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FILE: WAC 03 229 50357 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. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


for 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 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 corporation organized in the State of California and claims to be engaged in the business of international trade and investment. The petitioner states that it is a subsidiary of ~~Shackem Trading Co., Ltd.~~, located in China. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings in a supplemental brief.

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 regulations at 8 C.F.R. § 214.2(l)(3) state 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a 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.

In support of the petition, the petitioner provided the following description of the beneficiary's job duties:

1. He determines [the] company's policies and establishes business goals. With [the] business nature in mind, he considers [the] company's marketing capability, financial capability and human resource. He also considers social and economic environment here in the United States. Then, he determines and formulates [the] company's policies of product, price, distribution, promotion, finance and human resource. And he sets business goals regarding market share, revenue and profit.

2. He devises an evaluation system and assigns authorities and responsibilities to his supervisees. He reviews marketing and financial reports to ensure that [the] company's objectives are achieved. He analyzes operations to evaluate [the] company's performance and to determine areas of cost reduction and program improvement. He directs financial and budget activities to fund operations and increase efficiency.
3. He exercises his discretionary authority to make decisions. If [the] business environment changes, he adjusts policies regarding [the] product, price, distribution, promotion, finance and human resources. He determines business orientation and operation.
4. He reports to the parent company in China. The report concerns the performance of the U.S. subsidiary and business opportunities here in the United States. He also receives instructions and information from the parent company.

The petitioner also provided an organizational chart showing five employees with the beneficiary at the top of the organizational hierarchy. The chart indicated that the beneficiary has three subordinates, which include a business manager, a chief financial officer, and a secretary. The one other position in the company is a business clerk, who is subordinate to the business manager.

On August 12, 2003, the director issued a notice requesting additional evidence acknowledging the petitioner's prior submission of an organizational chart. However, the director stated that the previously submitted chart did not contain sufficient information. Therefore, the petitioner was instructed to indicate its total number of employees, and to submit a line and block organizational chart describing the petitioner's managerial hierarchy. The petitioner was also asked to identify all employees under the beneficiary's supervision by name and job title, and to provide their brief job descriptions, educational levels, salaries, and immigration statuses.

The petitioner complied with the director's request, stating that it currently has a total of five employees. The petitioner also provided information regard all of its employees except the beneficiary.

On August 29, 2003, the director denied the petition noting that the employees supervised by the beneficiary are not managerial or professional. The director concluded that the petitioner has not reached a complexity level that would support the beneficiary in a qualifying capacity.

On appeal, counsel submits a brief recreating the petitioner's organizational chart. He also restates the beneficiary's duties as provided in support of the petition and describes a one-day schedule of the beneficiary's work activities claiming that the beneficiary is the petitioner's top executive who primarily performs duties typically associated with those of a manager or executive. However, the beneficiary's overall job description and one-day schedule do not support counsel's claim. The beneficiary's job description emphasizes his heightened degree of discretionary authority over the petitioner's daily and overall business activity. While this factor is a relevant and necessary component in identifying a manager or executive within the statutory definition, 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). In the instant case, the beneficiary's daily tasks seem to consist primarily of various business meetings with his subordinates and other business associates. However, there is insufficient detail as to the subject matter of these meetings. Furthermore, the beneficiary's job description states that he reviews

marketing and financial reports; yet, the petitioner did not indicate that any of its employees actually perform the marketing function or create any reports for the beneficiary to review. Moreover, the beneficiary's daily work schedule indicates that the beneficiary was actually in the process of preparing a report to be reviewed by the president. This indication is confusing for two reasons. First, because the job description indicates that the beneficiary reviews, rather than creates reports; and second, because the beneficiary's title is that of president. Therefore, the indication that the beneficiary would create a report to be reviewed by the president directly contradicts the petitioner's original claim. 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). In addition, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* In the instant matter, the conflicting information is offered in the same appellate brief without any additional explanations to resolve this apparent inconsistency.

In addition, the petitioner has indicated that it is an import and export operation that conducts millions of dollars worth of trade. However, neither the petitioner's organizational chart, nor any of the job descriptions for its employees indicate who is actually doing the sales and marketing, particularly for the materials that are imported into the United States for the assumed purpose of selling such materials in the U.S. market. 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record is unclear as to who actually performs the sales and marketing functions of the petitioner's business. Therefore, the AAO cannot affirmatively determine that the beneficiary would be relieved from having to perform primarily these non-qualifying tasks himself. Although counsel has cited a number of the AAO's unpublished cases, 8 C.F.R. § 103.3(c) only binds Citizenship and Immigration Services (CIS) employees to AAO precedent decisions. Unpublished decisions, such as the ones cited by counsel, are not similarly binding. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the 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.