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Citizenship and Immigration Services

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



FILE: WAC 01 180 51306

Office: CALIFORNIA SERVICE CENTER Date:

NOV 20 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:



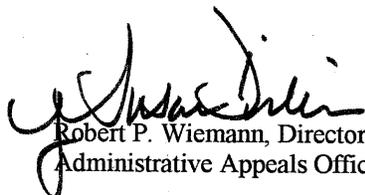
INSTRUCTIONS:

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 nonimmigrant visa petition was denied by the Director, California 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 IC technology development business. It seeks to employ the beneficiary temporarily in the United States as the president and general manager of its office for three years. The director determined that: (1) the evidence did not demonstrate that the petitioner had been doing business as defined in the regulations; and (2) the beneficiary's proposed duties for the U.S. entity do not involve responsibilities that are primarily managerial or executive in nature.

On appeal, counsel disagrees with the director's determination and asserts that the record demonstrates that the petitioner is doing business and that the beneficiary's job duties 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, in part, 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1999 as an IC technology design and development business. The petitioner states that the U.S. entity is a subsidiary [REDACTED] Corporation, located in Beijing, China. The petitioner declares seven employees. The petitioner seeks the beneficiary's services as a president and general manager for a period of three years, at a yearly salary of \$150,000.

The first issue in this proceeding is whether the petitioner had been doing business as defined in the regulations.

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(G) state:

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 regulations at 8 C.F.R. § 214.2(1)(1)(ii)(H) state:

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 petitioner initially submitted a copy of its US Corporation Income Tax Return for the year 1999 (IRS Form 1120) which showed no gross receipts and no compensation to officers, or salaries and wages to employees.

The director requested that additional evidence be submitted to substantiate the petitioner's visa application. In particular, the director requested the petitioner submit copies of its Form DE-6, Quarterly Wage Report, and Form 941, Quarterly Wage Report, for the last four quarters to establish that it was doing business.

In response to the director's request for additional evidence, counsel asserted that the Trinet Employer Group, Inc. provides employees and services to Viewtel Corporation and, "due to business concerns, Trinet Employer Group didn't provide Petitioner copy [sic] of Form 941 and DE-6."

The director denied the petition, and in so doing determined that the evidence did not demonstrate that the petitioner had been doing business as defined in the regulations.

On appeal, counsel contends that, although not all documents were submitted per the director's request, the evidence that was submitted is sufficient to establish that the petitioner was

doing business within the meaning of the regulations. Counsel submitted a copy of the US Corporation Income Tax Return for the year 2000 (IRS Form 1120) and states, "the petitioner did not include the 2000 Tax Form 1120 with the petition because at the time the petition was submitted, the 2000 Tax Form 1120 was still under preparation by the petitioner's CPA." Counsel also submitted U.S. company invoices, the majority of which are dated May 31, 2001 and beyond, to confirm the petitioner's position. Counsel further submitted a copy of a list dated March 6, 2002, provided by the [REDACTED] for all employees of the petitioner, which listed their annual gross pay, annual adjusted gross pay, YTD FICA, YTD Federal, YTD State and YTD Local withholding information for the year of 2001. Counsel also provided previously submitted business and financial documents. It is noted that the initial petition was filed on May 1, 2001.

Counsel's assertions are not persuasive. The evidence submitted on appeal, although explanatory in nature, is not sufficient to overcome the issues initially raised by the director. Contrary to counsel's contention, the evidence that the petitioner failed to submit was material because it could have established that the U.S. entity was doing business; moreover, the evidence could have demonstrated that the beneficiary served in a primarily managerial or executive position abroad and would do so in the United States.

Furthermore, there has been insufficient evidence submitted to establish that the U.S. entity was engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(H). On appeal, the petitioner submits evidence that was not submitted to the director and which was not in existence at the time the petition was filed. 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts, See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998).

Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner's new evidence will not be considered and the record as presently constituted does not demonstrate that the petitioner was doing business in accordance with the regulations. For this reason, the grounds for denial of the petition by the director have not been overcome, and the appeal will therefore be dismissed.

The second issue in this proceeding is whether the petitioner has established that the beneficiary 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.

