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**U.S. Citizenship
and Immigration
Services**



IN

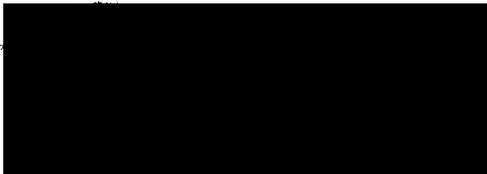
File: WAC 02 099 52415 Office: CALIFORNIA SERVICE CENTER Date: **OCT 01 2004**

IN RE: Petitioner:
Beneficiary



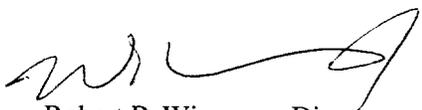
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

The petitioner is a corporation organized in the State of California in November 1998. It imports, retails, and wholesales cashmere products and markets and promotes the use of liquorices products in the health industry. It seeks to temporarily employ the beneficiary as its marketing and trade vice-president. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims that it is a 51 percent owned subsidiary of Inner Mongolia Yi Tai Coal Company, Limited (Yi Tai), located in Dongsheng City, Inner Mongolia, China.

The director denied the petition concluding that the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director applied an incorrect standard and overlooked evidence previously submitted by the petitioner.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 initially stated that the beneficiary's position included the following duties:

[The beneficiary] will have overall responsibility for the management of the liquorice operations of the U.S. entity. [The beneficiary] will be focusing about 40% of his time on planning, organizing, directing, and controlling the activities of independent contractors who perform certain essential functions necessary for the successful operation of [the petitioner's] business, including accountants, customs brokers, and warehousing services. In this capacity, [the beneficiary] will have broad discretionary decision-making powers, including the power to hire and fire, evaluate and set operational procedures, develop new business goals, and approve the budget. [The beneficiary] will also spend about 60% of his time researching, developing and overseeing the implementation of the corporate marketing and sales programs, including the development of the North American market for the company's liquorice products. [The beneficiary] will receive only general supervision from the company's President and Board of Directors.

The petitioner also included its organizational chart showing a president, an officer manager, the beneficiary's position of marketing and trade vice-president, and a sales representative who reported to the beneficiary.

On February 2, 2002, the director requested: (1) the U.S. entity's organizational chart including the named employees on the chart; (2) a more detailed description of the beneficiary's job duties including the percentage of time spent on each duty; (3) that the petitioner clearly indicate whether the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees; and, (4) a list of other employees under the beneficiary's supervision including name, job title and duties, entry date of employment, and whether they are actually employees of the U.S. entity.

In response, counsel for the petitioner indicated that the beneficiary's time would be more specifically spent:

- Meeting with existing or potential customers, including food manufacturers and health product manufacturers to monitor customer satisfaction and potential business opportunities as well as to identify potential advertising venues trade show exhibitions. – 30 percent;
- Developing local sales networks, including interviewing potential corporate partners for strategic marketing and sales alliances. – 15 percent;
- Developing operational procedures and goals for the company, including sales and promotional objectives, and engaging in price negotiations and preparation of agreements - 15 percent;
- Choosing service (accountants, shippers, customs brokers, and warehousing) providers, negotiating terms and conditions of engagement, and meeting and communicating by telephone with these independent contractors as well as with customers to monitor efficiency and customer satisfaction – 30 percent; and,
- Communicating with the company's suppliers to manage inventory, preparing progress reports for the Chinese parent, and meeting with the company's staff – 10 percent.

Bullets added

Counsel acknowledged that the beneficiary did not supervise or control the work of supervisory, professional or managerial employees. Counsel claimed that the beneficiary would manage “an essential function of the organization – the development of its liquorice business.” Counsel added that the beneficiary did supervise a sales representative who identified potential sales leads and partners, communicated with the sales force, and coordinated communication with the Chinese parent company as well as compiling sales and expenditure information from sales staff, and preparing reports.

The director observed that the record did not contain evidence of independent contractors that the beneficiary purportedly supervised or that the sales representative position was a professional position. The director determined that the beneficiary would be employed primarily as a marketing analyst. The director also determined that the record did not support counsel’s contention that the beneficiary would manage an essential function. The director noted that the record did not demonstrate that the petitioner had qualified employees to perform the function so that the beneficiary would be relieved from performing non-qualifying duties.

On appeal counsel for the petitioner asserts that the “Petitioner’s staffing meets the reasonable needs of the company without requiring the Petitioner to engage in non-qualifying duties.” Counsel submits copies of agreements between the petitioner and custom brokers and the company’s outside accountants and references the sales representatives duties. Counsel cites an unpublished matter and argues that the beneficiary has full managerial responsibility for the direction and coordination of the petitioner’s liquorice business and operations. Counsel contends that the beneficiary will manage and oversee functions relating to the petitioner’s liquorice business through his supervision of the sales representative and independent contractors; and, that the AAO has recognized a manager or executive responsible for setting up operations will engage in a variety of activities not normally performed by executives or managers. Counsel cites unpublished decisions and again asserts that the petitioner has adequate staffing to ensure that the beneficiary will have minimal direct involvement in the day-to-day operation of the company.

Counsel’s assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(i)(3)(ii). The petitioner’s description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Counsel for the petitioner describes the beneficiary as meeting with customers, identifying potential advertising venues, developing sales and promotional objectives, engaging in price negotiations, and communicating with suppliers. These duties are indicative of an individual actually performing tasks necessary to promote and provide the petitioner’s liquorice product. 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).

Even though the petitioner claims that the beneficiary manages the development of the petitioner's liquorice business, it does not claim to have anyone on its staff to actually perform the marketing tasks necessary to develop this aspect of its business. The beneficiary is the individual exploring the business opportunity and performing the marketing services.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has identified the function as the development of an additional product; however, the petitioner has not explained the essential nature of this new product and has not provided evidence that the beneficiary manages this essential function, rather than providing the necessary tasks to develop the new product line.

In addition, the petitioner lists the beneficiary's duties as managerial and although counsel seems to acknowledge that the beneficiary will perform some non-managerial duties, counsel fails to quantify the time the beneficiary spends on the non-managerial duties. This failure of documentation is important because, as observed above, the beneficiary's daily tasks, including meeting with customers, identifying potential advertising venues, developing sales and promotional objectives, engaging in price negotiations, and communicating with suppliers do not fall directly under traditional managerial duties as defined in the statute. For this additional reason, the AAO cannot conclude that the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Further, the petitioner has not explained how the services of the contracted employees and the sales representative obviate the need for the beneficiary to primarily conduct the petitioner's marketing of the petitioner's new product line. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Service (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be “primarily” employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). As determined above, the record does not establish that the beneficiary will spend the majority of his time on managerial or executive tasks but rather will spend a majority of his time on non-qualifying duties.

Counsel’s citation to unpublished cases carries little probative value. Counsel has not furnished sufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

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.