

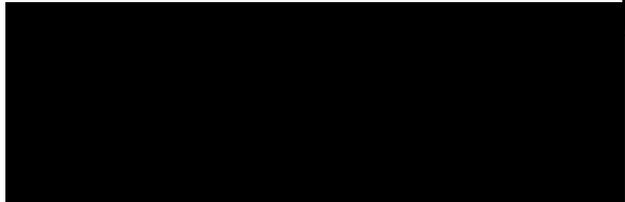
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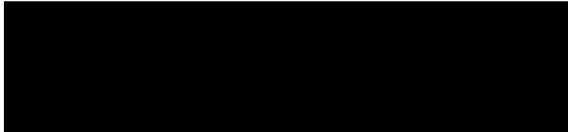
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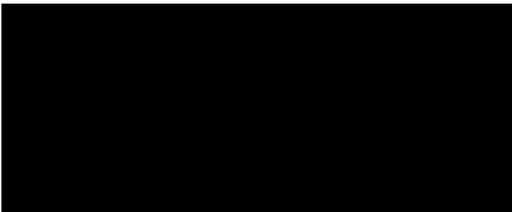
File: WAC 01 263 59782 Office: CALIFORNIA SERVICE CENTER Date:

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. The file has been returned to the National Benefits Center. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Acting Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation that trades on a wholesale basis. It seeks to employ the beneficiary temporarily in the United States as a vice president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel states that the acting director abused her discretion by not requesting evidence to establish the beneficiary's eligibility and in finding that the beneficiary has not been and will not be employed in a managerial or executive capacity.

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.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii), in part, state:

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 petitioner is a corporation that originated in the State of California on June 5, 1997. The petitioner filed its petition on August 20, 2001. Since the petitioner had been doing business for more than one year at the time the visa petition was filed, it shall not be considered under the regulations covering the start-up of a new business.

The first issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been and 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.

The petitioner submits a letter dated August 10, 2001 from the president of Wing Lee Yuen Trading Co., Ltd. in Hong Kong describing the beneficiary's vice president job duties abroad as follows:

Since Ms. Tsang became our Vice President in 1991, she has been managing both the marketing and product development functions. While in Hong Kong, she has been directing the marketing effort targeting North America buyers, particularly in the United States. Under her leadership and skills, Ms. Tsang has established long term business relationships with many wholesalers in the United States. The most notable one is Goodview Industries Co. Inc.

In the past decade, Ms. Tsang has also represented our company to negotiate business with many import export brokers in Hong Kong to further promote our business. These brokers are on commission, based on certain percentage of the value of goods their clients order from us. Among these brokerage firms are: Queetex Co. Ltd., Ziang Kong Mfg. Co. Ltd., Brand's Co. Ltd., Power Sea International Ltd., and Top Gate Trading Company. Ms. Tsang has wide discretion to negotiate,

to deny or accept orders from any of these brokers. Our long-term relationship with each of these brokerage firm [sic] is so strong and trusting that most of the time, they often just negotiate over the telephone and they consummate transaction [sic] over a phone call.

Ms. Tsang did not perform all these functions by herself without support. In Hong Kong, our Manager, Kim Fung Ho, reports to Ms. Tsang and carries out her directions and decisions. Mr. Ho, on a day-to-day basis, communicates with many of the import export brokerage firms, reports to myself and to Ms. Tsang coordinates [sic] and follows up with overseas buyers and with shipping companies, and occasionally conducts research of suppliers at the Trade Department. He often makes recommendations to Ms. Tsang about our operation. Mr. Ho's 25 years of experience and knowledge in the trading business makes him a professional.

In addition, our company is also the 100% owner of a subsidiary in Shunde, China, Wing Yu Yuen Manufacturing Factory Ltd., which was established in 1989. Our company has also appointed Ms. Tsang to be the General Manager of that subsidiary. She spends about 30% of her time to manage that subsidiary, not so much as the factory's operation [sic], but its directions, goals and policies. The remaining 70% of her time, Ms. Tsang is working at Wing Lee Yuen Treading [sic] in Hong Kong.

Although registered as a garment factory in China, Wing Yu Yuen is both a factory as well as a "product development branch" for our company headquartered in Hong Kong. That subsidiary employs about 130 to 160 employees, bulk of the [sic] them are seamstresses and the number fluctuates depends [sic] on volume of orders. Please see the attached Business License and Organization Chart.

In her position of General Manager at Wing Yu Yuen in China, Ms. Tsang spends 2/3 of her time on directing and supervising the Marketing Director in product development and 1/3 of her time overseeing the Deputy General Manager over general operation [sic]. Both the Deputy General Manager and the Marketing Director regularly assists [sic] Ms. Tsang in implementing long-term and short-term goals and policies. In addition, the Marketing Director is in charge of exploring new product ideas, locating new suppliers, and researching the chinese [sic] market for materials and suppliers and reports to Ms. Tsang. She attends the famous national Trade Show in Guangzhou with the Marketing Director every year to get new product development information to develop ties with new suppliers throughout China.

Based upon the additional information provided on appeal, it is determined that the beneficiary occupies a managerial position abroad.

In its letter dated August 10, 2001, the petitioner describes the beneficiary's prospective job duties in the United States as:

As Vice President for Petitioner [sic], Beneficiary will serve as the second-highest executive in the U.S. in charge of planning long-term goals and authorizing annual budgets and procurements,

product line focus, representing the company in business negotiations, and in charge of marketing and new product development. Ms. Tsang will be expected to travel between the U.S. and Hong Kong, China from time to time to visit manufacturers and suppliers, to negotiate contracts for procurement of new products into the U.S., and to research and find sourcing of new products custom-ordered by U.S. customers and distributors in the future.

On appeal, counsel states that after filing, the petitioner has re-structured its organization and that the beneficiary would be supervising three employees and not one. Counsel submits a new organizational chart reflecting the restructured entity and a new description of the beneficiary's duties. These documents add little weight to the petitioner's request because the petitioner must establish eligibility at the time of filing; *See* 8 C.F.R. § 103.2(b)(12); *Matter of Izummi*, 22 I&N Dec. 169 (AAO 1998). The petitioner must demonstrate that the beneficiary would occupy a qualifying managerial or executive position on the date the visa petition was filed.

On August 20, 2001 when the petition was filed, the record shows the United States corporation employed seven persons, its president, a manager, three inside sales and customer service representatives, a warehouse worker/service representative and a silk and pad printing technician. The beneficiary would be employed as the second in command in this seven-person organization and supervise the manager. The record does not clearly show that the petitioner had sufficient staff to relieve the beneficiary from performing non-qualifying duties. Without more compelling evidence, the record does not establish that a majority of the beneficiary's duties will be primarily directing the management of the organization, and that she is not directly providing the services of the business. 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). Consequently, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient documentation to establish that a qualifying relationship exists between the petitioner and a foreign firm, corporation or other legal entity. For this additional reason, this petition may not be approved.

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.