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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 98 029 52752

Office: Vermont Service Center

Date: OCT 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:



Identifying 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
for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Vermont Service Center. Due to Service error, the beneficiary's status was subsequently revoked. Upon reopening the decision to revoke, the director determined that the beneficiary was not clearly eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of his intent to revoke approval of the visa petition, and his reasons therefore, and ultimately revoked the approval of the petition. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion. The motion to reopen will be granted and the previous decisions of the director and the Associate Commissioner for Examinations will be affirmed. The petition will be denied.

The petitioner imports and exports silk products. Information contained in the record indicates that the beneficiary was granted L-1A status from July 15, 1995 through June 14, 1998, and subsequently granted an extension of his status until June 14, 2000. The extension of the beneficiary's L-1A status was revoked on October 8, 1999. Currently, the petitioner seeks again to extend its authorization to employ the beneficiary temporarily in the United States as its finance department manager for three years. The director determined that the petitioner had not established that the beneficiary had been or would continue to be employed in a primarily managerial or executive capacity. The director's decision was affirmed by the Associate Commissioner on appeal.

On motion, counsel states that the beneficiary's duties are of an executive nature in terms of the business decisions made in the capacity of vice president and financial controller. Counsel also states that the beneficiary's high position in the hierarchy of the organization, supervising professional managers and subordinates, who in turn supervises other employees, clearly demonstrates his executive capacity. Additional information in rebuttal to the director's and Associate Commissioner's findings has been submitted.

The United States petitioner was established on May 24, 1985 and states that it is a wholly-owned subsidiary of China National Silk Import & Export Corporation, located in Beijing, China. The petitioner seeks to extend the employment of the beneficiary for a three-year period at an annual salary of \$30,000. At issue in this proceeding is whether the beneficiary has been and will continue to be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act (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.

Counsel states that the beneficiary has made outstanding efforts in directing the subsidiary and accomplished many transactions. Counsel also states that for all the important transactions, the beneficiary acted as the number one person and signed the documents because the president had been primarily in China. Counsel has not stated that the transactions were accomplished by the beneficiary, only that the beneficiary signed the transactions in behalf of the president.

Counsel also states on motion that the beneficiary supervises the business manager and the business manager in turn supervises a deputy business manager. Counsel does not describe the deputy business manager's duties or the business manager's duties. Absent such information, the Service cannot conclude that they function as mid-level managers.

Counsel contends that although the business manager earned the same amount in salary as the beneficiary, he did not have the same privileges as the beneficiary, and therefore, the beneficiary is being compensated at a higher level. However, the beneficiary cannot be considered as acting in an executive capacity merely by virtue of the privileges given to him by the petitioning entity.

Finally, the petition indicates that the beneficiary will hold the position of finance department manager. On motion, counsel states that the position the beneficiary will hold is that of vice president and financial controller. However, it is the duties that the beneficiary will perform in the position that determines whether he is employed in a managerial or executive capacity.

The petition reveals the nontechnical description of the beneficiary's job as: "assume the general function of supervision and management."

The petitioner indicates in its letter dated October 23, 1997 that the beneficiary's duties include:

- directing activities of subordinates engaged in routine calculating, analyzing and preparing sales statistics and accounting records;
- devising and implementing new systems for efficient accounting methods by studying current trends of financial management in the United States;
- directing and supervising the collection of financial information, and preparing such into budget reports for each transaction, and for yearly financial statements in the company;
- directing the preparation of yearly financial reports for the review of the parent company;
- coordinating accounting records and statistics between offices in China and the United States

Upon review of the record, the petitioner has not sufficiently demonstrated that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. The beneficiary's duties do not persuasively demonstrate that the beneficiary has been and will be performing in a primarily managerial or executive capacity. 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 nonqualifying duties. 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. Counsel has not demonstrated that the beneficiary's duties have been and will continue to be primarily in a managerial or executive capacity. For this reason, the petition may not be approved.

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 order of May 3, 2000 dismissing the appeal is affirmed. The petition is denied.