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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[Redacted]

File: WAC 02 271 50759 Office: CALIFORNIA SERVICE CENTER Date: **OCT 28 2004**

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)

IN BEHALF OF PETITIONER:

[Redacted]

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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prevent disclosure of unclassified
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invasion of personal privacy

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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 March 1996. It claims it is engaged in the international trade of electrical and electronic products and equipment. It seeks to temporarily employ the beneficiary as its chairman of the board and 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 60 percent owned subsidiary of Northeast Electric Transmission & Transformation Equipment Group Corporation, located in Shenyang City, China.

The director denied the petition concluding that the record did not establish: (1) that the beneficiary would be employed in a primarily managerial or executive capacity; or (2) that the petitioner is doing business on a regular and systematic basis, but rather was acting as an agent for foreign entities.

On appeal, counsel for the petitioner contends that the petitioner's business is expanding and requires the services of an executive from the parent company.

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 first issue to be discussed is whether the petitioner has been doing business as defined by the regulations. The regulations at 8 C.F.R. § 214.2(l)(1)(ii) state: “*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.”

The petitioner submitted invoices, packing lists, bills of lading, letters of credit, and contracts with various companies dating from December 2001 to substantiate that it was engaged in the regular, systematic, and continuous provision of goods.

The critical focus in the definition of “doing business” is not whether the petitioner is an agent or representative office, but whether the entity constitutes the “mere presence of an agent or office” without conducting any business activities. The proper focus on this issue thus, is the nature and conduct of the petitioner’s business activities, if any. In the matter at hand, the petitioner has presented evidence that it has been involved in a high volume of transactions. The petitioner has submitted sufficient evidence to establish that it facilitates the annual import of significant quantities of goods per year. The petitioner has adequately established that it is doing business in a regular, systematic, and continuous manner.

The second issue in this proceeding is whether the beneficiary will be employed in an executive capacity for the United States entity. The petitioner does not contend that the beneficiary will be employed in a managerial capacity.

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 on the Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary would “manage and supervise all major affairs of the company.” In an August 27, 2002 letter appended to the petition, the petitioner stated that the beneficiary’s “leadership ability and management expertise are crucial to the success of [the petitioner’s] operations in the United States.

On January 9, 2003, the director requested: (1) the total number of employees at the United States location; (2) a more detailed description of the beneficiary's duties in the United States, including a list of all employees under the beneficiary's direction and the percentage of time the beneficiary spent performing his duties; (3) copies of the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for the last four quarters; (4) copies of the petitioner's payroll summary and Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, evidencing wages paid to employees; and (5) a list of the specific goals and policies the beneficiary had established, a list of discretionary decisions that the beneficiary had exercised, and a specific day-to-day description of the duties the beneficiary had performed over the previous six months.

In a March 25, 2003 response, the petitioner indicated that the beneficiary had previously been in the United States on brief one to two week trips but that the petitioner's growth potential required that the beneficiary stay with the petitioner for longer periods. The petitioner provided the following information regarding the beneficiary's proposed duties:

The proposed executive duties for [the beneficiary] will encompass all the important aspects of the business, some of which include making the policies and business goals for the company, making all the decisions on office leases and relocation of the office, hiring employees, assigning work for the employees, negotiating business projects and making sure that business projects are carried out. He will also, from time to time, work with attorneys and [certified public accountants] to make legal and budgeting/accounting decisions for the company. He will travel in the U.S., Canada, and even Mexico and other places to negotiate business contracts, make decisions on customs brokers for import and export matters. He will basically make all the major decision[s] for the company and be responsible to the board and the parent company for the success of the business. Other employees of the company report to him for their work.

The petitioner also included its organizational chart showing the beneficiary as chairman/president, a manager, an accountant, a sales associate, and a secretary. The petitioner submitted its California Form DE-6, for the quarter in which the petition was filed. The names on the California Form DE-6 corresponded to the individual identified as manager, the individual identified as the accountant, and an individual with an Americanized first name but the last name of the individual depicted as the sales associate, on the organizational chart.

