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Citizenship and Immigration Services

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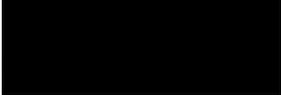
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street NW
Washington, DC 20536



FILE: LIN 02 172 53478 Office: NEBRASKA SERVICE CENTER

Date: **DEC 3 - 2003**

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)

ON BEHALF OF PETITIONER:



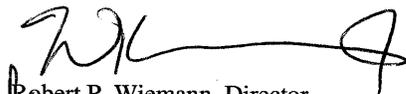
INSTRUCTIONS:

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 Director, Nebraska Service Center, denied the nonimmigrant visa petition (L-1A). The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED], claims to be a subsidiary of a Chinese business, [REDACTED]. The petitioner describes itself as a real estate developer of residential units. The U.S. entity was incorporated on September 20, 2000 in the State of Oregon. In May 2001, the U.S. entity petitioned to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). The director approved the initial petition for a one-year period from May 7, 2001 until May 6, 2002, so that the beneficiary could open the new office. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's president at an annual salary of \$50,000. On June 14, 2002, the director determined, however, that (1) the petitioner had not demonstrated during its first year of operation that it was doing business; and (2) the beneficiary did not qualify as an executive or a manager. Consequently, the director denied the petition. On appeal, petitioner's counsel asserts generally that the beneficiary's proposed duties qualify as a manager or executive.

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 meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

Under 8 C.F.R. § 214.2(1)(3), 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(1)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(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 first question the AAO will address is whether the petitioner is "doing business" as defined in the regulations. The pertinent regulations at 8 C.F.R. § 214.2(1)(1)(ii) define a "qualifying organization" and related terms as:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulation at 8 C.F.R. 214.2(1)(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.

The record indicates that, in one instance, the petitioner purchased one house at 3017 SE 9th Place, Portland, Oregon 97266, and, on another occasion, apparently bought four other unimproved lots in Portland. The petitioner plans to construct homes on the four lots. The petitioner did not specify what it plans to do with the home on SE 9th Place. Two large transactions over the course of one year do not qualify as the regular, systematic, or continuous provision of goods and/or services. Furthermore, the petitioner purchased the four lots

for a future provision of goods and services. CIS may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 19 I&N Dec. 582, 591-2 (BIA 1988).

On May 9, 2002, the director issued a Notice of Intent to Deny, in part, because the petitioner had failed to conduct regular, systematic, and continuous provision of goods and/or services. In response, the petitioner submitted a May 17, 2002 statement from the beneficiary. The statement cited eight activities, "A" through "G," as demonstrating that the petitioner has been doing business.

Only item A suggested that the petitioner had actually transacted business. Specifically, the petitioner said it had "purchased equipment for the Zhu Hai fruit wholesale supply business." An isolated transaction, such as the purchase of one piece of equipment, does not establish the regular, systematic, and continuous provision of goods and/or services. Moreover, it appears that the petitioner purchased the equipment as Zhu Hai's agent.

Items B through G simply listed contacts which had been made for possible future work. Therefore, the petitioner has yet to provide any goods or services in connection with items B through G. As previously explained, CIS may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire, supra.*

The regulation at 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, 8 C.F.R. § 214.2(1)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant case, the petitioner has not reached the point where it can employ the beneficiary in a predominantly managerial or executive position. Therefore, given that the U.S. entity has not demonstrated the regular, systematic, and continuous provision of goods and/or services, the director properly denied the petition.

The AAO now turns to the issue of whether the beneficiary has been and will be primarily performing managerial or executive duties. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "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:

The term "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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In this instance, counsel's March 20, 2002 brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

On Form I-129, the petitioner described the beneficiary's proposed U.S. duties as: "Overall running of US office in order to develop residential units on vacant land. Structure running of US office; develop infrastructure of office; report progress to parent company; obtain building permits; oversee employees and hire subordinate staff and outside contractors."

An April 24, 2002, letter submitted with the Form I-129, provided further details about the beneficiary's proposed duties:

- Maintain overall office infrastructure[.]
- Hire required support personnel and oversee personnel functions. The company currently has two

employees, a part-time manager and a secretary. We are also petitioning to have another employee transferred from China, Ms. Liao, as real estate development manager.

- Act as liaison with Chinese parent company to advise of [sic] US operations and business matters.
- Actively seek new business and purchase residential property for development.
- Negotiate contracts on behalf of company.
- Work with city and state officials to obtain necessary building and residential permits.
- Work with outside building contractors to prepare construction documents and plans.

Additionally, the petitioner submitted its 940-EZ Employer's Annual Federal Unemployment (FUTA) Tax Return for 2001. Form 940-EZ reflected total taxable wages of \$3000.00. The wages were paid during the second quarter of 2001. Similarly, the petitioner's U.S. Corporation Income Tax Return for 2001 listed \$3000 in compensation to officers. The petitioner's Form 941 Employer's Quarterly Federal Tax Return and Oregon Quarterly Tax Report, Form OQ-2001, both reported one employee for the quarter which ended on June 30, 2001.

The petitioner also provided an organizational chart. The petitioner placed the beneficiary at the top of the hierarchy and described him as "Board Director Manger [sic] in Chief." The chart depicted him as supervising "Dept. of Treasure [sic]," a secretary, "Real Estate Liao Shou Hui," and "Treading [sic] Import/Export."

