



U.S. Department of Justice

Immigration and Naturalization Service

107

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

[Redacted] Public Copy

DEC 19 2001

File: EAC 99-010-50218 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:

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[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 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. Wolf, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter was put before the Associate Commissioner for Examinations on motion to reopen. The motion was granted and the previous decision of the Associate Commissioner was affirmed. The matter is again before the Associate Commissioner for Examinations on motion to reopen. The motion will be granted. The previous decision of the Associate Commissioner for Examinations will be affirmed.

The petitioner, an import and export company, 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 and on motion, the petitioner asserts that the beneficiary is employed in a primarily managerial or executive capacity.

The Associate Commissioner dismissed the appeal and initial motion, reasoning that the petitioner had submitted insufficient evidence to establish that the beneficiary has been or will be employed in a primarily managerial or executive capacity. In denying the motion, the commissioner stated that the petitioner had also failed to establish that a qualifying relationship existed between the United States and the foreign entities.

On new motion, the petitioner states that the Associate Commissioner should grant the petition because previous petitions for the beneficiary were approved, the beneficiary's duties mirror those described in the previously approved petitions, demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity and, that the Service erred in stating that the petitioner has submitted insufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities.

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 petitioner states that the Associate Commissioner should have granted the petition because previous petitions for the beneficiary were approved. The petitioner states that the beneficiary's duties mirror those described in the previously approved petitions, demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner states that the Service erred in stating that "the petitioner has submitted insufficient evidence to establish that there is a qualifying relationship between the US and foreign entities." The petitioner adds:

...The documents submitted clearly showed that there is a qualifying relationship there- Hoberica is solely owned by Hebei Garment Import and Export Corporation. Here are the four stages of the changes:

1. At the time of our incorporation in 1991, [REDACTED] Import & Export Corporation held 500 shares and Hebei Metals & Mineral Import & Export Corporation held 500 shares.
2. In May 1993, Hebei Native Import & Export Corporation acquires 500 shares from Hebei Metals & Mineral Import & Export Corporation, becoming sole owner of the company.
3. In September 1995, Hebei Garment Import and Export Corporation bought 500 shares from Hebei Native Import & Export Corporation.
4. In March 1999, Hebei Garment Import and Export Corporation acquired the other 500 shares from Hebei Native Import & Export Corporation, becoming the sole owner of this company.

The petitioner noted that the Service had previously approved other L-1 petitions for this beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. The record of proceeding does not contain copies of the visa petitions that are claimed to have been previously approved. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the Service. 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. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. Sussex Enqq. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988).

The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000).

At issue in this proceeding is whether the beneficiary has been or will be employed in a primarily managerial or executive capacity and whether there is a qualifying relationship between the U S entity and the foreign entity.

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 initially described the beneficiary's duties as follows:

- performing essential executive functions of president of the company in all aspects of business decision making, policy making and personnel management particularly;
- establishing the company management structure, office rules, operation guidelines, and communication protocol between offices abroad and within the U.S.;
- formulating immediate goals for expansion and long term business policies in accordance with the parent company's direction;
- ensuring our company's compliance with regulations, guidelines, business direction and profit goals established and mandated by the parent company'
- directing the preparation of financial plans and annual budget reports for the parent company's review'
- guiding the company through the web of American, Chinese and other international laws and regulations concerning the import and export of goods;
- researching and familiarizing himself with the American and Chinese markets as well as the relationship between the two markets;
- amending and/or modifying company's directions in response to the changing markets;

- meeting and/or discussing with parent company to form an [sic] cooperative effort in response to the changing market;
- exercising personnel management authority concerning hiring, recruiting and discharging of subordinates;
- exercising wide latitude in discretionary decision-making power and receiving only general direction from parent company; and
- committing 90% of his time to performing executive duties.

The record reflects that, in response to a request for additional information, the petitioner submitted the following description of its employees' weekly duties:

President

10 hours - performing essential executive functions of president of the company in all aspects of business decision making, policy making and personnel management;

5 hours - establishing the company management structure, office rules, operation guidelines, and communication protocol between offices abroad and within the U.S.;

4 hours - formulating immediate goals for expansion and long term business policies in accordance with the parent company's direction;

4 hours - ensuring our company's compliance with regulations, guidelines, business direction and profit goals established and mandated by the parent company;

4 hours - directing the preparation of financial plans and annual budget reports for the parent company's review;

4 hours - guiding the company through the web of American, Chinese and other international laws and regulations concerning the import and export of goods;

3 hours - researching and familiarizing himself with the American and Chinese markets as well as the relationship between the two markets;

2 hours - amending and/or modifying company's directions in response to the changing markets;

2 hours - meeting and/or discussing with parent company to form cooperative effort in response to the changing market;

1 hour - exercising wide latitude in discretionary decision-making power and receiving only general direction from parent company;

1 hour - exercising personnel management authority concerning hiring, discharging, promoting and transferring of subordinates.

Vice President

8 hours - assisting the President in decision making of all aspects of the entire company's business operations, finance and personnel;

4 hours - monitoring the changes in supply and demand in the markets of China and the United States to seek a suitable way of the company's business operations'

3 hours - reviewing, assessing and interpreting the changing climate of the trade between China and the U.S.'

