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U.S. Citizenship and Immigration Services

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FILE: WAC 05 022 51469 Office: CALIFORNIA SERVICE CENTER Date: DEC 0 6 2006

IN RE: Petitioner: [redacted]
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:

[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, 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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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, a California corporation, claims to be the subsidiary of China Film Group Corporation, located in Beijing, China. The petitioner claims to be a film exporter and importer, and seeks to employ the beneficiary as its president.

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 filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous, and submits a detailed statement in support of this contention.

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) provides 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 primary issue in this matter is whether the beneficiary was employed abroad 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 from the petitioner's former attorney dated October 25, 2004, counsel explained that the foreign entity and the petitioner had a job rotation policy and that the beneficiary had previously been employed in the United States by the petitioner from 1995 to 2000. In addition, counsel provided the following overview of the beneficiary's duties in the United States:

> According to the job rotation policy, the beneficiary will fill the position of President of [the petitioner]. In this executive capacity, he will be engaged in managing general corporate

affairs and the business operation of the company. Specifically, he will perform the following duties:

1. He will plan and develop policies and objectives of the company.
2. He has responsibility for financial administration of the company, including cost accounting, capital investment management, budget control and the development of appropriate business strategies for maintaining the sound financial status of the company.
3. In addition, he will be responsible for implementing the business goals and policies of the parent company, and serve as the chief liaison between the United States and China with regard to ongoing operational matters.
4. He will direct the review and purchasing of feature films and documentaries in the United States, sales of Chinese feature films, animation films and documentary films to various American companies.
5. Furthermore, he will evaluate performance of employees for compliance with established policies and objectives of the company.
6. Most importantly, he will develop business relationships with major American film studios and companies on behalf of the overseas parent company and submit the company work report to the board of directors of the overseas parent company regularly.

On January 26, 2005, the director requested additional evidence pertaining to the beneficiary's proposed employment in the United States. Specifically, an organizational chart outlining the U.S. hierarchy was requested, as well as more details pertaining to the beneficiary's position as well as the positions of his subordinates. The director also requested copies of the petitioner's payroll summaries and quarterly wage reports.

In a response dated April 14, 2005, the petitioner indicated on its organizational chart that the beneficiary would oversee one business manager, [redacted], who had recently been hired to replace the former business manager, [redacted]. Also listed as subordinates to the beneficiary were the company attorney and the company accountant, neither of whom were identified by name.

The petitioner provided the previously-submitted description of the beneficiary's duties, noting that the beneficiary possessed four years of college and would earn an annual salary of $36,000. The petitioner provided a description of the business manager as well, noting that he also had four years of college education and would earn an annual salary of $30,000. Regarding the business manager's duties, the petitioner stated:

- He will review and select films to be exported to the parent company for distribution in China.
- He will acquire copyrights of American home video, TV programs, and feature films produced by independent film companies in the U.S. and Canada.
- He will meet top executives of major film studios and distribution entities to discuss particular issues involving exporting their products to China.

- Based on his knowledge of China's film market, China's governmental regulations regarding distribution of foreign films, and the company's internal procedure, he will pre-select films, make initial purchasing decision and recommend to the parent company.
- Furthermore, he will conduct negotiations with producers or distributors with regard to film purchasing, copyrights, and methods of distributing those films, such as revenue-sharing or flat-sale deals.
- He will also promote China-made films in the United States and Canada.

The director denied the petition on May 20, 2005. Specifically, the director determined that based on the description of the beneficiary's duties contained in the record, it appeared that the beneficiary would perform more non-qualifying duties than actual managerial duties. The director specifically noted that the proposed organizational structure of the U.S. entity, with just one other employee, did not support the premise that the beneficiary would enter employment with the United States entity in a primarily managerial or executive capacity.

