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U.S. Citizenship and Immigration Services

D7

MAR 11 2004

FILE: LIN 02 001 50339 Office: NEBRASKA SERVICE CENTER Date:

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 of the Administrative Appeals Office 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.

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 a television reporting business. It seeks to employ the beneficiary temporarily in the United States as its representative reporter of its new office. The director determined that the petitioner failed to establish that: (1) the beneficiary would be employed in a primarily managerial or executive capacity; and (2) the petitioner had not established that it had secured sufficient physical premises to house the new office.

On appeal, counsel submits a brief in opposition to the director's decision. Counsel states that the beneficiary will be employed in a managerial and executive capacity, and that the petitioner has submitted sufficient evidence to establish that it has acquired sufficient physical premises to house the new office.

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.

The regulation at 8 C.F.R. § 214.2(l)(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 (I)(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 in Chicago, Illinois in 2001 as a television station representative office, and claims to be a subsidiary of China Henan Television Station, located in Henan, China. The petitioner declares two prospective employees and does not declare any projected or actual gross revenue. The petitioner seeks the beneficiary's services in order to open a new office and render services in a managerial or executive capacity for a period of one year, at a monthly salary of $1,600.00.

The first 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
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> (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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

> If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In the petition, the petitioner described the beneficiary's proposed duties as: responsible for setting up and establishing a United States correspondence office for HNTV, in order to facilitate Henan provincial television station's coverage of United States business, commercial, political and cultural affairs for Henan province.

In response to the director's request for additional evidence, the director of the Henan, China television station described the beneficiary's proposed duties for the U.S. entity as:

1. Design the short-term, mid-term and long-term goals of HNTV Chicago office and corresponding plans for achieving such goals.
2. Sketch out a strategic plan to foster the communication and business relationship development between HNTV Chicago and American news agencies, television stations and Chinese broadcast agencies.
3. Produce, edit and screen newsreels and documentaries featuring American cultures and customs; promote the sino-U.S. relationship through exchanges of cultures.
4. Manage the financial operations of HNTV Chicago office, regularly review the financial statements and cash flow, scrutinize financial transactions.
5. Develop and expand the operations of HNTV Chicago office, make any additional investment to achieve company goals within a budget of $100,000 U.S. dollars when necessary.
6. Supervise the daily operations of HNTV Chicago and any other operations-related business.
7. Supervise the hiring, promotion and termination of HNTV Chicago office's employees.

The director determined that the information provided by the petitioner was insufficient to show that the beneficiary's actual duties would be primarily managerial or executive in nature.

On appeal, counsel asserts that the petitioner has provided sufficient evidence to show that the beneficiary will be employed in the United States in a managerial and executive capacity. Counsel contends that the beneficiary was classified the chief reporter status for HNTV; that he was in fact in charge of the news center operations for HNTV which in addition operates the advertising and TV series/syndication departments. Counsel also states that the beneficiary more than qualifies as a manager or executive where the duties of a "chief reporter" such as: investigations, newsgathering, reporting, shooting photographs, editing and computer technology are used to define the manager/executive position. Counsel further states that a "chief reporter" by grade, has the power to make news assignments, select reporters for each assignment, editing, and the power to air a story without prior approval from higher authorities.

Counsel's assertions are not persuasive. On review, the record as presently constituted does not demonstrate that the beneficiary has been or will be employed in a primarily executive or managerial capacity. The information provided by the petitioner describes the beneficiary's proposed duties only in broad and general terms. Duties described as: design short-term and long-term goals; sketch out a strategic plan; produce, edit and screen newsreels; develop and expand the U.S. operations; and supervise the daily operations of the Chicago office are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive in nature.

The record does not contain a comprehensive description of the beneficiary's day-to-day activities or a breakdown of the percentage of time to be spent by the beneficiary performing managerial and non-managerial tasks. The beneficiary's position title cannot be used to substitute for a concrete description of the beneficiary's actual duties. The limited information contained in the record regarding the beneficiary's proposed duties indicates that the beneficiary will primarily perform as a reporter, gathering information and reporting newsworthy events. The evidence also establishes that the beneficiary will carry out the necessary day-to-day activities of the new office. 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). In addition, the record does not establish that within one year, the beneficiary will function at a senior level within the organization or that the new office would be able to support a managerial or executive position. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. Nor has the petitioner submitted sufficient evidence to establish that the beneficiary will be managing a function of the organization.

The assertions made by counsel in the support brief are not supported by evidentiary facts. 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). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). The assertions of counsel without documentary evidence cannot be used to establish that the beneficiary will be acting in a primarily managerial or executive capacity.

On review of the record of this proceeding, the petitioner has not established that the beneficiary will be employed primarily in a managerial or executive capacity.

A second issue in this proceeding is whether the petitioner has secured sufficient physical premises to house a new office. Counsel initially submitted an affidavit attesting to a lease arrangement between himself and the beneficiary, which has been made a part of this record. The director concluded that the affidavit was not

sufficient to establish that the petitioner had secured sufficient physical premises to house a new office, and thereafter requested additional evidence to show how the leased space would accommodate all the anticipated employees where the agreement only allowed space for two other individuals. Petitioner subsequently submitted a copy of a new lease agreement between the beneficiary and the local chamber of commerce and photographs of the new office interior and exterior. The lease agreement was dated December 11, 2001. The director concluded that the December 11th document was submitted after the initial time of filing, and therefore the petitioner had not established that it had secured sufficient physical premises to house the new office. There has been no additional evidence submitted by the petitioner to rebut the director's decision. 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 248, 249 (Reg. Comm. 1978). 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).

Beyond the decision of the director, the petitioner has not established that the U.S. and the foreign entities are qualifying organizations. The record contains little documentary information regarding the extent of ownership and control between the parent's and the petitioner's business operations, thus raising the issue of whether there is a qualifying relationship between the U.S. entity and the foreign entity pursuant to 8 C.F.R. §214.2 (l)(1)(ii)(G). As the appeal will be dismissed, this issue 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.