In a letter from the U.S. company, dated April 12, 2001, the Director of the Board states "Viewtel has 7 employees" He also states that the beneficiary "will play an integral role in the company's strategic direction, development and future growth." He goes on to state that the beneficiary "will provide overall technology vision and thought leadership to the organization and lead decisions in the areas of technology platforms, partnerships and external relationships." The director also avers that the beneficiary "will spearhead the development of the company strategy and have overall responsibility for the day-to-day operations." He continues by describing the beneficiary's proposed job duties as follows:

- Direct and participate in the development and implementation of corporate goals and objectives;

- Formulate policies, establish procedures, delegate authority, oversee and ensure all business performance and projects to be accomplished in accordance with corporate policies and goals;
- To [sic] build and manage a top flight management and technology teams and ensure the office is successful at attracting, training, and retaining talented staffs;
- Coordinate and lead the management team, providing guidance on forecasts and strategy to meet targets;
- Direct preparation of reports which summarize and forecast company business activity and financial position, based on past, present and expected operations;
- Establish a rapport with the technology community to anticipate and react to major technology changes to ensure the company stays at the forefront in the competitive market;
- Manage the overall relationship with strategic partners to drive ongoing results and new opportunities;
- Directs [sic] business expansion and strategic business cooperation to strengthen the competitiveness of the business;
- Coordinate liaison with China headquarters office;
- Advice [sic] the Board on desirable operational adjustments and organizational development to strengthen the competitiveness of the business; and
- Direct company's expansion, major alliances, business development, merger and acquisition.

In a letter from the Viewtel Corporation, dated April 25, 2001, the Operations Manager stated "Viewtel Corp. currently has 5 employees under [REDACTED] payroll."

The petitioner also provided an organizational chart of the U.S. entity that listed ten employees; and an employee listing for the U.S. entity that listed nine employees, and detailed employee names, titles, educational backgrounds, annual salaries and a brief description of duties. The U.S. entity's organizational chart reads as follows:

- Acting General Manager - no salary indicated
- VP Hardware Engineering - annual salary \$116,000
- VP Software Engineer - annual salary \$116,000
- VP Imaging - annual salary \$10,400

██████████ Marketing Manager - annual salary \$60,000

██████████ Operations Manager - annual salary \$48,000

██████████ - VP Business Development - annual salary \$120,000

██████████ Firmware Engineering Consultant (the chart shows that he is managed by ██████████ - annual salary \$42,000

██████████ Software Engineer (the chart shows that he is managed by Adam Min) - annual salary \$18,000

██████████ Business Development Manager (the chart shows that he is managed by ██████████ - annual salary \$40,000

In response to the director's request for additional evidence, the petitioner stated:

[A]ll Viewtel Corp.'s employees were hired through Trinet Employer Group, Inc. Trinet provides employees and services to Viewtel Corp. and provides payroll and payroll related taxes services to Viewtel Corp's employees.

Viewtel Corp. does not retain Form DE-6 and 941, since Trinet Employer Group, Inc. filed Form 941 and DE-6 on behalf of all Viewtel Corp's employees as well as other companies' employees, as Trinet Employer Group is the official employer of record. Due to business concerns, ██████████ Employer Group didn't provide Petitioner copy of Form 941 and DE-6.

The petitioner submitted an unaudited financial statement for the U.S. entity, for the twelve months ending December 31, 2000. The statement reflects expenses for outside services in the amount of \$168,883 and salaries and wages in the amount of \$128,954.86.

The petitioner also provided a copy of a service agreement, entered into by the U.S. entity and the ██████████ Employer Group, Inc., dated February 16, 2000. The agreement calls for the Trinet Group to provide outsourced human resources services to the U.S. entity in exchange for a fee. There is no indication in the agreement as to how many individuals the Trinet Group agreed to outsource to the U.S. entity.

The director, in denying the petition, determined that the record lacked sufficient evidence to establish that the beneficiary's duties will involve responsibilities which are primarily managerial or executive in nature. The director stated in the denial:

Two elements generally characterize an executive or managerial position which qualifies a beneficiary for L-1 nonimmigrant classification. First, the position must involve significant authority over the generalized policy of an organization or a major subdivision of an organization. Second, substantially all of the employee's duties must be at the managerial or executive level.

