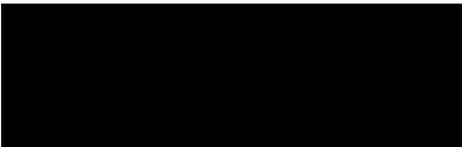


U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: EAC 02 286 51689 Office: VERMONT SERVICE CENTER Date: OCT 1 1 2008

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 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

PUBLIC COPY
Identifying data deleted to
prevent disclosure of unwarranted
invasion of personal privacy

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

The petitioner was established in 2002 and claims to be in the business of importing and exporting mung beans and other agricultural products. The petitioner claims to be a subsidiary of Tongtu Xinyu Countr Foodstuffs Economic Trade Co., Ltd. China. It seeks to employ the beneficiary temporarily in the United States as the business development manager of its new office for three years, at an annual salary of \$30,000.00.

The director determined that the petitioner had submitted insufficient evidence to establish that the beneficiary would be employed primarily in a managerial or executive capacity; that the entity would be able to support such a position within one year of the filing of the petition; and that the U.S. entity is doing business.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary will be performing in a primarily managerial or executive capacity; that the U.S. entity will be able to support a managerial or executive position within one year of filing the petition; and that the entity is doing 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)(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.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(1)(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 (1)(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.

The issue in this proceeding are whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity, and whether the U.S. entity will be able to support a managerial or executive position within one year of operations as a “new office.”

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.

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.

The petitioner initially described the beneficiary's proposed duties in the petition as being responsible for establishing trade relations with United States wholesalers and for importing food items from the foreign company.

In a support letter dated May 15, 2002, the foreign entity described the beneficiary's duties as:

[The beneficiary's] responsibilities relate to the development of new businesses in the oversea[s] markets. She has been directed by the company's managing director to proceed in business activities to expand the business of our company. Her responsibilities overseas will be to develop new businesses in Massachusetts, in particular, developing a new venture with Chang & Son in Whately, Massachusetts to export mung beans products for distribution in

the United States. She will be the managing director of the U.S. subsidiary . . . and will have the overall responsibility of the subsidiary's sales.

In a translated letter of support, the foreign entity described the beneficiary's proposed duties as:

[The beneficiary's] position in the US office is general manager. In US, first she will look for new customers and sign contracts with them, then she buys cargoes (green and red mung beans, etc) from Chinese head office and arrange to receive cargoes, finally shipping to customers. In addition, she is in charge of documents and the management of the US operation.

The petitioner also described the beneficiary's proposed duties as:

General Manager – Manage the operation of the United States entity. Duties include personnel, marketing, coordination with the parent company, strategic and operational decision making.

The petitioner also stated that the proposed import/customs specialist, administrative assistant/secretary, sales/marketing director, and sales staff would be subordinate to the beneficiary.

The director denied the petition determining that there was insufficient evidence to establish that the beneficiary would perform in the U.S. entity primarily in a managerial or executive capacity or that the entity would be able to support such a position within one year of operation. The director noted that the evidence submitted describing the beneficiary's proposed duties was in the abstract and primarily paraphrased the definitions of managerial and executive capacity. The director also noted that based upon the record it appeared that the beneficiary would be primarily engaged in the day-to-day operations of the business.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary's role is to run the U.S. office. Counsel further asserts that the U.S. entity has not conducted any business because the beneficiary remains in China. Counsel also contends that the beneficiary will be responsible for directing and managing the staff, interfacing with the parent company, and for developing the business and sales aspects of the business.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity or that the U.S. entity will be able to support a managerial or executive position within one year of operation. 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(l)(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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are described as managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include establishing trade relations with United States wholesalers and importing food

items from the foreign company. The petitioner further describes the beneficiary's duties to include: personnel, marketing, coordination with the parent company, and strategic and operational decision making. The petitioner did not, however, define the beneficiary's strategic and operational decision making, or clarify the personnel and marketing aspects of the business operation. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner requests the beneficiary be transferred to the United States to open a new office, and in so doing, is not expected to initially perform only managerial or executive duties; however, there has been no evidence submitted to establish the percentage of time she will be performing managerial or executive duties. The record shows that no other individual is currently employed by the U.S. entity. There has been no evidence submitted to show that the beneficiary will be in a position to manage rather than perform any primary function within the entity. In addition, the petitioner describes the beneficiary duties as marketing and selling the foreign entity's product. Since the beneficiary will actually be performing the marketing and sales functions, she is performing a task necessary to provide a service or product and this duty will not be considered managerial or executive in nature. 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).

Although the petitioner asserts that the beneficiary will be managing a subordinate staff, the record does not establish that the subordinate staff will be composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. There has been no evidence submitted to demonstrate the educational requirements of the positions or the level of experience needed to perform said duties adequately. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. It appears from the evidence submitted that the beneficiary will be primarily supervising a staff of non-professional employees; therefore, the beneficiary cannot be deemed to be primarily acting in a managerial or executive capacity.

In this matter, the proposed position of the beneficiary is business development manager of an import and export company. Regardless of the beneficiary's position title, the record is not persuasive in demonstrating that the beneficiary will function at a senior level within an organizational hierarchy. Even though it is inferred that the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based on the evidence of record, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. Neither has the petitioner submitted sufficient evidence to show that the U.S. entity will be able to support a managerial or executive position within one year of operation. In the instant case, the petitioner submitted a business plan which fails to show that the U.S. entity will receive the financial support needed from the foreign entity to commence doing business or that the U.S. company will be able to hire sufficient staff within the first year of operation. Accordingly, the appeal will be dismissed.

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.

EAC 02 286 51689

Page 7

ORDER: The appeal is dismissed.