As previously noted, the director issued a Notice of Intent to Deny on May 9, 2002. In pertinent part, the notice stated:

[T]he U.S. entity had gross income in 2001, of approximately \$9500, and total payroll expense of \$3000. The record clearly establishes that at the end of 2001, the U.S. entity did not have any full time employees. The U.S. entity was incorporated in

September, 2000. The U.S. entity has purchased one residential home and appears to be possibly purchasing four residential lots.

The record does not establish that the U.S. entity has grown to a point [where] it can support the beneficiary as an L-1A executive/manager as contemplated by regulation. The business activities have been limited [to] a minimal amount of real estate investment activity. The beneficiary has been involved in the day to day duties necessary to carry out these limited business activities. The record does not support a conclusion that the beneficiary has been performing in an executive/management capacity. The beneficiary does not supervise any professional, managerial, or supervisory personnel [who] preclude him from the performance of the day to day duties of the business. The U.S. entity does not have any organizational structure or hierarchy that would indicate that the beneficiary is performing executive duties as contemplated by regulation.

Given the conclusions above, the director requested the petitioner to "[p]rovide a description, **in detail**, of the routine day-to-day tasks to be performed by the beneficiary within the U.S. entity, **and** identify the percentage of weekly hours which he is expected to [spend] performing each of the tasks identified." (Emphasis in original.)

On May 30, 2002, the petitioner responded to the Intent to Deny asserting that there is no requirement that a certain number of individuals be supervised or that the company be a particular size. The petitioner stated that a "function manager" may direct and run a company without an overseeing large staff. The petitioner cited the unpublished Irish Dairy Board decision as analogous to the facts in this petition. Furthermore, the petitioner stated:

[T]he beneficiary . . . runs the operations of the US company and directs and manages the goals and policies of the company. He also has authority to select all outside contractors for the building projects, has selected the attorneys and accountants for the company, has negotiated all contracts and acted as signatory on behalf of his company, as well as

supervises the administrative work of Mr. Dan Yan, who in lieu of salary receives bonus share[s] of company stock in addition to payment for his part time work. As such, [the beneficiary] does not perform administrative functions, but acts in an executive capacity. In addition, . . . [the beneficiary] continuously meets with outside contractors and potential joint venture partners in expanding his company's business both here and in China. These functions are clearly executive in nature.

Furthermore, the petitioner's May 30 response essentially reiterated the beneficiary's proposed duties listed in the April 24, 2002 letter. The May 30 response, however, assigned percentages of time the beneficiary would spend on each of his proposed day to day tasks:

Meet with industrial and business contacts, such as attorneys and contractors for real estate matters and business associates to investigate and negotiate potential joint venture projects - 60 percent

Review contracts supplied by contractors and review land use regulations and permit requirements for building - 20 percent

Act as liaison with parent company and Board of Directors - 5 percent

Review bank account information and financial status of company - 5 percent

Review work of Mr. Dan Yan, assign secretarial duties to Mr. Dan Yan and consult with Ms. Shou Hui Liao on real estate matters concerning parent company - 5 percent

As the list above indicates, the beneficiary will spend at least 60 percent of his time developing leads for future work which, by definition, qualifies as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The AAO

agrees with counsel that a person can qualify as a functional manager without directly supervising other employees. However, as explained above, the evidence demonstrates that, at most, the beneficiary performs tasks necessary to provide a service or produce a product. Consequently, the beneficiary does not qualify as a functional manager.

Moreover, despite the percentages listed above, the beneficiary's job description is so vague that it fails to convey an understanding of the beneficiary's proposed daily duties. For example, the petitioner does not explain what "maintain[ing] office infrastructure" means. Furthermore, the petitioner gives no concrete examples to define "meet with industrial and business contacts," "review contracts supplied by contractors and review land use regulations and permit requirements," and "act as liaison with parent company and Board of Directors." Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In sum, the record fails to demonstrate that the beneficiary will primarily function as a manager or executive.

Finally, the evidence presents conflicting information regarding the petitioner's employees. The organizational chart depicts the beneficiary as supervising as many as four persons; however, the tax returns indicate that the petitioner employed only one person for one quarter in 2001. Also, it is unclear whether the petitioner actually employs Dan Yan and Liao Shou Hui. The petitioner asserts that it pays Dan Yan with company stock, but provides no evidence to support that claim. The petitioner claims that it plans to employ Liao Shou Hui; however, the organizational chart suggests that she already works for the petitioner. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). In short, the record fails to establish that the beneficiary supervised anyone at the time the petitioner was filed.

On appeal, petitioner's counsel likens this case to an unpublished Administrative Appeals Office decision relating to the Irish Dairy Board. The Irish Dairy Board case is unpublished; thus, it adds no precedential weight to the matter at hand. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Also, beyond the decision of the director, the AAO notes that the petitioner has submitted no evidence conclusively demonstrating that the U.S. entity has a qualifying relationship with the Chinese entity. See 8 C.F.R. § 214.2(1)(1)(ii)(G). The petitioner asserts that it is the subsidiary of a Chinese entity; however, the petitioner submitted no stock certificates, stock ledgers, or verifiable wire transfers to document its status as a subsidiary. As established above, going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*. As the appeal will be dismissed, the AAO will not examine this issue any further.

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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.