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

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



FILE: EAC 02 128 53433 Office: VERMONT SERVICE CENTER Date: **NOV 13 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:

SELF-REPRESENTED

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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as an importer and exporter of IT products, computer software and hardware. It seeks to employ the beneficiary temporarily in the United States as the president of its new office for one year. The director determined that the evidence was not sufficient to establish that the beneficiary has been or would be employed primarily in a qualifying managerial or executive capacity or that the petitioner would be able to support a managerial or executive position within one year of operation.

On appeal, the petitioner disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or executive in nature.

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.

The regulation at 8 C.F.R. § 214.2(1)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

The regulation at 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 with 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 regulation at 8 C.F.R. § 214.2(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in

paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

- (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
- (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
- (3) The organizational structure of the foreign entity.

According to the documentary evidence contained in the record, the petitioner was incorporated January 17, 2002 as an import and export business, whose principal activity is the sale of software and computer parts. The petition was filed March 1, 2002. The petitioner states that the U.S. entity is a subsidiary of

[REDACTED] Ltd. of the People's Republic of China (China). The petitioner declares three employees. The petitioner seeks the beneficiary's services in order to open a new office and render services as president for a period of one year, at a yearly salary of \$35,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been or 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:

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.

The record contains a business plan that lists the beneficiary's proposed job duties as follows:

President (Xi Yao Dong) As president of the US entity, he has been the one who takes responsibility of [sic] overall administration of the US entity, and his job duties have included organizing, supervision dept. Managers and lower-level supervisors, making important decisions concerning business, personnel, management & administration, finance, etc. hiring and firing of company staff, examining & checking agreements & listening to reports for dept. [sic] managers & lower-level these reports, analyzing financial papers and allocation funds, planning for company strategies, plans, schemes, and deciding company lines, etc. [sic].

The petitioner submitted a chart labeled "Personnel Structure" which further describes the beneficiary's proposed job duties as: "participating in formulation of major corporate policies and strategies; coordinating intra-company relation and conveying and communicating the directory and guidelines with respect to financial and business policies and in some cases when necessary, involving in everyday business operation of American Co. [sic]."

An appointment notice signed by the general manager of the foreign entity, dated October 15, 2001, restates the board of director's resolution to appoint the beneficiary to be president of the U.S. entity, with overall responsibilities concerning everything over the American subsidiary. It is also noted in the notice that the appointment of the beneficiary would be effective the day the U.S. entity is established.

In a letter written in support of the petition dated, March 5, 2002, the petitioner further describes the beneficiary's qualifications as:

In accordance with the resolutions of the board of directors of the parent organization, the beneficiary, Mr. [REDACTED] has been transferred from the parent organization to the US entity to the position of president of the US entity. He has been transferred here to strengthen the leadership of the US entity, and to reinforce the control of the parent organization over the US entity.

The record also includes a copy of the Certificate of Incorporation for the U.S. entity in the State of New York, filed by the beneficiary, signed by the beneficiary and dated January 17, 2002; a copy of the U.S. entity's by-laws signed by the beneficiary and dated January 30, 2002; and a lease agreement entered into by the beneficiary on behalf of the U.S. entity, signed by the beneficiary and dated January 15, 2002.

In the petition the beneficiary's employment with the foreign entity is listed from August 1998 to the present, with no interruptions. In an authorized appointment notice written by the foreign entity and dated October 30, 1998, the beneficiary is appointed to the position of Vice General Manager of the foreign entity with responsibilities concerning personnel, administration and finance. The appointment was to become effective on the same day as the notice was written.

The petitioner also submitted copies of the beneficiary's passport and B-2 visas as evidence. The beneficiary's passport was issued March 2, 1999. His profession on the passport reads "unemployed." The record also reflects that the beneficiary was issued a B-2 visa, that he arrived in the United States on March 9, 2001, and that he remained in the United States at the time the petition was filed on March 1, 2002. There has been no evidence submitted to establish that the beneficiary adjusted his employment status to read "employed" versus "unemployed" on his passport.

In response to the director's request for additional evidence, the petitioner submitted a salary list for the foreign entity that lists the beneficiary's basic salary, basic subsidy, duties subsidy, overtime pay, and transportation pay from March 2001 to February 2002, uninterrupted. The petitioner also submitted a letter of confirmation from the foreign entity's president, dated March 10, 2002, in which it is stated, "[T]his letter is to certify that Mr. Xi Yao Dong is a full time employee at our company. Since Jan. 1999, he has been promoted to be Vice President at our company." The president of the foreign company continues by stating that the beneficiary governs seven sub-managers and that his duties are:

- 1). Sign import & export and/or Sales & purchase contracts on behalf of parent company;
- 2). Review the performance of sub-managers under his supervision, based on information such as business amount, profits, and satisfaction of customers;

- 3). Employ and lay off all sub-managers under his direction; [and]
- 4). Assist General Manager to make and conduct business plan.

In response to the director's request for additional evidence, the petitioner also submitted a translated version of the beneficiary's work card, on the foreign company's letterhead, that lists the beneficiary as a vice general manager as of January 16, 1999. The petitioner also submitted a translated version of the foreign entity's organizational chart that depicts the beneficiary as vice general manager with six divisions and thirty subordinates under him. Finally, the petitioner submitted a "Milestone" business plan for the U.S. entity that depicts startup activity from February 1, 2002 to March 31, 2002. It also reflects that the majority of the U.S. entity's funding will come from the parent company, and that the petitioner anticipates hiring additional employees within the startup year.

