



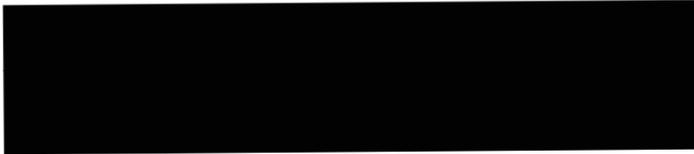
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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data used to prevent clearly unwarranted invasion of personal privacy

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



File: WAC 99 195 51657 Office: California Service Center Date: **DEC 21 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 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an importer and exporter and wholesaler of toys and clothing. It seeks to employ the beneficiary temporarily in the United States as its president and chief executive officer. 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 states in an appellate brief that the director's conclusions are erroneous and that the beneficiary's position is upper-level management. Counsel submits additional documentation from the beneficiary.

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.

8 C.F.R. 214.2(1)(14)(ii) states that 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 (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(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 first 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.

On appeal, counsel states that:

The Service denied the petition and stated on page three of its decision that "the petitioner is only comprised of a small amount of employees, the beneficiary will not be serving primarily and substantially all prospective job duties in a executive or managerial capacity. Rather, in difference to the job description stated by the petitioner, the beneficiary must be involved in and participating in the day-to-day, non-executive aspects of the business." We respectfully disagree with Service's assertion.

Petitioner has three (3) departments: (1) Designer, or better designated as R&D department - responsible for product development to meet the customers' requirements; (2) Accounting department - responsible for the company's accounting and purchasing; and (3) Sales department - responsible for customers' follow-up and services and inventory....

...Although the petitioner currently only has three employees, the operations still have to be conducted in the same manner as is done by those in multi-million dollar companies...It is true that when a company hires few employees, there is a relatively high probability that the upper level manager will participate in the day-to-day activities and operations of the business and thus lost [sic] his or her upper management identity. However, in this case, the likelihood of the beneficiary losing his upper-level management identity is remote...

The record reflects that the U.S. company was established in July 1996. The record further reflects that the beneficiary was granted L-1A status from October 1, 1996 to October 1, 1997 and that a petition for extending that benefit was denied on September 15, 1998. In a letter dated June 1, 1999, the beneficiary's duties are described in the record as follows:

As Chief Executive Officer and General manager of our U.S. subsidiary [REDACTED] U.S.A. CORPORATION, [the beneficiary] will be responsible for the operation of activities of all personnel, accounting, marketing, sales

representatives, import and administration. [The beneficiary] has the right to hire or promote the employees; make decisions on new lines and prices; oversee the daily operation of import, export and market the company's products. {The beneficiary} communicates directly with the China's headquarters office by submitting periodic reports of the entire operation of DRAGON FLYING U.S.A. CORPORATION to the headquarters office in China.

The Service concluded that the petitioner had not submitted a clear description of the beneficiary's job duties, and on August 16, 1999, requested, in pertinent part, that the petitioner submit the following documents:

...the United States entity's organizational chart describing its managerial hierarchy and staffing levels. This is best accomplished by indicating:

- current names of executive, manager(s), supervisor(s), the beneficiary's position in the chart
- The names of other existing employees within each department or subdivision
- Clearly indicate all existing employees to be under the beneficiary's supervision in the U.S. including: name(s), job titles, brief job duties, nonimmigrant status...

In response to the director's request for evidence, the petitioner submitted, in addition to financial data, a proposed organizational chart, which indicated that three individual employees were under the beneficiary, two (2) "Manager Asst." employees and one (1) "Sales-Administration" employee. The petitioner also submitted Form I-9 Employee Eligibility Verification for the aforementioned employees.

The petitioner has not demonstrated that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. There is no evidence to establish that the petitioner employs a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing non-qualifying duties. The evidence provided is not persuasive in establishing that the beneficiary is not primarily involved in performing the day-to-day functions of the petitioning organization. The description of duties provided is too general to convey any understanding of exactly what the beneficiary has been and will be doing on a daily basis. The petitioner has not demonstrated that the beneficiary is primarily engaged in managing or directing the management of a function, department, subdivision or component of the company.

Further, the petitioner has not submitted a comprehensive description of any of its other permanent or contract employees' duties, or a breakdown of their hours worked. 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).

Based on the evidence submitted, it cannot be found that the beneficiary has been or will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the director's decision, the petitioner has not demonstrated that there is a qualifying relationship between the U.S. and foreign entities.

8 C.F.R. 214.2(1)(1)(ii)(G) states:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(1)(1)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(1)(1)(ii)(J) states:

Branch means an operation division or office of the same organization housed in a different location.

8 C.F.R. 214.2(1)(1)(ii)(K) states:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly,

more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

8 C.F.R. 214.2(l)(1)(ii)(L) states, in pertinent part:

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Initially, on the L-1 petition and on appeal, the petitioner claimed that it is a subsidiary of the foreign entity; that Jinan Defeng Toys Co., Ltd owned 100 per cent of the U.S. entity. However, the petitioner submitted share certificate number 1 dated July 3, 1996, which shows that Jinan Defeng Toys Co., Ltd. owns 100 shares of the petitioner. The petitioner also submitted share certificate number 2 dated July 3, 1996, showing that the beneficiary owns 900 shares of the petitioner. The record contains no subsequent stock transaction agreements.

Further, according to schedule K, question 4, of a 1998 U.S. Corporation Income Tax Return, the petitioner is not "a subsidiary in an affiliated group or parent-subsidary controlled group"; question 5 was answered in the affirmative that at the end of the year an individual, partnership or corporation did own directly or indirectly 50% or more of the petitioner's voting stock; The percent owned is stated to be 100%; The identity of the owner of the stock is stated as being the beneficiary. However, question 10 was answered in the affirmative that the petitioner was 100 per cent owned by a unidentified foreign individual or entity. It is concluded that this entity is the beneficiary. Consequently, it cannot be concluded that the petitioner has demonstrated that there is a qualifying relationship between the U.S. and foreign entities. It is incumbent upon 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, 591-92 (BIA 1988).

Further, the petitioner has not provided sufficient evidence to demonstrate that the beneficiary's employment in the United States will be temporary. Matter of Isovich, 18 I&N Dec. 361 (Comm. 1980);

8 C.F.R. 214.2(1)(3)(vii). Since the appeal will be dismissed for the reasons stated above, 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.

ORDER: The appeal is dismissed.