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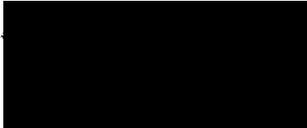
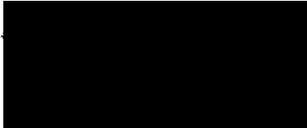
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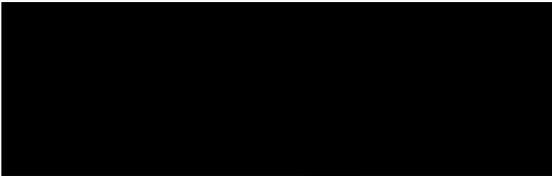
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File: WAC 03 141 51156 Office: CALIFORNIA SERVICE CENTER Date: **AUG 26 2005**

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 petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its vice president as an L-1A 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 is a California limited liability company, organized on September 15, 1997, that is engaging in the international trade of biological plastic test products. The petitioner claims that it is the subsidiary of Dong Fang Plastics & Hardware Factory, located in Guang Dong, China. The beneficiary was initially granted a three-year period of stay in the United States in L-1A status commencing in April 2000, and the petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director found that there is no evidence on record of a subordinate staff of professional, managerial or supervisory personnel to relieve the beneficiary from performing the non-qualifying day-to-day activities of the petitioner. The director concluded that the record does not establish that the U.S. entity has the organizational complexity to support an executive position, or that the beneficiary's activities will be primarily managerial or executive.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary has been and will be performing services in a managerial or executive capacity. Counsel submits a brief in support of this assertion.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. 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) 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.

At issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

In a letter dated March 14, 2003 accompanying the initial petition, the petitioner described the beneficiary's job duties as follows:

As Vice President, [the beneficiary] will assist the President for the daily operation of the company business [sic]. Especially when the President is absent, [the beneficiary] will be responsible for the overall management of the company. [The beneficiary] will assist the President in developing and promoting the company business in international trade and production of biological plastic test products. [The beneficiary] will be in charge of marketing development. He will design long-term and short-term business plans and review project reports, proposals and other activity data of the company to decide further business goals. In addition, he will hire experienced business sales representative to develop international market as well as the U.S. market of medical testing products. Besides, he will hire other employees to implement the company's business plans and goals. Furthermore, [the beneficiary] will participate in major business negotiations. [The beneficiary] will have wide latitude and discretionary authority in making decisions in relation to the day-to-day operation of the company.

On May 28, 2003, the director requested additional evidence. Specifically, 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: (1) the total number of employees at the U.S. location where the beneficiary will be employed; (2) a copy of the U.S. entity's organizational chart, which should include the current names of all executives, managers, supervisors, and employees within each department or subdivision, and identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title, with a brief description of the job duties, educational level, annual salaries/wages and immigration status of each such employee; and (3) copies of the U.S. entity's payroll summary and Internal Revenue Service (IRS) Forms W-2 and W-3 evidencing wages paid to employees.

In response, counsel for the petitioner stated in a letter dated July 30, 2003 that there are six employees at the U.S. location. The petitioner provided through counsel an organization chart, which shows the president supervising the beneficiary, who in turn supervises the production manager, the R&D scientist, and the marketing manager. The production manager is shown supervising a "production team" of one. Counsel's July 30, 2003 letter also set forth the name, job title, job duties, educational level, annual salaries/wages and immigration status of each employee under the beneficiary's supervision. The petitioner describes the job duties of the beneficiary's subordinates as follows:

- Production manager – responsible for overall production
- Production team – production, shipping, and receiving
- R & D scientist – research and develop products
- Marketing manager – international marketing

The petitioner also submitted IRS Forms W-2 for the year 2002 for all six of its employees.

On March 5, 2004, the director denied the petition. The director noted that the petitioner failed to provide a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision. Moreover, the director found that the wages paid to the managers and scientist on the petitioner's staff as listed on the 2002 Forms W-2 were unusually low for professional and managerial positions. In light of the lack of job descriptions and the low wages, the director found that the evidence does not establish that the beneficiary's subordinates are professional, managerial or supervisory employees who would relieve the beneficiary from performing the non-qualifying, day-to-day activities of the petitioner. The director concluded that the record does not establish that the U.S. entity contains the organizational complexity to support an executive or managerial position, or that the beneficiary's activities will be primarily managerial or executive.

On appeal, counsel for the petitioner contends that the beneficiary has been and will be performing services in a managerial or executive capacity. Counsel asserts that the beneficiary supervises and controls the work of both managerial and professional employees. Counsel provides a description of a "typical day" for the beneficiary and contends that the beneficiary is performing primarily duties that are characteristic of a manager or executive. In support of his assertions, counsel cites to unpublished decisions where the AAO approved petitions for L-1A petitions involving one-person offices.

Initially, the AAO notes that contrary to the director's statement that the petitioner failed to provide a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision, the petitioner in fact did provide the requested information through its counsel in the July 30, 2003 letter. Therefore, the director's finding in that respect, and only in that particular respect, is hereby withdrawn.

Notwithstanding the foregoing, on reviewing the petition and the evidence of record, the AAO concurs with the director's conclusion that the petitioner has not established that the beneficiary has been or will be employed in a managerial or executive capacity. 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.

In its March 14, 2003 letter, the petitioner stated that the beneficiary would "assist the President [in] the daily operation of the company business," "be responsible for the overall management of the company" when the president is absent, and "assist the President in developing and promoting the company business in international trade and production of biological plastic test products." These statements are a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a

day-to-day basis.¹ Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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).