2 hours - reviewing, assessing and interpreting the business and financial information to determine operating strategies;

4 hours - with the assistance of the professional staff, such as department managers to supervise and oversee business operation and market development policies;

4 hours - responsible for setting up operation procedures and business strategies for the company'

2 hours - coordinating the operations between offices in China and the United States;

3 hours - reviewing the analysis reports prepared by the department managers and reporting to the president of the status of trade;

2 hours - coordinating the operations between offices in China and the United States;

3 hours - reviewing the analysis reports prepared by the department managers and reporting to the president of the status of trade;

2 hours - considering if the company's business strategies and policies should be modified, if so, how operations will be modified in response to the changing market;

3 hours - directing the subordinate staff in the preparation of financial plans and annual budget reports for the Parent Company's review;

2 hours - reporting from time to time to the president the financial situation of the company and to recommend necessary measures in order to maximize the utilization of limited resources of the company'

2 hours - evaluating the operation through reports presented by the department managers and recommend policies to accommodate or assure steady operations;

1 hour - exercise personnel decision authority.

Department Managers

15 hours - assisting the president and vice president to maintain the management system in the Subsidiary, including budget, internal communication, shipping, international orders, personnel and business operations in their respective field of products;

15 hours - supervising and directing supporting staff in business operation;

9 hours - responsibility for all the decision making and general function of the import and export business under minor supervision from the president and vice president;

1 hour - exercising personnel authority, including hiring, promoting and firing of subordinates.

Supporting Staff

10 hours - assisting president, vice president and department managers to prepare financial and business reports, and other necessary records;

5 hours - responsibility for office inventory control and updating;

5 hours - coordinating account billing and collection;

4 hours - conducting general bookkeeping; and

16 hours - performing routine office activities.

On appeal, counsel asserted that the beneficiary was employed in a managerial or executive capacity and submitted a new breakdown of the beneficiary's weekly duties as follows:

8 hours -- holding meetings with departments managers; discussing the progress of each department's business activities; reviewing reports prepared by department managers; making suggestions to improve the efficiency of each department's operations.

10 hours -- formulating the company's policies in long-term expansion, business scopes and investment projects, etc.

1 hours [sic] - exercising personnel management authority, including hiring, discharging and assigning workload for employees.

12 hours -- directing and supervising the daily operational [sic] of the two departments of the company, including reviewing, approving and signing off of each department's business plans, proposals, business reports, budget reports, personnel evaluation reports and other internal and external documents.

4 hours -- flexible hours reserved for emergency calls, such as attending the company's special meetings, attendance of customers, holding of interviews with the employees of the company, etc.

On previous motion, the petitioner repeated its initial description of the beneficiary's duties and stated that this description "mirrors the language of the Dictionary of Occupational Titles (1998) which is the definitive reference book for job titles and their descriptions." The petitioner claims that it appears that the "reviewing officer is implying that the definitive reference book...is abstract and vague and unacceptable to him personally." The petitioner also claimed that the description of the beneficiary's duties meets the definition of a manager or executive "as quoted by the CFR 101(a)44(A) and 101(a)44(B)." It is noted that there are no such sections within 8 C.F.R., and it appears that the petitioner is referring to section 101 of the Immigration and Nationality Act.

The petitioner further asserted on motion that the petition should have been approved because a previous petition for the beneficiary was approved. However, Service regulations are exacting in requiring an office demonstrate that it meets regulatory requirements whenever a petition requesting an extension of

authorization to employ a beneficiary is filed. 8 C.F.R. 214.2(l)(14)(ii).

In total, the information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as performing essential executive functions, establishing the company management structure, office rules, operation guidelines and communication protocols, formulating goals, ensuring compliance with regulations, guidelines, and goals, directing the preparation of financial plans and budget reports, amending or modifying the company's directions in response to changing markets, exercising wide latitude in discretionary decision-making power, holding meetings, and approving plans, proposals and reports, are without any context in which to reach a determination as to whether they would be qualifying. The use of the position title of "president" is not persuasive.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a managerial or executive capacity. The petitioner has not provided a 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.

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 director's decision, but addressed by the Associate Commissioner on motion, the petitioner has submitted evidence to establish that there is a qualifying relationship between the U.S. and foreign entities. The Associate Commissioner noted in his decision that the petitioning U.S. entity claimed that it is owned in equal amounts by Hebei Garments I/E Corp. and Hebei Native Produce I/E Corp. However, share certificate one showed that as of May 1, 1991, Hebei Native Produce Import & Export Corporation owned 500 shares. The Associate Commissioner also stated that the information on the share certificates contradicted by schedule K of a 1995 U.S. Corporation Income Tax return, stating that one foreign person owns 100 per cent of the U.S. entity's stock.

On previous motion, the petitioner submitted a new version of share certificate number two showing that Hebei Native Produce Import & Export Corporation owns 500 shares of Hoberica International, Inc. as of March 9, 1999. There was no indication that Hebei Metals &

Minerals Import & Export Corporation agreed to transfer the shares ascribed to it on share certificate number two.

The information contained in the share certificate provided on motion was further contradicted by an "Assignment Agreement" dated March 9, 1999, which states that Hebei Native Produce Import & Export Corporation gave 500 shares of Hoberica's stock to Hebei Garment Import & Export. The documentation indicated that Hoberica would still be owned by Hebei Garment Import & Export and Hebei Metals & Minerals Import & Export Corporation.

On new motion, the petitioner submits a 1993 consent decree from Hoberica International, Inc. reflecting that shareholders had unanimously approved the transfer of five-hundred (500) shares of stock from Hebei Metals & Minerals Import & Export Corporation to Hebei Native Produce Import & Export Corporation. The petitioner submits an "Assignment Agreement" from Hebei Metals & Minerals Import & Export Corporation to Hebei Native Produce Import & Export Corporation executed May 1, 1993 as well as stock certificate #2 transferring the stock as indicated. However, as the motion will be dismissed on grounds previously stated, this issue need not be discussed 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 decision of the Associate Commissioner dated February 24, 2000, is affirmed.