic) Mr. [REDACTED] manages the financial function. Since the US subsidiary provides 25% funding for banana business, this function is central to the success of both the parent company and the US subsidiary. To manage this function, Mr. [REDACTED] oversees funds arrangements in accordance with contract executions and shipping schedules. He also oversees activity and financial status reports in order to ascertain the company's current standing and success at achieving its objectives. For example, Mr. [REDACTED] relies on his internal managers to provide banana sales and marketing reports that allow him to grasp the updated banana importing information in China. Mr. [REDACTED] also reviews the outside accountant's financial statements to determine the financial status of the company. At the end of every year, Mr. [REDACTED] prepared [REDACTED] Import/Export Inc. Annual Reports representing the management progress under his administration including a comprehensive annual financial analysis.

Most importantly, Mr. ██████ directs and formulates the financial programs that provide funding for new operations, with an eye toward maximizing returns on investments, increased productivity, and continued growth. For example, Mr. ██████ made it a policy to use wire transfer to pay banana contracts. This method is greatly appreciated by Chiquita, Del Monte, etc. companies. On the other hand, for all new clients, no matter how small amount involved in transactions, Mr. Zhao made it a policy to use Letter of Credit method. This approach minimized the company's risk in the course of international trade business.

It is estimated that Mr. ██████ spends . . . 4 to 6 hours per week formulating, overseeing, and implementing the financial programs that fund Mighty Dragon.

(4) Mr. ██████ analyzes division and department budget requests to identify areas in which reductions can be made, and allocates operating budget. 5 Hours.

(5) Mr. ██████ confers with administrative personnel, and reviews activity, operating and sale report(s) to determine changes in programs or operation required. 5 Hours.

(6) Mr. ██████ directs preparation of directives to division or department administrator outlining policy, program, or operations changes to be implemented. 6 hours per week.

(7) Mr. ██████ promotes (the) organization in industry and trade associations. 1 hours per week. Mr. ██████ also invited and hosted many Chinese delegations to discuss, explore business opportunities. For example, in July 1997, Mr. ██████ hosted a delegation from China Customs Bureau, Qinhuangdao Branch. After the discussion, the leader of the delegation expressly promised to give us more favorable policies to export bananas to China. 2 hours per week.

On March 14, 2000, the director found that the petitioner had failed to demonstrate that the beneficiary's position is managerial or executive, and revoked approval of the petition.

On appeal, counsel submitted a brief, in which he noted that the establishment of the United States entity had eliminated the risk of conducting business through Chinese banks, and thereby permitted the elimination of Southeast Asia middlemen. Counsel cited precedent for the proposition that new companies may have a greater percentage of managerial or executive positions than do more

established companies. Counsel described the process of financing and shipping banana exports in somewhat more detail than that in the previous submissions to the Service. All of that information is of limited utility in determining whether the beneficiary's position is managerial or executive.

In addition, counsel submitted the following description of the beneficiary's duties:

A. Oversee and coordinate the activities of international goods (mainly refers to bananas) transportation and money movement in order to direct the planning of trade objectives and to develop operational policies and procedures for successful implementation of business goals. Every year, the US banana suppliers have banana-exporting plans with the Parent. The total amount is about 200 ships, i.e., about 4 ships per week. The US subsidiary maintains the plans, shipping and payment records and ensures the timely payments. The US subsidiary also maintains sufficient funds (\$1 million) ready to pay any adjustments. Mr. [REDACTED] as the overseer reviews various records and analytical charts, tables, and presentations, which are drafted by his subordinates both in the US subsidiary and in the Parent. Mr. [REDACTED] has discretion to the management (sic) of operational activities, i.e., to make operational policies and procedures, initiate new programs, modify the existing programs. Mr. [REDACTED] routinely communicates with the Parent and various Chinese government agencies. His monthly phone bill exceeds \$1,000.

B. Negotiate with US banking institutions, independent agencies and banana suppliers regarding establishment of credit and acquisition of resources in accordance of (sic) requirements for the business competition. The Petitioner principally deals with First Union National Bank. Mr. [REDACTED] routinely meets bank investment specialists and branch managers to negotiate and procure credit line(s) and issuance of Letter(s) of Credit and Loans. As an example, Mr. [REDACTED] directed to open a CAP account which combine(s) regular checking, saving, and market investment, so to maximize the company's interest on cash liquidation. Another example, in 1998, Mr. [REDACTED] directed the Marketing Manager to negotiate with Chiquita regarding one-ship rotten bananas. (sic) Chiquita eventually refunded the Petitioner \$280,000. Mr. [REDACTED] also personally maintains good relationships with banks and suppliers. Another example, Mr. [REDACTED] directed the company to be a member (of) Dun & Bradstreet so (as) to obtain updated information about its trade partners.

