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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

[REDACTED]

FILE: LIN 02 019 54229 Office: NEBRASKA SERVICE CENTER Date: **NOV 20 2003**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

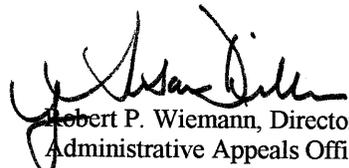
INSTRUCTIONS:

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

The petitioner is described as being engaged in the Chinese fisheries business. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the evidence did not demonstrate that the petitioner had been doing business as defined in the regulations. The director also determined that the evidence did not establish that the beneficiary's duties involved responsibilities that were primarily managerial or executive in nature.

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

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.

The regulation at 8 C.F.R. § 214.2(1)(14)(i) states, in part:

Individual petition. The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

According to the documentary evidence contained in the record, the petitioner was established in 1998 as a business engaged in Chinese fisheries. The petitioner states that the U.S. entity is a subsidiary of Liaoning Pelagic Fisheries of the People's Republic of China (China). The petitioner declares three employees. The petitioner seeks to continue the beneficiary's services as its president at a monthly salary of \$2,000.

The first issue in this proceeding is whether the petitioner has 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(l)(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 financial and business records as proof that the U.S. entity had been doing business at the time the petition was filed. The director determined that the evidence of record was not sufficient to establish eligibility and thereafter requested additional evidence from the petitioner.

In response, counsel submitted copies of the company's 2001 corporate income tax return, 2001 unaudited financial report, copies of sales contracts, and a sample list of the U.S. entity's U.S. clients. Counsel also asserted that the U.S. entity had experienced a steady growth since its establishment in 1998. No additional evidence was provided to substantiate counsel's contention.

The director, in denying the petition, determined that the evidence submitted was insufficient to establish that the petitioner was doing business. The director further stated that although the petitioner submitted receipts from the organization showing the purchase of both goods and services from other U.S. entities, the evidence failed to establish that the petitioning entity was providing any goods or services other than that of a customer basis.

On appeal, counsel disagrees with the director's decision and submits a brief letter and additional evidence to establish that the U.S. entity was doing business. The petitioner submits company invoices and bank statements dated February 2002 and beyond. It is noted that the initial petition was filed on

October 23, 2001. Hence, 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 Corp.*, 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).

As stated above, the copies of invoices that the petitioner submits on appeal will not be addressed because they pertain to the petitioner's operations subsequent to the filing of the petition. The petitioner's 2001 corporate income tax return shows that it had gross receipts/sales in excess of \$2,587,038; however, the petitioner did not show from where this income was derived. The petitioner did not submit copies of invoices, purchase agreements, or other documentary evidence to show that this income was derived from regularly, systematically and continuously selling products. The petitioner's gross receipts could have derived from selling products on one or two occasions during the year.

More importantly, however, the petitioner's gross sales in excess of \$2 million does not comport to its mission statement. In an October 8, 2001 letter to the director, the petitioner stated that it was established as a "U.S. Representative Office" that "administers all Chinese fisheries activities in US territorial waters and in the high seas of the North Pacific. It also revives and responds to any legal process issued in the United States for any cause arising out of the conduct of [the foreign entity's] fishing activities." The petitioner's business objectives do not include the sales of products; the petitioner describes itself as a representative office (agent) of the foreign entity. The petitioner has not resolved whether it sells a product, provides a service, or if it is simply an agent of the foreign entity. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, the petitioner has not established that it had been doing business as the regulations define that term. The director's decision on this issue shall not be disturbed.

The second 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.

In a letter of support dated October 8, 2001, the beneficiary's job duties in the United States are described as follows:

[The beneficiary] is responsible for establishing correspondence and record procedures; providing logistic support to the factory trawlers; ensuring that the activities of Liaoning fishing fleets operating off the US territory waters were in compliance with relevant US laws and regulations and the US-China Fisheries Agreement; and preparing and submitting applications for permits and quota.

