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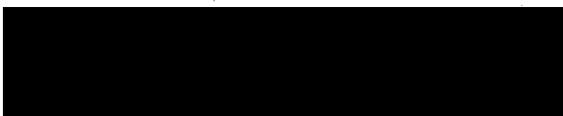
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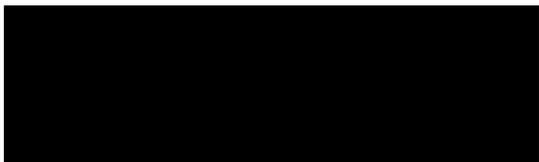
File: WAC-04-028-50145 Office: CALIFORNIA SERVICE CENTER Date: **AUG 03 2006**

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, Chief
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 under the laws of the state of California and is engaged in the import and distribution of electronics. The petitioner claims that it is the subsidiary of Zuhai Luck Development, Ltd., located in Guangdong, China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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 director's conclusions were based on speculation, lacked analysis that the beneficiary has been acting in a primarily managerial and executive capacity. However, the petitioner did not submit any additional evidence, cite any legal authority for its assertions, or articulate how the evidence in the record supported its assertions.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first 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 the initial petition, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] has absolute and discretionary authority and control of the entire domestic and international business operations as well as the authority to hire and fire supervisory personnel. He was tasked to direct and coordinate the overall business operations; prepare, plan and supervise day-to-day business and sales operations of the subsidiary; render work instructions and assignments to subordinates; participate in the management of personnel matters including hiring and firing of employees of the subsidiary; prepare periodic sales reports showing sales volume and potential sales, report to the parent company regarding the business operations and other related matters in a timely fashion.

On January 13, 2004, the director requested additional evidence. Specifically, the director requested evidence of a qualifying relationship, evidence that the beneficiary would be acting in an executive or managerial capacity, including a list of employees and their duties, an organizational chart, a payroll summary, Forms DE-6 quarterly wage reports, as well as evidence of doing business such as invoices and bills of lading.

In response, the petitioner submitted an organizational chart, list of employees, wage reports, payroll summaries and wage tax documentation, invoices, bills of lading and packing lists.

On July 9, 2004, the director denied the petition. The director determined that the petitioner had not established the beneficiary would be employed primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director failed acknowledge the facts of the case and that the petitioner established eligibility.

Upon review, 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(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 managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On appeal counsel for petitioner states that the director's decision did not properly regard what it considers to be facts. However, upon review of the record the director's exercise of discretion was proper because the evidence submitted does not support that the petitioner's assertions rise above mere characterization. The AAO would note that the petitioner has the burden of establishing that the beneficiary was *actually* employed primarily in a executive capacity through the submission of probative documentary evidence; merely alleging such is not sufficient. 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)). It is not persuasive to argue that a director must cite authority for a proper exercise of discretion. The AAO would note that it is the unsupported statements of counsel on appeal or in a motion which are not evidence and which are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The petitioner bears the burden of establishing eligibility in these proceedings, and that burden has not been met.

The evidence in the record does not support that the beneficiary is actually employed in an executive capacity. As indicated by the director the salaries listed for the employees indicate that they are not receiving a full time salary, thus undermining any assertion that they are operating in a supervisory, managerial or professional capacity. It is well within the director's discretion to make a reasonable inference that \$10,000 in annual salary is not indicative of a full time employee, much less a managerial, supervisory or professional employee. The petitioner has the burden establishing eligibility and in this case the evidence submitted by the petitioner to support its assertions is not persuasive. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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 this case the petitioner has asserted that the beneficiary is an executive. One element of an executive capacity is directing the management of the organization. Thus the record must indicate that the subordinate employees are supervisory, professional or managerial. As stated above, mere assertions, such as position titles and artificially inflated organizational tiers are not sufficient.

Counsel for petitioner repeatedly asserts that the duties listed for the beneficiary and the other employees establish eligibility, however, there is no evidence in the record that these are the actual duties of the beneficiaries and the employees listed. The record does not contain evidence of personnel actions, policy or goal setting, no evidence of clientele accumulation, no evidence of revenue generating contracts, reports to management or coordination of inventory or any other documentary evidence which might normally be generated in the normal course of business operations. The petitioner did not submit any evidence to

demonstrate that its assertions were more than mere characterizations. The petitioner submitted a summary of the wages for each of the employees, but in response to the director's RFE submitted W-2 wage forms that contradict these assertions. *See* IRS Forms W-2, attached hereto as petitioner's response to RFE exhibit; *contra* Employee summary, attached hereto as petitioner's initial exhibit. Without corroborating evidence such as work product for these employees the petitioner's assertions are not persuasive.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary has been or will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

The second issue in this proceeding is whether the petitioner has been conducting business for the prior year. While not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii).

In this case the petitioner has admitted that the president of the organization was not present for four months during the initial visa period. The petitioner submitted copies of invoices and bills of lading, but upon inspection these invoices are almost exclusively dated for the month of March, 2004. This date is subsequent to the period for which eligibility must be established. The fact that they are all for a period after the filing of the petition renders them irrelevant to demonstrating eligibility at the time of filing. 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).

Thus, it is not evident from the record that the petitioner has been conducting business. For this additional reason the petition will be denied.

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).

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.

ORDER: The appeal is dismissed and the petition hereby denied.