C. Direct the solicitation and negotiation of trade contracts including design and execution of business development strategies. Mr. [REDACTED] directed the subordinates to procure contracts exporting US goods other than bananas to China so (as) to diversify its product lines and ultimately to increase its competition capacity in the international trade field. As the evidence has shown, the Petitioner has maintained business relationships with more than 80 large companies in the world and has expanded its products to chemicals, sports equipments (sic), machineries (sic), water treatment equipments (sic), and computer hard wares. (sic)

D. Direct activities of external contracted contractors; review company activity reports, financial statements and economic forecast(s) as well as employee performance evaluations to determine the progress in completion of business objectives, with full authority to revise marketing strategies and operations protocols.

E. Control and allocate annual operational budgets of approximately \$2 million. In this year, company's expenses mainly include: salary \$250,000; reserved adjustment funds \$1 million; General Manager's Management funds \$100,000; transportation expenses \$120,000; travel \$50,000; advertisement \$20,000; catalog and other printing \$20,000, office expenses \$80,000; new project investment \$300,000; Bank and financial expenses \$50,000.

F. Recruit, train, manage, assign and evaluate in-house technical, managerial and professional staff.

The information provided by the petitioner, and, on appeal, by counsel, chiefly describes the beneficiary's duties 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 day to day operations, setting up goals, plans, policies, and procedures, carrying out plans, goals and policies through proper means, directing and coordinating activities of departments to obtain efficiency and economy, formulating, overseeing, and implementing financial programs, reviewing and following up on activity and financial reports, managing the financial function, overseeing activity and financial status reports, ascertaining the company's current standing and success at achieving its objectives, determining the financial status of the company, preparing annual reports for the parent

company, formulating, implementing, directing and overseeing financial programs, analyzing budget requests, conferring with administrative personnel, reviewing reports, directing preparation of directives, inviting and hosting Chinese delegations, are without any context within which to determine whether they would be qualifying.

The few concretely described duties cited in the petitioner's submission to the Service, such as promoting the petitioner in industry and trade associations, resemble duties of a sales position more closely than those of a managerial or executive position.

Overseeing financial transactions and transportation of goods, developing operational policies, managing operational activities, paying adjustments, initiating new programs, modifying existing programs, communicating with the Parent company and Chinese government agencies, negotiating with banks and banana suppliers, directing solicitation and negotiation of contracts, designing and executing business development strategies, directing subordinates to diversify the petitioner's product lines, maintaining business relationships with large companies, directing activities contractors, reviewing employee evaluations, and controlling the operational budgets, are similarly too abstract to enable the Service to determine that the beneficiary's position is managerial or executive.

Whether the petitioner's description of the beneficiary's duties is considered, or whether, instead, the description submitted, on appeal, by counsel, is relied upon, the record contains insufficient evidence to demonstrate that the beneficiary's position is primarily managerial or executive. 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 insufficient to establish that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner employs seven other employees. One of those, the petitioner's president, is above the beneficiary in the company hierarchy. The other six are engaged in clerical, marketing, sales, and computer duties rather than primarily managerial or professional duties. Based on the petitioner's descriptions of the duties of those positions, they do not appear to be professional, managerial, or supervisory.

On appeal, counsel implied that the notice of intent to deny issued in this case did not provide sufficient notice of the issues upon which the director intended to base the denial of the petition. Counsel argued that the denial was improper, because the petitioner had not been accorded sufficient notice of the basis of the impending decision, and, therefore, had not been granted an opportunity to respond.

However, that notice of intent to deny stated that, ". . . the record does not currently demonstrate that . . . the beneficiary's duties are primarily managerial or executive in nature." The notice of the decision of denial stated, ". . . the record as presently constituted is not persuasive in demonstrating that the beneficiary has been and will be employed in a primarily executive or managerial capacity" Those two statements, while not identical, demonstrate that the petitioner was accorded sufficient notice of the basis of the impending decision of denial.

The petitioner, through counsel, further argues on appeal that the beneficiary's position ought not to have been found to be non-managerial, as that issue was previously decided in the context of the adjudication of the beneficiary's initial L-1A Petition. In support of that contention, counsel cites the January 13, 1989 Telex, CO 214L-P, from James Puleo, INS Assistant Commissioner. That memo relates to the denial of Schedule A, Group IV labor certifications when the beneficiary (or his or her employer) files for a third or sixth preference immigrant visa petition. The memo states that, in that context, and in the absence of evidence of fraud or gross error, the issue of the managerial nature of the beneficiary's employment ought not to be re-adjudicated. The memo contains no indication that its contents were intended to apply to this situation.

Further, the record does not contain copies of the initial L-1A nonimmigrant visa petition and supporting documentation. Therefore, whether the beneficiary was eligible for L-1A classification at the time of the original approval, or whether the approval of the L-1A nonimmigrant classification involved an error in adjudication, is unclear. 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).

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.