The director determined that the United States did not possess the organizational complexity to support an additional executive or managerial position. The director observed that the evidence failed to establish that the beneficiary's duties would be primarily managerial or executive. The director noted that the petitioner had failed to provide a comprehensive description of the beneficiary's duties that demonstrated the beneficiary would be managing the organization or a department, subdivision, function, or component of the company.

On appeal, counsel for the petitioner contends that the expansion of the petitioner's business requires a high level executive from the parent company to make sure that the petitioner's business activities succeed.

Counsel asserts that there will be enough executive level work for the beneficiary so that he will not need to perform low-level administrative work.

Counsel's contentions 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(l)(3)(ii). On review, 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 "encompass all the important aspects of the business some of which include making the policies and business goals for the company, making all the decisions on office leases and relocation of the office, hiring employees, assigning work for the employees, negotiating business projects and making sure that business projects are carried out." The petitioner, however, does not define the policies and business goals and does not explain how hiring employees and assigning work to employees are executive tasks. 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). Moreover, making sure that business projects are carried out implies that the beneficiary's position is a supervisory role.

The petitioner also indicates that the beneficiary will travel to negotiate business contracts and will make decisions on customs brokers. Again, the petitioner does not explain how these duties fit within the criteria set forth in the definition of "executive capacity." Since the beneficiary is the individual actually negotiating the contracts, it appears he is performing a task necessary to market or otherwise promote and sell the petitioner's 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).

In addition to the petitioner's broad description of the beneficiary's duties, the petitioner has not provided evidence that it employs sufficient personnel to relieve the beneficiary from performing non-qualifying duties. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). When the petition was filed, the petitioner was a six-year-old import and export company that employed a manager, a part-time accountant, and a part-time sales associate. The record does not substantiate that the petitioner employed sufficient subordinate staff members who would perform the actual day-to-day, non-managerial and non-executive operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president, a manager whose duties have not been defined, and two part-time employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In sum, the petitioner has not provided sufficient evidence to establish that the beneficiary's assignment for the petitioner is primarily managerial or executive. The record does not contain sufficient evidence to overcome the director's decision on this issue.

Beyond the decision of the director, the petitioner has provided inconsistent evidence regarding its ownership and control. The petitioner provides three stock certificates and a board resolution that it claims show that the foreign entity in this matter owns and controls 60 percent of the petitioner's stock. However, the record is unclear as follows:

Stock certificate number 1 shows 8,000 shares issued to Shenyang Electric Power Corporation in March 1996; the accompanying stock ledger shows that Shenyang Electric Power Corporation paid \$80,000 for the stock. The record does not reflect a cancellation of this issuance, although the stock ledger shows that 8,000 shares were transferred to the petitioner for the sum of \$28,800 in June 2002.

Stock certificate number 2 shows 7,680 shares issued to Northeast Transmission & Transformation Equipment Group Corporation in June 2002; the accompanying stock ledger shows that Northeast Transmission & Transformation Equipment Group Corporation paid \$7,680 for the stock.

Stock certificate number 3 shows 5,120 shares issued to Shenyang Electric Power Corporation in June 2002; the accompanying stock ledger shows that Shenyang Electric Power Corporation paid \$51,200 for the stock.

The petitioner's 1999, 2000, 2001 IRS Forms 1120, at Schedule L, Line 22b, show that the petitioner's common stock is valued at \$96,000.

The petitioner's board resolution dated June 19, 2002, indicates: that Shenyang Electric Power Corporation invested \$80,000 originally and Shenyang Northeast Transmission & Transformation Equipment Group Corporation invested \$48,000 originally; that Shenyang Northeast Transmission & Transformation Equipment Group Corporation increased its investment by \$28,800 and that Shenyang Electric Power Corporation reduced its investment by \$28,800 through cancellation of the appropriate portion of its shares.

Although the petitioner asserts in its June 19, 2002 board resolution that the intent of the above machinations should result in Shenyang Northeast Transmission & Transformation Equipment Group Corporation owning 60 percent of the petitioner, the above transactions do not correspond with the petitioner's IRS Form 1120 and are confusing in their language. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the petitioner does not provide a comprehensive description of the beneficiary's duties for the foreign entity or sufficient supporting documentary evidence to conclude that the beneficiary was employed by the claimed 60 percent parent company or that his position for the foreign entity was primarily managerial or executive.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.