In his conclusion, the director states "The record indicates that a preponderance of the beneficiary's duties will be directly providing the services of the business."

On appeal, counsel disagrees with the director's decision and asserts that all records submitted to Citizenship and Immigration Services (CIS) indicated the beneficiary's duties are executive in nature and that he will not be providing the services of the business. Counsel submits a brief, new evidence, and a copy of evidence already included in the record in support of his contentions. Counsel resubmitted the U.S. organizational chart, the employee listing for the U.S. entity, the Trinet HR service contract, and statement letters, dated April 12, 2001 and April 25, 2001. Counsel submits a new organizational chart, which shows that the U.S. entity consists of a general manager, and a VP of Engineering, a VP of Marketing, Operations, a VP of Hardware, a VP of Software, a VP of Imaging, and a VP of Firmware, all of whom are under the direction of the general manager. There has been no evidence submitted to show that any subordinates serve under the numerous VPs. Counsel also submits Form 1120, Corporate Income Tax Return, for the 2000 and 2001 years, and an earnings and tax reported, dated March 6, 2002, and prepared by Trinet Employer Group. The U.S. organizational chart shows seven functions under the management of the general manager. Counsel also claims on appeal, that five employees were hired in 2000 through Trinet; that two additional employees were hired by the U.S. entity in 2001; and that the petitioner has retained the services of two IC consultants. Counsel also contends that all employees possess college and/or professional degrees. Counsel further asserts, "the beneficiary possesses leadership qualities, proactive management mindset, strong organizational ability, highly developed communication talents and strong IC background."

Counsel's assertions are not persuasive. The assertions of counsel do not constitute facts. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The assertions of counsel without documentary evidence cannot be used to establish that the

beneficiary will be employed primarily in a managerial or executive capacity. 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).

On review of the complete record, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity. On appeal, the petitioner submits evidence that was not submitted to the director prior to its denial, and/or was not in existence at the time the petition was filed. Therefore, this evidence will not be considered on appeal. See *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts, See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

Furthermore, the information provided by the petitioner describes the beneficiary's duties only in broad and general terms. Duties described as being responsible for directing and participating in the development and implementation of corporate goals and objectives; formulating policies, establishing procedures, delegating authority; coordinating and leading the management team; and establishing a rapport with the technology community are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive in nature. Further, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. In addition, the vague position descriptions, which include language such as "will play an integral role in the company's strategic direction, development and future growth," are not sufficient to establish that the beneficiary's proposed job duties are managerial or executive.

The petitioner has not provided persuasive evidence to establish that the beneficiary will be managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organizational hierarchy. The petitioner's evidence is not sufficient in establishing that the beneficiary will be directing the management of the organization or a major component or function of the organization, establishing the goals and policies of the organization, or exercising wide latitude in discretionary decision-making. In the instant matter, there has been no evidence presented that details how the beneficiary will manage subordinates, and with what power and authority he will direct employees' daily work activities. The

record does not demonstrate the percentage of time the beneficiary will spend performing managerial versus non-managerial duties on a daily basis. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title.

The record does not support a finding that the petitioner will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. In the instant matter, the petitioner failed to provide corporate tax documents and/or employee payroll documents to substantiate the petitioner's staffing claims, in compliance with the director's request for additional evidence. In addition, discrepancies in the number of employees employed by the petitioner at the time of filing; the salaries submitted by the petitioner versus the salary and wage amounts recorded in its financial statements; the discrepancy noted in the petitioner's ability to obtain payroll information from Trinet Employer Group; and the variances presented in the U.S. entity's organizational charts have not been adequately explained or clarified by the petitioner. 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 (BIA 1988).

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

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; *Republic of Transkei v. INS*, 923 F.2d 175,178 (D.C. Cir. 1991) (holding burden is on the petitioner to provide documentation); *Ikea v. U.S. Dept. of Justice*, 48 F.Supp.2d 22, 24 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.