As the President of Liaoning USAS, [REDACTED] is responsible for developing and implementing the company's business plans in the US. He controls and directs Liaoning USA's daily business operation, which includes import and export of seafood products, contract negotiation, marketing and promotion, and personnel administration. He makes important decisions with respect to personnel, finance and administrative duties of the company. Mr. Dai is responsible for implementing the long term business plan and budget, which is submitted to and approved by the parent company in China on an annual basis. He directs due diligence and financing for appropriate investment opportunities in North America, working closely with the outside professional such as CPA, attorney, business agents retained by the company. He

supervises and directs marketing and sales activities, which include market development, customer relations and quality control matters. In addition, [REDACTED] is responsible for Liaoning China's strategic business diversification and expansion in North and South America. [REDACTED] is also responsible for hiring, firing, determining compensation levels and bonuses for company staff. [REDACTED] is accountable for Liaoning USA's parent company in China and reports directly to the Board of Directors and the President of Liaoning China. Under Mr. [REDACTED] direct supervision are two full time employees, [REDACTED]

Counsel further stated that [REDACTED] is an office manager who handles documentation related to the U.S. entity's business transactions and engages in general office administration. Counsel also stated that [REDACTED] possesses a master's degree in business management and world economics, and is the company's sales manager responsible for market development and sales transactions.

In response to the director's request for additional evidence, counsel listed the beneficiary's job duties accompanied by the approximate time spent on each.

- Responsible for developing and implementing the company's long term business plan and budget 5%
- Sets up and implements the company's annual business plans 10%
- Supervises company employees 10%
- Participates in major undertakings with respect to personnel, finance and other important administrative decisions of Liaoning USA 45%
- Directs Liaoning USA's strategic development in the US, including assisting Liaoning China's business diversification and expansion in North and South America 25%
- Responsible for hiring, firing, determining compensation levels and bonuses for company employees 5%

The petitioner also submitted an organizational chart depicting the beneficiary as president of Liaoning USA, [REDACTED] as office manager, and [REDACTED] as sales manager.

In denying the petition, the director noted that the evidence did not establish that at the time of filing the petition, the U.S. entity contained the organizational complexity to warrant the services of the beneficiary. The director also stated that with only two other employees, the beneficiary would appear to be involved in the "hands on running" of the U.S. entity.

On appeal, counsel disagrees with the director's findings. He states that the evidence has established that the beneficiary qualifies as an executive in that he is ultimately responsible for the company's entire operation. Counsel continues by reiterating the beneficiary's qualifications. No additional evidence has been submitted to substantiate counsel's claims.

On review of the record, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. Duties described as being responsible for developing and implementing the company's long term business plan and budget; supervising company employees; participating in major undertakings with respect to personnel, finance and other administrative decisions; directing the strategic development of the U.S. entity; and hiring and firing employees are without any context in which to reach a determination as to whether they are qualifying as managerial or executive in nature. The petitioner further described the beneficiary's responsibilities with the U.S. entity as: establishing correspondence and record procedures; providing logistic support to the factory trawlers; assuring that the company activities operating off the US territory were in compliance with relevant US laws; preparing and submitting applications for permits and quota; and developing and implementing the company's business plans in the United States. These vague descriptions are insufficient to establish that the beneficiary's job duties are managerial or executive in nature. Furthermore, the petitioner has not provided persuasive evidence to establish that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organization hierarchy. Based upon the descriptions given of the beneficiary's job duties, it appears that he will, at best, be responsible for supervising non-professional subordinates and carrying out the day-to-day services of the organization. The record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed managerial or executive staff position. The record demonstrates that only two other individuals, whose titles are office manager and sales

manager, are employed by the U.S. entity. The petitioner has not provided documentary evidence to show how the beneficiary's daily activities interrelate to that of the other employees. 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. Although it is stated that the sales manager possesses a master's degree, there has been no evidence presented to show that the sales manager's actual activities at the U.S. entity are professional, supervisory or managerial in nature.

Furthermore, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or 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; exercising wide latitude in discretionary decision-making; or receiving only general supervision or direction from higher level executives. On appeal, counsel asserts that the beneficiary's duties are executive in nature. He goes on to explain that the beneficiary establishes and implements the company's business plans, objectives and policies; participates in major undertakings and makes important decisions; supervises employees, and is responsible for hiring, firing and determining compensation levels and bonuses for the staff; and receives only general direction from the executive and board members. The description of the beneficiary's job duties essentially paraphrases the essential elements of the statutory and regulatory definitions of executive. In the instant case, paraphrasing the regulation, as a substitute for a day-to-day description of the beneficiary's job duties, is insufficient to demonstrate the beneficiary is acting in an executive capacity. The record does not contain a comprehensive description of the beneficiary's day-to-day activities. Although the petitioner submitted a description of the beneficiary's job duties, it does not entail a detailed description sufficient to determine how his daily activities are, in fact, executive in nature. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Based upon the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

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.