



U.S. Department of Justice
Immigration and Naturalization Service

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



File: EAC 99 146 52042 Office: Vermont Service Center Date:

JAN 23 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:



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identification 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


Mary C. Mulrean, 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, an international trading company, seeks authorization to employ the beneficiary temporarily in the United States as the general manager of its purchasing and sales department. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel argues that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel further argues that the director's decision is arbitrary, capricious, and "fundamentally unfair" because the petitioner has been previously granted authorization to employ the beneficiary in the same position, and the facts of this case are unchanged.

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(1)(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 (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, 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: however, the work in the United States need not be the same work which the alien performed abroad.

The U.S. petitioner states that it was established in 1992 and that it is the parent company of [REDACTED] a foreign entity located in Beijing, China. The petitioner declares nineteen employees and a gross annual income of approximately \$1,500,000.

At issue in this proceeding is whether the beneficiary will be employed by the U.S. entity 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 with the U.S. entity as follows:

As the General Manager of the Purchase/Sale Department, Ms. [REDACTED] had been and will continue to be responsible for among others: conferring with other company officials regarding the overall management of the purchase/sale department; directing and supervising professionals in the department under her leadership in researching and analyzing the market trend, developing forecasts for finished goods and investigating suppliers and sources for merchandise, locating sources of technology, machinery, equipment and materials; directing through subordinate supervisory personnel collection of accounts; endeavoring to resolve major problems regarding purchasing and selling operations; hiring key personnel for her department; preparing and finalizing market activity reports of the president and/or the board, submit proposals and reports to the President and the Board of Director[s] for review. Ms. [REDACTED] shall continue to be responsible for the supervision of our new purchase manager at BEIJING MAXPRO because her knowledge, skills and expertise in purchase and sale transactions, [and] in management is extremely important and will be continuously needed by the branch office.

The petitioner submits an organizational chart showing the following employees and departments:

Managing Director/President
Vice President
International Operations/Overseas Branch: 80 employees

Purchase & Sales Department: 6 employees
Shipping Clerks/Companies: independent
Secretary
Lawyers/Accountants (independent)
Vice President
Department of Financial Control: 4 employees
Department of Technical Transfer: 4 employees

On the petition, the petitioner claimed to have 19 employees. It is unclear which of the above positions are considered to comprise the U.S. entity's staff.

In a letter dated April 29, 1999, the petitioner was requested to respond to the following:

Submit additional evidence to establish the beneficiary has been and will be employed in a managerial/executive capacity in the United States firm.

Submit a comprehensive description of the beneficiary's duties. Also, indicate how the beneficiary's duties have been, and will be, managerial or executive in nature. For executive or managerial consideration, you must also: (1) demonstrate the beneficiary functions at a senior level within an organizational hierarchy other than in position title, and (2) demonstrate the beneficiary has been, and will be, managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him/her from performing non-qualifying duties, if appropriate.

Submit a list of your United States employees identifying each employee by name and position title. In addition, submit a complete position description for each of your United States employees. Submit a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary.

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

-The current names of executive[s], manager(s), supervisor(s), [and] the beneficiary's position in the chart;

-The names of other existing employees within each department or subdivision, and,

-Clearly indicate all existing employees to be under the beneficiary's supervision in the United States, including: names, job titles, brief job duties, and Nonimmigrant status (I-1, H-1B, etc.).

In response the petitioner submitted the following description of the beneficiary's duties:

-Assisting and conferring with the Vice President (Mr. [REDACTED]) in overall direction of the Purchasing and Sales Department and regarding planning and implementation of corporate policies and goals in purchasing and sales (10%);

-Directing, overseeing, and reviewing the performance of the Purchasing and Sales Department in carrying out business goals, policies and procedures in purchasing and sales efforts; directing, overseeing, assisting and reviewing the performance of the assistant manager and purchasing and sales representatives in the Purchasing and Sales Department (30%);

-Hiring, overseeing, and evaluating purchasing and sales representatives, contractors and consultants, and reporting to and conferring with the Vice President (Mr. [REDACTED]) regarding same (10%);

