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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

DEC 03 2003



File: LIN 99 221 52301 Office: NEBRASKA SERVICE CENTER Date:

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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the denial and the appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion to reopen. The motion will be granted. The previous decision of the AAO will be affirmed.

The petitioner is engaged in the import and export of seafood products. It originally sought to employ the beneficiary temporarily in the United States as its president. On December 27, 1999, the director determined that the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserted that the beneficiary was employed in a primarily managerial capacity.

On May 7, 2002, the AAO dismissed the appeal reasoning that the evidence submitted by the petitioner had not overcome the objections of the director. In the decision, the AAO found that the petitioner had submitted insufficient evidence to establish that the beneficiary manages or directs the management of the organization. The AAO also found that the petitioner had submitted evidence that revealed that the beneficiary is performing the duties necessary for the petitioner to continue its operations.

On motion, counsel for the petitioner states that the petitioner has undergone changes in its organizational structure and requests that CIS reopen the proceeding and consider new evidence. First, counsel for the petitioner restates and slightly modifies the description of the beneficiary's duties that were previously submitted. Second, counsel for the petitioner states that the petitioner now has two employees under the direct supervision of the beneficiary. Counsel describes the two new employee's qualifications and job duties as well as the 2001 Form W-2's for the petitioner's three employees.

The issue in this proceeding is whether the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Both the director and the AAO quoted the statutory language defining managerial and executive capacity in their decisions. See §§ 101(a)(44)(A) and (B) of the Act. Therefore, these sections will not be restated within this decision.

On motion, counsel explains that since the petitioner filed the appeal, two years have passed and there have been changes to the petitioner's organizational structure.

On motion, counsel for the petitioner describes the duties of the beneficiary as president of the petitioner as:

Wholly responsible for management of the company's entire operation in the United States. Responsible for developing and implementing the company's long-term business plan and budget. Sets-up and implements the company's annual business plans, supervises company's employees and participates in major undertakings with respect to personnel, finance and other important administrative decisions of Liaoning USA. Directs strategic development in the United States, including managing North and South America business diversification and expansion of Liaoning Pelagic Fisheries Co., Ltd.'s ("Liaoning China"), Liaoning USA's parent company. Responsible for hiring, firing, determining compensation levels and bonuses for company employees.

Counsel restates, with no substantive changes, the description of the beneficiary's job duties that was previously submitted by petitioner. As explained previously by the AAO in its dismissal of the appeal, the petitioner has not provided a comprehensive description of the beneficiary's duties. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of his duties.

Upon review, the record as presently constituted does not contain persuasive evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The vague description of the beneficiary's duties in the United States company does not persuasively establish that the beneficiary is to function primarily in a managerial or executive position. It appears that the beneficiary will be performing operational rather than managerial or executive duties. Although the beneficiary's duties included hiring and firing personnel in both the foreign and United States companies, the evidence submitted must demonstrate that the majority of the beneficiary's actual daily activities have been and will be managerial or executive in nature. The beneficiary's duties have not been established as the duties of one who functions or will function at a senior level within an organizational hierarchy. Based on the evidence submitted, it cannot be found that the beneficiary has been and will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Counsel states that the petitioner now has two employees under the direct supervision of the beneficiary. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. The petitioner must establish

eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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 decision of the AAO dated May 7, 2002 is affirmed.