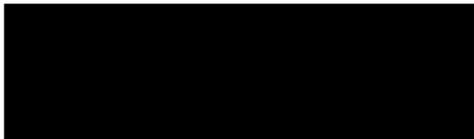




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U.S. Department of Justice
Immigration and Naturalization Service

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



Public Copy

FILE: EAC-99-100-50889

OFFICE: Vermont Service Center

DATE:

JUN 18 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)

IN BEHALF OF PETITIONER:



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 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

Myra L. Rosenberg
for Robert J. Wiemann, Acting Director
Administrative Appeals Office

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

The petitioner imports and exports metallurgical products and equipment between China and the United States, and seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The Acting 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 argued that over 51 percent of the beneficiary's duties are managerial or executive in nature, and that the beneficiary has built the petitioning entity into a multimillion dollar business from scratch.

The Associate Commissioner for Examinations affirmed the Acting Director's decision, finding that the petitioner had submitted insufficient evidence to establish that the beneficiary had been or would be employed in a primarily managerial or executive capacity. In addition, the Associate Commissioner noted that the petitioner had failed to establish that the foreign entity is doing business, or that a qualifying relationship exists between the U.S. entity and the foreign entity. Further still, the Associate Commissioner noted that the various documents submitted by the petitioner indicate a discrepancy in the address shown for the petitioner.

On motion, counsel argued 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)(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 U.S. petitioner states that it was established in 1996 and that it is a wholly owned subsidiary, "and managerially controlled (sic) by China Metallurgical Import & Export Corporation." The petitioner declares four employees and a gross annual income of approximately \$900,000.

In the decision on appeal, the Associate Commissioner noted that the stock certificate, an important part of the petitioner's evidence of a qualifying relationship between the U.S. entity and the foreign entity, was undated. On motion, counsel argued that the lack of a date on that document does not affect the ownership of the United States entity by the foreign entity. Counsel's argument misses the point. Clearly, the lack of a date on the stock certificate casts doubt not just on the legal effect, but also on the authenticity, of that document.

However, with the motion, counsel submitted three documents bearing on the ownership of the United States entity. Those documents are (1) a Chinese language document and an English translation which states that the document is a "Brief Introduction" to the foreign entity and states that the U.S. entity is a wholly-owned subsidiary of the foreign entity, (2) a letter, dated March 8, 2000, from Edward Y. Ma, a New York attorney, stating that all 200 shares of the United States entity were issued to the foreign entity and are still outstanding, and (3) a letter, dated March 3, 2000, from David C.W. Cheng, a C.P.A. in Flushing, New York, also stating that the U.S. entity is wholly-owned by the foreign entity.

The documentary evidence submitted by counsel is convincing evidence of the ownership of the United States entity, and,

therefore, convincing evidence of the existing qualifying relationship between the United States entity and the foreign entity. Consequently, the petitioner has overcome this portion of the Associate Commissioner's objections.

The next issue in this proceeding is whether the beneficiary has been or 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 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; establishing the company management structure, office rules, operation guidelines, and communication protocol between offices abroad and within the United States; leading (the petitioner) with little or no guidance from superiors at the Parent Company, but with the Parent Company's goals in mind; formulating immediate goals for expansion and long term business policies in accordance with the Parent Company's direction; ensuring (the petitioner'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's business through American, Chinese and other international laws and regulations concerning the two markets; amending and/or modifying the company's directions in response to the changing markets; meeting and/or discussing with Parent Company to form cooperative effort in response to the changing market; exercising wide latitude in discretionary decision-making power and receiving only general direction from parent company; exercising personnel management authority concerning hiring, discharging, promoting and transferring of subordinates; and committing 90% of his time to performing executive duties.

On appeal, the petitioner provided the following breakdown of the beneficiary's duties:

8 hours - holding meetings with Vice President and Business in the company; discussing the progress of the

business activities; reviewing reports prepared by business manager; making suggestions to improve the efficiency of the company'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.

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

5 hours - studying and understanding the matters concerning the company's business activities, making suggestions in resolving problems faced by the company's business and discussing with the vice president and the business manager

6 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.

In addition, the petitioning entity provided the following additional description of the beneficiary's duties on appeal:

As President, Mr. [REDACTED] enjoys full authority over the establishment and implementation of policies and procedures that do not go against those of the parent company. He reports directly to the Vice-president of the parent company. His present level of compensation is \$40,000 per year. Because the nature of his duties, his hours are not regimented although he spends of [sic] at least 40 hours a week on business for the company. He is the most recognizable face in our company, and meets, dines, and shepherds around our chief customers, executives from our parent company, and delegations from China. This is very important as it would be insulting to most of these very important persons if the President could not take the time to do this. He also attends trade shows to keep up his knowledge of the field and to make new contacts, and returns to China at least once a year to receive praises or criticisms of his leadership of the company in the United States

On motion, the petitioner, through counsel, argued that the description of the beneficiary's job is not vague or general, as the director found, but is specific. Counsel observed that the decision on appeal quoted almost five pages of that description.

That the decision on appeal quoted almost five pages of the beneficiary's job description demonstrates that the description is long, but not that it is concrete. As was noted in the decision on appeal, the petitioner has described the beneficiary's duties only in broad and general terms. The descriptions provided are insufficient to demonstrate that the beneficiary has been or will be employed at a managerial or executive capacity.

The petitioner, through counsel, further argues on motion that the beneficiary's position ought not to have been found 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, 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. 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).

The petitioner, through counsel, argued yet further, on motion, that the address discrepancy noted by the director is easily explained. Counsel stated that one of the addresses on the various submissions is the beneficiary's home address, from which he often works. The petitioner provided a letter from the beneficiary in support of that explanation.

The petitioner's explanation may be feasible. However, 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). Further, 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.

The next issue in the proceeding is whether the foreign entity is doing business.

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

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

On the motion, counsel did not specifically address this issue. The only documentary evidence that the foreign entity is doing business is the "Brief Introduction," described above. Although that document states that the foreign entity is engaged in importing raw materials, smelting, and exporting metallurgical products, we note that this Brief Introduction appears to have been produced by, or for, the foreign entity. As such, it does not constitute the sort of independent objective evidence, contemplated in Matter of Ho, *Supra.*, required of the petitioner in order to resolve inconsistencies.

The petitioner has provided no additional evidence that would demonstrate that the petitioning entity is doing business. No reason exists to disturb the previous finding of the Associate Commissioner. For this additional reason, the petition may not be approved.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Likewise, the record does not demonstrate that the foreign entity is doing business within the meaning of 8 C.F.R. 214.2(l)(1)(ii)(H).

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 September 21, 1999, is affirmed.