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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 99 054 52582 Office: Vermont Service Center Date:

MAR - 6 2001

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:



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

Robert P. Wiemann, 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 importer and exporter of high tech machinery and equipment, seeks 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 primarily performed the duties of an executive or manager for one continuous year of full-time employment within the three years prior to the filing date of the petition, that the beneficiary has been or will be employed in a managerial or executive capacity, or that there is a qualifying relationship between the U.S. and foreign entities.

On appeal, counsel argues that the Service decision "was based on a faulty analysis of the information that was provided twice to the Service."

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 1996 and that it is a wholly-owned subsidiary of Beijing Da Hao Company, located in Beijing, China. The petitioner declares six employees and a gross annual income of approximately \$550,000.

The first issue in this proceeding is whether the beneficiary has at least one year of full-time employment abroad with a qualifying entity within the three-year period preceding the filing of the petition.

8 C.F.R. 214.2(1)(3)(iii) states that an individual petition filed on Form I-129 shall be accompanied by 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.

8 C.F.R. 214.2(1)(1)(ii)(A) provides that periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

In a letter dated November 17, 1998, the petitioner describes the beneficiary's duties with the foreign entity as follows:

From October 1994 to October 1997, [the beneficiary] served as Vice General Manager for the Parent company in Beijing, China. He supervised Overseas Business Department, Enterprise Development Department and the Soft Ware Department.

[The beneficiary] has a very distinguished work history. He had work in foreign trade and economical and technical exchange and cooperation programs for the Chinese national and municipal and private enterprise levels.

The director noted that the beneficiary had indicated that he had resided in China from January of 1990 to March of 1995 and was employed by the Shenzhen Fulin Industry Co., Ltd. from October of 1991 to March of 1995 in Beijing, China. The director further noted that the beneficiary indicated on Form G-325A that he had resided in China from January 1, 1990 to July of 1999, but that he

also indicated that he resided in New Jersey from November of 1998 to July of 1999, in New York from January of 1996 to October of 1998, and in California from June of 1993 to July of 1995. Finally, the director noted that the beneficiary was in L-2 status for the first several years after his entry into the U.S. and claimed to have worked for the U.S. entity during periods in which he was authorized employment due to a pending I-485. The director concluded that "as the EAD does not place the beneficiary in a lawful status, the period in which he was employed is considered to be interruptive of his claimed foreign employment."

On appeal, counsel argues that:

During the three-year period between December 8, 1995 and December 7, 1998, [the beneficiary] worked continuously and exclusively for the parent company. Of this time, he spent 460 days in China working directly and on-site for the parent company as Vice General Manager. This is equal to one year and three months. This was a qualifying job and this was a qualifying length of time.

Counsel further argues that the Service confused place of residence with place of employment and contends that:

The definition of residence, whether asked for on a G-325A or elsewhere, is very unclear in Immigration law as there has never been a clear cut distinction made between legal, physical, intentional, or imputed residence. For most people most of the time these are identical. But for others, they can be different and the INS makes no attempt (certainly not on the G-325A) to define which kind of residence they are looking for.

The fact that the beneficiary gave conflicting places of residence in different G-325As is the best evidence that he did not know what the Service was asking for. In the first G-325A the addresses listed are his places of physical residence with no attempt made to list his places of legal residence. In the second G-325A the residence list includes both his places of legal residence from 1990 to 1999 as well as his places of physical residence during the preceding five years (all that is requested on the G-325A).

Counsel's argument is not persuasive. The record contains insufficient evidence to demonstrate that the beneficiary has at least one continuous year of full-time employment abroad as a manager or executive with a qualifying organization within the three years preceding the filing of the petition. The petition was filed on December 7, 1998. The beneficiary should have been employed abroad for one year from December 7, 1995 to December 7,

1998, the date the petition was filed. It appears, however, that from June of 1993 to October of 1998, the beneficiary was allegedly abroad for only six months.

The second 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.

In his decision, the director noted that the evidence did not sufficiently demonstrate that the beneficiary had been employed abroad in a qualifying managerial or executive capacity, or that he would be employed in the U.S. entity in a primarily managerial or executive capacity.

The petitioner described the beneficiary's proposed duties as follows:

I. COMPANY OPERATIONS: As the President of the Petitioner, [the beneficiary] has been focusing his energy in the organization and marketing of Parent company goods to supply the American market through the US subsidiary. He also uses his energy in the company's sales and marketing project with his technical background so that he can make the company clients understand better about the technology of the company products. He directs the responsibility of sales and marketing and export of American made equipment to other company managers and employees. He currently makes major contacts with the Chinese health care institutions which are interested in buying American medical equipment and technology.

II. DUTIES: The PRESIDENT'S ADMINISTRATIVE DUTIES include: training, supervising, disciplining, and terminating purchase/sales personnel and company employees under his supervision; making work assignments; ensuring that other business managers (to be hired) of the company and the employees (to hire more) keep, prepare and maintain records and administrative correspondence properly; and handling the many details that are essential to the functioning of the company.

The EXPORT & IMPORT OPERATION DUTIES require constant communication with the Parent Company in Beijing, China as well as with its suppliers, shipping company warehouses, and U.S. Customs and the company's Custom's brokers and agents. Accurate records must be maintained regarding the status of the shipments of merchandise that

has been ordered from the Parent company and its Asian customers.

The President directs and does much of this work himself, particularly the communications with Parent Co., overseas agencies and businesses, convey the customer's reports regarding the products sold in the Orient to the US manufacturers so that they improve the products and services.

III. DECISION MAKING RESPONSIBILITIES: The President makes company decisions on behalf of the Parent Co. regarding the employment of managerial level staff and other workers for the business operation, and the duty assignments of the personnel he supervises, decides what job is to be done and then reviews it, development plans and have other managers and staff to make all necessary arrangements to reach the common goal of the company. He also has the authority to allocate company funds for the US operations.

On appeal, counsel describes the beneficiary's duties as follows:

During this time, he has hired, supervised, disciplined and terminated employees, lawyers, accountants, and others, signed company checks, negotiated and signed contracts, signed numerous state and federal government documents including tax returns, met as an equal with senior executives of other companies, supervised the work of all other company employees, created budgets and ensured adherence to them, reported to his Board of Directors and done all of the many duties that the chief executive of any company does in the normal course of business.

He has managed a subordinate staff of professional and administrative personnel who have handled the day-to-day duties and work of the company. One of the principal jobs of the company is to evaluate software programs and the companies who produce them to determine if they can be used in China so the parent company can establish a business connection. Three members of the subsidiary company's staff are computer professionals who are directed and managed by the beneficiary in performing these evaluations and making these contacts. Furthermore the company hires professional consultants from time to time as needed to evaluate specialized products and to make recommendations to the beneficiary which are then transmitted to the parent company for action. All of this work is supervised and managed by the beneficiary.

The record does not reflect that the beneficiary functions or will function at a senior level within an organizational hierarchy other than in position title. There is no evidence to establish that the petitioner will employ a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing nonqualifying duties. Further, it appears that the beneficiary performs and will perform operational duties in both the foreign and U.S. entities. There is no comprehensive description of the beneficiary's duties that persuasively demonstrates that the beneficiary has been or will be performing in a primarily managerial or executive capacity. The record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary has been and will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. For this additional 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.