-Direction and oversight of overall business operations of the company in the area of marketing, outside contracts, and purchase and sales and shipment of products (import and export), both to and from the Parent Corporation in the U.S. through directives to lower level managers and the managers at [REDACTED] Beijing Both directly and through direction and supervision of the assistant manager of Purchasing and Sales Department (10%);

-Conferring and meeting with important business clients/accounts (10%);

-Initiating/developing, carrying out and implementing reporting procedures for the Purchasing and Sales Department and conferring with the Financial Comptroller, Accountants regarding same (5%);

-Investigating, reviewing, and conferring with the Purchasing and Sales Department on supply sources, business opportunities and marketing efforts worldwide (5%);

-Conferring with and reporting to the Vice President on implementation of overall corporate policies, strategies and goals, and personnel decisions (5%);

-Preparing and submitting financial, marketing, industry, and various other reports for the Purchasing and Sales Department (5%).

The petitioner also provided a description of the duties of the following 16 additional employees:

President: [REDACTED]
Vice President: [REDACTED]
Vice President: [REDACTED]
Assistant Manager: [REDACTED]
Purchasing and Sales Representatives: [REDACTED]
[REDACTED], [REDACTED]
Staff Accountant and Accounting Clerks: [REDACTED]
[REDACTED]
Manager of Technology Transfer: [REDACTED]
Technology Transfer Specialists: [REDACTED]
[REDACTED]
Secretary: [REDACTED]

On appeal, counsel argues that the Service misinterpreted and ignored information submitted by the petitioner. Counsel contends that the petitioner has demonstrated that the beneficiary will be employed in a primarily managerial or executive capacity.

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 conferring with other company officials regarding the overall management of the purchase/sale department; directing and supervising professionals in her department; directing the collection of accounts; endeavoring to resolve major problems regarding purchasing and selling operations; hiring key personnel; directing, overseeing, assisting and reviewing the performance of the assistant manager and the sales representatives; conferring and meeting with business clients; and investigating, reviewing and conferring with subordinates on supply sources, business opportunities and marketing efforts, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as researching or analyzing market trends; developing forecasts for finished goods; locating sources of technology, machinery, equipment and materials; preparing and finalizing market activity reports; and seeking and contacting potential purchasers of products made in China, have not been demonstrated to be managerial or executive in nature. The use of the position title

of "general manager of department of purchase/sales" is not persuasive.

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title.

Further, the petitioner's evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties.

The organizational chart shows that the beneficiary is a manager of a department of six employees; however, it is unclear how many employees the U.S. entity has. The petitioner initially claimed to have 19 employees. In a letter dated January 19, 1999, the petitioner's accountant stated that the U.S. entity has only eleven employees. The petitioner's organizational chart shows that the beneficiary's department has six employees. According to a list of employees and their duties, the beneficiary's department has only five employees. There is no explanation as to why the number of employees claimed by the petitioner on the petition does not match the number of employees listed by the petitioner's accountant or the number listed in the actual position descriptions. These discrepancies have not been resolved.

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 (Comm. 1988).

Further, it is unclear whether the employees that work within the beneficiary's department are actually full-time staff. According to a 1998 Form W-2 Wage and Tax Statement, the sales employee, [REDACTED] earned only \$6,249.99 in 1998. As it does not appear that the other employees were in the petitioner's employ at time the petition was filed, there is no independent record of their wages or hours worked in 1998.

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

It is noted that counsel argues on appeal that the Service previously granted the petitioner's L-1A petition, and a renewal of the L-1A visa for the beneficiary, based on exactly the same executive position. The director's decision does not indicate whether the beneficiary's nonimmigrant file 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 decision, 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).

Further, an unpublished decision carries no precedential weight. See Chan v. Reno, 113 F.3d 1068, 1073 (9th Cir. 1997) (citing 8 C.F.R. section 3.1(g)). As the Ninth Circuit says, "[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference." Id. (citing De Osorio v. INS, 10 F.3d 1034, 1042 (4th Cir. 1993)).

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.