The director determined that the record did not establish that the beneficiary had been or would be employed in a primarily managerial or executive capacity. The director also maintained that the record did not establish that the new business would be able to sustain a managerial or executive position within one year of operation.

On appeal, the petitioner disagrees with the director's decision and states that the new evidence will show that the beneficiary has been employed in an executive capacity during one of the three years of employment as required.

The petitioner submits a brief and additional evidence to support its contention. A sworn statement by the beneficiary, signed May 31, 2002, and notarized in the State of New York reads:

I, [REDACTED] Being duly sworn; deposes and says:

That I was applied [sic] to Chinese passport at Dec., 1988. I was unemployed at that time. The process to get the Chinese passport was about 6 months. That when I got the Chinese passport I have been employed by the parent company at Jan., 1999 [sic]. There was no changed under "profession" on the passport when I get the [sic] it at March 2, 1999.

The petitioner also resubmitted the authorized appointment notice, dated October 30, 1998; and a revised version of the U.S. company's milestone that now emphasizes the anticipated hiring of eight to ten full-time employees rather than the original three to ten part-time employees.

While the petitioner has presented additional clarifications and explanations, the record does not support a finding that the beneficiary was continuously employed by the parent organization for one (1) year during the three (3) years immediately prior to the filing of the petition. There is evidence in the record, which, demonstrates that the beneficiary has been recorded as working full-time and over-time for the foreign entity at a time when he was present in the United States on a B-2 visa. The record contains a description of the beneficiary's job duties that essentially paraphrases the essential elements of the statutory definitions of manager and executive. The record does not contain a comprehensive description of the beneficiary's day-to-day activities. The beneficiary's position title cannot be used to substitute for a concrete description of the beneficiary's actual duties.

The record also contains many inconsistencies regarding the beneficiary's employment history with the foreign entity. Information contained in the record shows that the beneficiary stated that he was unemployed in 1998 for purposes of obtaining a passport. In contradiction, the beneficiary's employment record indicates that he has been continuously employed since October 1990. Additionally, the foreign entity states that they employed the beneficiary during the period in question. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not established that the beneficiary served in a primarily managerial or executive capacity for one continuous year immediately preceding the filing of the petition.

Moreover, the record does not support a finding that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity. The information provided by the petitioner describes the beneficiary's job duties only in broad and general terms. Duties described as being responsible for organizing and supervising department managers and lower-level supervisors, making important decisions concerning business,

personnel, management and administration, finance, and hiring and firing of company staff are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive in nature. The petitioner has not demonstrated that the beneficiary will manage or direct the management of a department, subdivision, function, or component of the organization. Neither has the petitioner established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing the services of the corporation. The record reflects a management structure for the U.S. entity that includes the beneficiary as president, and a vice-president. The record also reflects a personnel structure for the U.S. entity that includes the beneficiary as president, and a vice-president under his direction. All other position titles are listed as "[W]ill be hired." Although the petitioner, in its business plan, indicates intent to hire other professional and managerial staff, it is unlikely that the additional employees will be in a position to relieve the beneficiary from performing non-qualifying duties within the first year of operation. Based upon the evidence of record, the beneficiary will be performing the services of the organization, rather than managing a function or the overall day-to-day activities of the organization. The evidence does not establish that the U.S. entity will be able to sustain a managerial or executive position within one year of operation. Furthermore, there is no evidence to show how much of the time spent by the beneficiary has been or will be allotted to managerial or executive duties and how much to other non-managerial or non-executive functions. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title.

Furthermore, there has been no evidence presented by the petitioner that establishes that the petitioner would grow as a new office, within one year to be able to support a managerial or executive position. The record contains a business plan "Milestone" containing projected start-up growth and earnings, and lists the foreign entity as its major funding source.

However, on review, the record contains no contemporaneous documentation of the foreign parent company or of the U.S. entity having corroborated the aforementioned financial statements. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (reg. Comm. 1972). Accordingly, there is

insufficient evidence in the record to show that the petitioner has sufficient financial ability to remunerate the beneficiary within one year of operation.

On review of the complete record, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Therefore, the appeal will be dismissed.

Beyond the decision of the director, the remaining issue is whether the beneficiary had maintained his B-2 visa status at the time the petition for change in status was filed. The record establishes that the beneficiary was initially admitted to the United States on a B-2 (pleasure) visa on March 9, 2001 and that it was due to expire March 8, 2002. The record reflects multiple business transactions made by the beneficiary during his stay in the United States as a B-2 status nonimmigrant. The record also reflects that the beneficiary was listed as being employed full-time and working overtime hours for the foreign entity at a time when he was in the United States as a B-2 status nonimmigrant. An applicant for change of nonimmigrant classification under section 248 of the Act must establish that he has been lawfully admitted to the United States as a nonimmigrant and that he is continuing to maintain that status at the time of filing the application. In addition, the applicant must be eligible for the nonimmigrant status sought as described in section 101(a)(15) of the Act, 8 U.S.C. § 1101(A)(15). *Matter of Kung*, 17 I&N Dec. 260 (BIA 1978). Pleasure is defined as "Legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment and activities of a fraternal, social or service nature." 22 C.F.R. § 41.31(b)(2). As the appeal will be dismissed, this issue need not be examined further.

Although not explicitly addressed in the decision, the record is not persuasive in demonstrating that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad on completion of the temporary assignment in the United States pursuant to 8 C.F.R. § 214.2(1)(3)(vii). In addition, the minimal documentation submitted to reflect the parent's and the petitioner's business operations raises the issue of whether there is a qualifying relationship between the U.S. and foreign entities pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G). As the appeal will be dismissed, these issues need not be examined 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.