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U.S. Department of Homeland Security
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: SRC 02 226 52285 Office: TEXAS SERVICE CENTER

Date: FEB 06 2004

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:



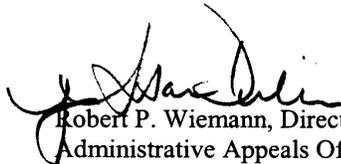
INSTRUCTIONS:

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

The petitioner claims to be an importer, wholesaler and retailer of building stone. It seeks to employ the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner failed to establish that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner disagrees with the director's determination and asserts that the evidence establishes that the beneficiary's duties will be 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(l)(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(l)(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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1998 and claims to be an importer, wholesaler and retailer of building stone. The petitioner claims that the U.S. entity is a subsidiary of Xiamen Wanli Stone Company, located in China. The petitioner declares three employees and \$1,447,328.00 in gross annual income. The petitioner seeks the beneficiary's services as chief executive officer of its organization for a period of three years, at an annual salary of \$42,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily executive capacity.

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 the petition, the petitioner described the beneficiary's proposed job duties as chief executive officer of the U.S. entity as:

Direct and coordinate business contracts and shipments in the entire operation of Sinostone's North America market and will develop other relevant policies and procedures implementing the overall objective of Wanli Stone Group. Ms. [REDACTED] will also preside over the Board of Directors and serve as the Chairman of executive officers to make sure that they comply with established policies and objectives of the company. She will re-structure [sic] the personnel within the company and redetermine and evaluate the current operation functions on behalf of the Group for the better business opportunities. She will report directly to the president of the Group for all business matters within the USA [sic].

In a letter of support, dated July 7, 2002, the president of the U.S. entity stated that the beneficiary will be employed as chief executive officer, and as such will plan, develop and establish policies and objectives of the U.S. entity. The president also stated that the beneficiary will direct and coordinate business contracts and shipments, and will develop other relevant policies and procedures implementing the overall objective of the parent company. The director stated that the beneficiary would preside over the board of directors and serve as the chairman of executive officers to make sure they comply with established policies and objectives. The director also asserted that the beneficiary would restructure the company personnel and redetermine and evaluate current operation functions. He concluded by stating that the beneficiary will report directly to the president of the group for all business matters within the United States.

In response to the director's request for additional evidence regarding the workers that the beneficiary would be managing, counsel stated that the beneficiary would be managing two employees. Counsel further asserted that one employee is a sales manager and that the other employee is an inventory warehouse manager.

The petitioner also submitted an organizational chart of the U.S. entity that depicts a chief executive officer, with an account manager, import manager, inventory warehouse manager and sales manager in positions subordinate to the chief executive officer.

The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary will be employed primarily in an executive capacity. The director stated that the petitioner's business has not expanded to the point where the services of a full-time chief executive officer would be required. The director also stated that the majority of the beneficiary's time would be spent in the nonmanagerial, day-to-day operations of the business, and that the three current employees of the petitioner, all with supervisory titles, could not be engaging in managerial or executive duties for a preponderance of the time.

On appeal, counsel disagrees with the director's decision, and states that Citizenship and Immigration Services (CIS) has approved other similar L-1A visa petitions. Counsel further contends that the director's decision conflicts with prior decisions and should be reconsidered. Counsel submits a brief and evidence in support of his contentions. As evidence on appeal counsel submits copies of previously approved L-1A petitions for beneficiaries other than the beneficiary of this petition.

Counsel asserts on appeal that the instant case is similar to other cases that have come before the Citizenship and Immigration Services (CIS) for consideration of status. Counsel also contends that the AAO should follow these decisions in granting an extension of stay for the beneficiary, in that the beneficiary is capable of serving the U.S. entity as its chief executive officer. Counsel's assertions are not persuasive. There is no evidence to show that the facts of the instant case are in anyway similar to the facts in the approved petitions.

Each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). In the instant case, there is no indication from the record demonstrating that the petitioner has ever petitioned for the beneficiary to receive a L-1A nonimmigrant visa. There is also no evidence contained in the record that shows that the beneficiary has ever been granted L-1A nonimmigrant visa status. Further, the director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petitions. In addition, the record of proceeding does not contain detailed copies of the visa petitions claimed to have been previously approved. If, however, the previous nonimmigrant petitions were approved based

on the same facts that are contained in the current record, the approval would constitute clear and gross error on the part of CIS. As established in numerous decisions, CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals, which may have been erroneous. See *Sussex Engg. Ltd. V. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert. denied, 485 U.S. 1008 (1988); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (BIA 1988). The Administrative Appeals Office is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

Counsel further states that the petitioner is in the process of developing and implementing new projects, which in turn will result in the creation of new positions, and the recruitment for employees. Counsel also states that the beneficiary will be involved in this development process. The record indicates that the petitioner was established in 1998. The petition for nonimmigrant visa status does not claim that the petitioner is a new office and, therefore, the entity will be examined as an ongoing enterprise. As an ongoing enterprise, the petitioner has to establish that its business has developed to a point where it can support a managerial or executive position. In the instant matter, the evidence demonstrates that the petition employs a chief executive officer, sales manager and inventory and warehouse manager. There has been no evidence submitted to show that the three employees manage or supervise any subordinates. Hence, it appears from the record that the beneficiary, as chief executive officer, would be performing the day-to-day non-executive services of the organization rather than serving as its chief executive officer. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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 evidence fails to demonstrate that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

On review of the complete record, it cannot be found that the beneficiary will be employed primarily in an executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that she will be primarily directing the management of the organization or a major component or function of the organization, that she will be

establishing goals and policies, that she will be exercising a wide latitude in discretionary decision-making, or that she will receive only general supervision or direction from higher level individuals. The record does not contain any evidence of a subordinate staff that will relieve the beneficiary from performing the day-to-day non-executive duties of the business.

Furthermore, the record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed executive staff position. While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these facts can be used as indicators to help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. In the instant matter, the latter more accurately describes the beneficiary's role. The record demonstrates that the petitioner is in the business of importing building stone and serving as a wholesaler and retailer of building stone. The record also demonstrates that the beneficiary will be responsible for hiring new employees in the future to carryout the functions of the U.S. entity. There has been no independent documentary evidence submitted to establish that there are any individuals currently available to perform the functions of the organization or to relieve the beneficiary from performing non-executive duties. When examining the capabilities of an established organization, future projections are not sufficient to establish that the petitioner is developed to the point where it can support an employee in a primarily managerial or executive position.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed by the U.S. entity in an executive capacity. Moreover, the petitioner has not shown that the beneficiary will function at a senior level within an organizational hierarchy other than in position title. While it is apparent that the beneficiary's experience is a tremendous asset to furthering the petitioner's business objectives, it does not appear at this time that the petitioner is prepared to sustain the beneficiary in a strictly 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.