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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: WAC 98 115 54437 Office: CALIFORNIA SERVICE CENTER

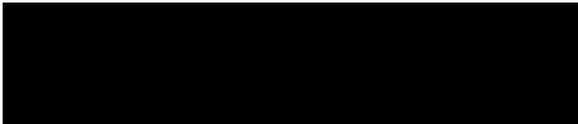
Date: DEC 08 2003

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:



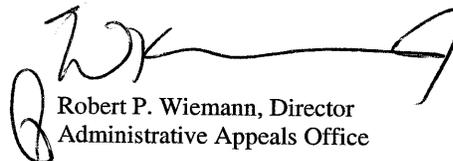
**INSTRUCTIONS:**

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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner [REDACTED] avers that it is a subsidiary of a Chinese business, [REDACTED] Ltd. The petitioner states that it is in the export and import business. The U.S. entity was incorporated on January 8, 1997 in the State of California. In February 1997, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). CIS approved the petition as valid from March 16, 1997 until March 16, 1998. 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 vice president and chief financial officer at an annual salary of \$18,000. On November 17, 1998, the director determined, however, that the beneficiary did not qualify as an executive or a manager. Consequently, the director denied the petition.

On appeal, the petitioner's counsel asserts that: (1) the director should have characterized the petitioner as a start up business; (2) the beneficiary's proposed duties are managerial and executive; and (3) the denial will cause the petitioner economic hardship.

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 director should have characterized the petitioner as a start up business. In March 1997, CIS granted a petition for the beneficiary to open a new office in the United States. The petitioner claims, however, that due to a delay at the U.S. consulate in Shenyang, China, the beneficiary did not obtain a visa until January 8, 1998. In turn, the beneficiary was unable to open the petitioner's new office until she arrived in the United States in late January 1998. The petitioner asserts, therefore, that the one-year period to open a new office should have started in January 1998, not March 1997. In turn, counsel maintains that the director should have judged the beneficiary's duties by the standards applicable to a manager or executive who works for an office that has been in operation for less than one year.

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 support an executive or managerial position. There is no provision in CIS regulations allowing for an extension of this one-year period. Therefore, the director properly judged the beneficiary's duties against standards applicable to a manager or executive who was initially granted one year to open a new office and now seeks to extend the validity of that 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, CIS 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.

The petitioner described the beneficiary's proposed U.S. duties in a supplement attached to Form I-129 and in a March 9, 1998 letter. The supplement and letter depicted the duties in virtually the same terms:

As Vice President and Chief Financial Officer of the subsidiary, [the beneficiary] has been responsible for the initial set-up and operations of the US subsidiary. She has been developing [the] subsidiary's administrative and business policies and establishing intracompany operation procedures and systems between the subsidiary and its Chinese parent company. To facilitate corporate growth, she has been contacting and networking with American manufacturers, suppliers and trade associations for business opportunities and arrangements. She has also been preparing for overseeing negotiation and progress of various contractual arrangements with American companies. Meanwhile, [the beneficiary] has also been playing a critical role of coordinating the business and administrative transactions between the US subsidiary Chinese parent company. For the financial operation, [the beneficiary] has been managing the financial and budgetary aspects of the subsidiary; and developing corporate financial systems, procedures and policies with financial and accounting assistance from professional services. Finally, she has been interviewing and recruiting corporate employees in accordance with the corporate needs.

In the coming years of her L1-A extension, [the beneficiary] will basically continue the above-described duties with [the petitioner] while becoming more specialized in some managerial functions. This

is because further expansion and diversification of this company's operations will bring about ever-growing complexity of the corporate transactions and administrative process.

The beneficiary's job description is vague and fails to convey an understanding of the beneficiary's proposed daily duties. For example, the petitioner gives no concrete examples to define "developing [the] subsidiary's administrative and business policies," "establishing intracompany operation procedures and systems," or "developing corporate financial systems, procedures and policies." 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).

Moreover, the beneficiary's proposed duties appear to comprise mainly marketing duties. For instance, the beneficiary's proposed tasks include "contacting and networking with American manufacturers, suppliers and trade associations for business opportunities and arrangements" and "preparing for . . . negotiation . . . of various contractual arrangements with American companies." Marketing duties, by definition, qualify 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). In sum, the record fails to demonstrate that the beneficiary will primarily function as a manager or executive.

On appeal, the petitioner's counsel further described the beneficiary's proposed tasks:

[The petitioner's] duties are primarily executive in nature. She directs the management of the organization and all of the company's major components and functions from administration to business development finance. She established the business and administrative goals and policies of the company. She exercises wide latitude in discretionary decision-

making with information provided by her subordinate manager. And she only receives only general supervision from the board of directors and the Chinese parent company, basically informing them periodically [of] developments in the subsidiary.

\* \* \*

Similarly, her duties are also primarily managerial in nature. She manages [the petitioner's] whole organization and set up all policies and procedures. She supervises and controls the work of her subordinate manager and will do the same to other managerial or supervisory employees to be hired after the company gets through its start-up stage. She makes the final decisions in virtually all essential functions and components of the organization. She has authority over all personnel actions in the company. With no other officer above her, she functions autonomously at a senior level within the organizational hierarchy. Also, she exercises discretion over the day-to-day operations of all administrative and business activities . . . .

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, counsel's descriptions on appeal of the beneficiary's duties cannot demonstrate that the beneficiary will function as a manager or an executive. Additionally, counsel's descriptions generally paraphrase the statutory definitions of "managerial" and "executive" capacity. See sections 101(a)(44)(A)(i), (iv) and 101(a)(44)(B)(iii) of the Act. For example, the petitioner depicted the beneficiary as:

- exercising wide latitude in discretionary decision-making;
- receiving only general supervision from the board of directors;
- supervising and controlling the work of her subordinate manager and future managerial or supervisory employees; and

- having authority over all personnel actions in the company.

In short, paraphrasing statutory definitions cannot establish that the beneficiary serves as a manager and an executive.

Additionally, the petitioner asserts that the beneficiary is a manager because she will supervise and control the work of future managerial and executive employees. In other words, the petitioner's assertions rely, in part, on future events rather than on conditions in existence when the petition was filed. 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*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Therefore, the future hiring of additional employees have no bearing on whether the beneficiary's proposed duties qualify as primarily managerial or executive.

Finally, on appeal, counsel asserts that, if CIS does not extend the validity of the petition, the denial will cause the petitioner economic hardship. When determining eligibility as a nonimmigrant manager or executive, CIS is limited to the criteria outlined in the statute and regulations. See section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L); see sections 101(a)(44)(A), (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A), (B). Neither of these two authorities allows CIS to consider the impact of a denial on the petitioner's operations when determining whether the proffered position is primarily managerial or executive. Therefore, counsel's assertions regarding the potential effect of the denial on the petitioner's future operations are irrelevant to this matter.

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.