The AAO concurs with the director's determination. First, the description of the beneficiary's duties, as provided in the initial petition and which was not supplemented in the response to the request for evidence, is extremely broad. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Although some specifics are listed, the petitioner identifies numerous duties for the beneficiary that are not traditionally managerial or executive. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on each. This failure of documentation is important because several of the beneficiary's daily tasks, such as "financial administration of the company" and "develop[ing] business relationships with major American film studios," do not fall directly under traditional managerial duties as defined in the statute. Specifically, these duties identify crucial tasks that are necessary for the petitioner to promote and provide its products and services. 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. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Without a breakdown of the percentage of time the beneficiary will devote to each of his duties, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties will involve supervising employees, as in this case, 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, only one person, a business manager, is under the beneficiary's supervision.[1] Despite the director's request, minimal documentation was provided regarding his position, his duties, and the educational requirements to fill the position. Although the petitioner indicates that he has four years of college education, it is uncertain whether he obtained a degree of any kind, or whether a professional degree is necessary to perform the duties of his position as business manager. Thus, the petitioner has not established that this employee possesses or requires an advanced degree, such that he could be classified as a professional. Nor has the petitioner shown that he supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that he could be classified as a manager or supervisor. Merely inserting the word "manager" in his job title is insufficient to satisfy this requirement. The minimal information provided, coupled with the general overview and lack of specific detail regarding his duties, precludes the AAO from finding that the beneficiary supervises qualifying employees. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner, therefore, has not shown that the beneficiary's subordinate employee is supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

On appeal, counsel asserts that the director's decision on this issue was erroneous and that the record contains ample information to establish the beneficiary's qualifications. The AAO disagrees. No evidence to overcome the director's specific basis for the denial is submitted on appeal, nor are any additional arguments in support of the beneficiary's qualifications submitted. Counsel merely claims that by virtue of the beneficiary's position, he is qualified for the benefit sought. 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)). In addition, 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).

The director determined that the petitioner lacked the organizational complexity to support the beneficiary in a primarily managerial or executive capacity. Specifically, the director noted that absent evidence to the contrary, the beneficiary would be required to perform many administrative, clerical, and non-qualifying duties based on the small staff and nature of the business. As previously stated, 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. at 604.

On appeal, counsel alleges that the director's conclusions are erroneous, and specifically claims that the foreign entity is responsible for performing all of the U.S. entity's administrative and clerical functions. This

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[1] While it is noted that the organizational chart indicates that the beneficiary oversees a company attorney and a company accountant, there is no indication that these persons were on the petitioner's staff at the time of the petition's filing. In fact, these alleged employees are not identified by name. Since the petitioner provided evidence that the business manager, Ye Wang, was receiving wages from the petitioner during the last quarter of 2004, it is apparent that he is the beneficiary's only verified subordinate.

claim is not credible and is unsupported by the evidence of record. Specifically, to suggest that the beneficiary and one subordinate employee operate a business in the United States without having to perform any administrative or clerical tasks on a daily basis, such as answering telephones, opening mail, and/or meeting with clients is simply unreasonable and unfounded. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Notably, the record indicates that the beneficiary is "responsible for the financial administration of the company," yet the petitioner claims on appeal that financial services are handled either by the Chinese parent company or by the company accountant. 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. *Id.* at 591-92.

The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary will spend performing the claimed managerial or executive duties. It has been noted in the record that there is only one other employee working for the petitioner in the capacity of business manager. There is no mention in the record of any administrative staff, secretary, or sales person working for the petitioning enterprise. Collectively, this brings into question how much of the beneficiary's time would actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See s*ections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Finally, it is noted that, when staffing levels are used as a determining factor in denying a visa to a multinational manager or executive, the reasonable needs of the organization in relation to its overall purpose and stage of development must be considered and addressed. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, there is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act.

In addition, it is important for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* As discussed above, the fact that the petitioner employs only one other person in addition to the beneficiary, yet simultaneously claims that the beneficiary is exclusively employed in a managerial capacity, creates a

discrepancy in the record that the petitioner has failed to overcome. 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.