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U.S. Citizenship
and Immigration
Services



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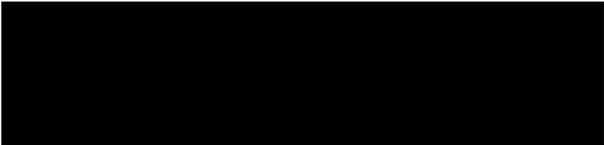
IN RE: Petitioner:
Beneficiary:



MAR 31 2004

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

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invasion of personal privacy

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as engaged in the import and export of construction and agricultural goods. The petitioner also states that it has a retail store. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its Vice President. The director determined that the beneficiary has not been and will not be employed in a primarily executive or managerial capacity.

On appeal, counsel asserts that the beneficiary has been and will be responsible for the overall management of the company's 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(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 (l)(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 United States petitioner was incorporated in 1996 and states that it is a 100% owned subsidiary of Chongqing Yingli Real Estates Development Co., Ltd. of Chongqing, China. On the Form I-129, the petitioner stated that it has five employees and its gross annual income was \$314,593. The initial petition was approved and was valid from June 20, 1998 to June 20, 1999. It was extended for a two-year period and was valid until June 20, 2001. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$18,000.

The only issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties.

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.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2 (l) (3) (ii). In this instance, the petitioner states that the beneficiary is the vice president of the company. In the instant petition, the petitioner stated that the beneficiary:

Has been the Vice President in charge of its financial affairs and day-to-day operations since 1998. She has been supervising all aspects of the company. She reviews activity reports and proposals to determine progress. She determines the budget for the company. She also participates in larger project negotiations and approves contracts. She submits regular reports to the overseas parent company. In addition, she has authority to hire and fire employees and evaluate their performances.

The director requested the following evidence to establish that the beneficiary has been or will be performing the duties of a manager or executive with the U.S. company:

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The

chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, education level, annual salaries/wages (in U.S. Dollar equivalents) and immigration status for all employees under the beneficiary's supervision. Finally explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission.

- Federal Income Taxes: Provide signed and certified copies of the U.S. company's Federal income taxes, to include Forms 1120 for the last three years.
- Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's Form DE-6, Quarterly wage reports for all employees for the last two quarters that were accepted by the States of California. The forms should include the names, social security numbers, a number of weeks worked for the employees.
- Form 941, Quarterly Wage Report: Provide copies of the U.S. company's Federal Form 941 Quarterly Wage Reports for all employees for the last two quarters.

On October 7, 2001, the petitioner submitted a response to the director's request for evidence. The petitioner submitted a list of employees of the U.S. company. The petitioner did not submit an organizational chart. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). This list consists of the president, the vice-president and two retail store clerks. The beneficiary's position of vice president is described as:

Coordinates the business and personnel activities of the company; assists president with budgeting, purchasing, accounting, vendor accounts relationship and employees benefits in conjunction with company's accountant, etc.

The director stated that the submitted evidence does not demonstrate that the beneficiary's duties involve responsibilities which are primarily managerial or executive in nature. The petitioner is not a new office. The director reviewed U.S. company's tax returns and found that the salaries paid to employees for 1997 were \$53,199, \$46,324 for tax year 1998 and \$59,674 in wages for the tax year 1999. The director determined that the W-2, Wage and Tax statements showed \$1,521 in wages was paid to one store clerk and \$2,743 in wages was paid to a second store clerk during the year 2000. The director concluded that the store clerks were part-time employees based on the information provided by the petitioner.

The director concluded that the contained insufficient evidence to demonstrate that the beneficiary has been and will be employed in a managerial or executive capacity. The director found that the record indicated that a preponderance of the beneficiary's duties will be directly providing the services of the business. The director determined the petitioner had provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing the organization or managing the department. The director

stated that the submitted evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The director concluded that the beneficiary is ineligible for classification as an intra-company transferee.

On appeal, counsel explains that in 2000, the board promoted a vice president as president of the petitioning company. Counsel states that the new president had frequent international travel and "the burden of managing the business almost entirely fell on the beneficiary." Counsel did not submit any additional evidence that the beneficiary was managing the business. 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).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (Emphasis in original).

Counsel restates the beneficiary's position descriptions that were provided in the instant petition and in the response to the director's request for evidence. As previously described by the petitioner, the beneficiary "assists the president" in various functions. Even though counsel states that the beneficiary "has been and will be responsible for the overall management of the company's business," the petitioner did not submit any supporting evidence such as contracts the beneficiary approved or projects she negotiated in order to document the level of the beneficiary's authority. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

On appeal, counsel states that "[t]he nature of the business determines that it has an unstable work force. Its employees change jobs more frequently than those of other types of businesses." The AAO is unclear as to the meaning of these two statements. Counsel further adds "having a retail operation only added the work load of the management [sic]. Decisions regarding the sourcing of supplies, vendor relations, cash flow control, accounting, personnel management, etc. all have to be made by the beneficiary." It is noted that the only personnel of which the petitioner provided evidence were the two part-time retail store clerks.

Counsel's assertions are not persuasive. The AAO notes the 1999 and the 1998 Corporate 1120 tax returns both indicate that the U.S. petitioner's principal business activity is the resale of liquor. The petitioner stated it employed a president, vice president and two retail store clerks. Based on the tax information provided by the petitioner, the director concluded that the store clerks were part-time positions. Counsel admitted that the petitioner has an "unstable workforce" and "its employees change jobs frequently." Additionally, counsel stated that the president travels frequently and delegates much of his duties to the beneficiary. Even though the petitioner stated that the beneficiary "has been successful in securing a number of projects, exporting U.S. company manufactured construction related equipment, such as garage doors, building air conditioners, water coolers, etc. worth more than one million U.S. dollars, to China," the petitioner has not provided any independent evidence that is engaged in any business besides the retail sale of liquor and beer. Based on the evidence provided, the beneficiary is operating the retail store. The beneficiary is primarily engaged in producing the product or providing the services of the petitioner. An employee who primarily performs the tasks necessary to

produce a product or to provide services 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner is engaged in the retail sale of liquor and employs a president, vice president and two part-time sales clerks. The petitioner states that the beneficiary has been and will be responsible for the overall management of the company's business. The fact that an individual operates a business does not necessarily establish eligibility for classification in a managerial or executive capacity with the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly performing the operations of the organization, operating the retail store. The other two employees are part-time retail clerks. The petitioner has not demonstrated that the beneficiary primarily will be supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Based on the evidence submitted, it cannot be found that the beneficiary has been employed in a primarily executive or managerial capacity.

Additionally, counsel notes that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be 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).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.