In addition, the petitioner indicated in the March 14, 2003 letter that the beneficiary would "be in charge of marketing development." The petitioner claims that it has a marketing manager, whose job duties are described in counsel's July 30, 2003 letter only as "international marketing." Based on these brief and general job descriptions, the AAO cannot determine to what extent the beneficiary is "in charge of" the company's marketing function rather than directly performing this function himself. Similarly, the petitioner indicates that the beneficiary "design[s] long-term and short-term business plans and review[s] project reports, proposals and other activity data of the company to decide further business goals." However, the brief "job descriptions" of the beneficiary's subordinates do not indicate that any of those employees actually prepare the project reports, proposal, and activity data that the beneficiary purportedly reviews. If the beneficiary actually performs the marketing function of the company rather than manages or directs it, and actually prepares the project reports, proposals and activity data himself rather than reviews them to plan or direct the business as the petitioner claimed, he is performing tasks that are necessary to provide a service or product, which 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).

The evidence of record also does not support counsel's claim that the beneficiary supervises and controls the work of both managerial and professional employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not

¹ The AAO notes that on appeal, counsel attempts to describe "a typical day" to illustrate the beneficiary's executive duties. However, descriptions such as "reviewed faxes and letters," "made telephone calls," "prepare a report to the president," without further details as to the context of these activities, shed no light on whether these acts are "managerial or executive" in nature. Moreover, the record contains no evidence to support these assertions by counsel. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. While the petitioner reported that all of the beneficiary's subordinates received "college" level education, the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not provided any information that would establish that an advanced degree is actually necessary to perform the duties of any of the beneficiary's subordinates, such that they could be classified as professionals. Moreover, while two of the beneficiary's subordinates have managerial titles, the brief one-line descriptions of their job duties are insufficient to show that they actually supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel's reference to unpublished AAO decisions is also unpersuasive. Counsel asserts that in the referenced decisions, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though the petitioning companies in those matters are one-person offices. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all employees of the Citizenship and Immigration Services (CIS) in the administration of the Act, unpublished decisions are not similarly binding.

Finally, the AAO notes that the petitioner indicates in the March 14, 2003 letter that the beneficiary will hire a sales representative to develop the international and U.S. markets and other employees to implement the company's business plans and goals. However, future staffing and expansion plans that have yet to be implemented do not establish or bolster the beneficiary's present eligibility for the benefit sought. 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).

Accordingly, the AAO concurs with the director's conclusion that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the AAO finds that there are material inconsistencies in the evidence of record regarding the ownership of the U.S. entity, which cast doubt upon the petitioner's claim that there exists a qualifying relationship between the U.S. and foreign entities. Specifically, the petitioner indicated on the Form I-129 that the foreign entity owns 82% of its issued and outstanding membership interest. In support of this claim, the petitioner provided a copy of the U.S. entity's operating agreement, certificates of

interest, and membership interest transfer ledger, which indicate that as of June 20, 1998, the foreign entity owned 82% interest in the U.S. entity, for which it had paid \$30,000, and an individual named ██████ owned the remaining 18%, for which he had paid \$6,500. However, the petitioner also submitted its 2001 IRS Form 1065, U.S. Return of Partnership Income, and California Form 568, Limited Liability Company Return of Income, which indicate that ██████ has 50.0041% membership interest in the U.S. entity, and an individual named ██████ held the remaining 49.9959%.

On May 28, 2003, the director requested proof of purchase by ██████ and ██████ of their respective proportions of interest in the U.S. company as set forth in the tax returns. In response, the petitioner claims that the two individuals had paid for their shares in the U.S. entity and submitted (1) copies of money transfer documents showing that funds in the amount of \$29,983.79 was transferred from ██████ to another individual and then to ██████ purportedly for the U.S. entity's account; and (2) cancelled checks dated January through May 1998 showing that ██████ paid \$8,500, and ██████ paid \$12,500, to the U.S. entity. At that time, there was no indication from the petitioner that the information regarding the ownership of the U.S. entity as set forth in the schedules to the tax returns was incorrect.

On October 11, 2003, the director requested further clarification of the conflicting information regarding the ownership of the U.S. entity as set forth in the organizational documentation of the U.S. entity and its 2001 tax returns. In response, the petitioner stated that (1) the foreign entity and ██████ did own 82% and 18% of the U.S. entity, respectively, at the time the company was established; (2) the "50.001%" and "49.999%" ownership distribution set forth in the tax returns reflected erroneous assumptions of the U.S. entity; and (3) presently, the foreign entity owns 78.33% and ██████ owns 21.67% of the U.S. entity. The petitioner submitted no documentation to support these assertions. 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). Furthermore, willful misrepresentation in these proceedings may render the beneficiary inadmissible to the United States. Section 212(a)(6)(C) of the Act.

In light of the unresolved inconsistencies described above, the AAO cannot determine based on the present record the nature and extent of the foreign entity's ownership interest in the U.S. entity. Consequently, the AAO cannot conclude that the evidence of record is sufficient to establish that there exists a qualifying relationship between the foreign and U.S. entity as required by the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) and (G). For this additional reason, the petition may not be approved.

In addition, it is noted that the petitioner indicated under penalty of perjury in Part 4 of the Form I-129 petition that it had never filed an immigrant petition for the beneficiary. However, CIS records show that on August 7, 2000, the petitioner filed a petition on Form I-140, receipt number WAC 00 252 56158, for classification of the beneficiary as an employment-based immigrant under section 203(b)(1)(C) of the Act. That petition was denied by the director on or about July 9, 2001. The regulations at 8 C.F.R. § 214.2(l)(2)(i) state that "[f]ailure to make a full disclosure of previous petitions filed may result in a denial of the petition." As the petitioner indicated on the Form I-129 that it had never filed an immigrant petition for the beneficiary,

and the petitioner failed to fully disclose the previously filed petition, this petition will be denied as a matter of discretion.

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). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if the plaintiff shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.