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U.S. Citizenship and Immigration Services

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[redacted]

DEC 07 2004

File: SRC 03 124 50388 Office: TEXAS SERVICE CENTER Date:

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)

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

DISCUSSION: The Director, Texas 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 Texas, which is engaged in the business of railway technology. The petitioner claims to be the subsidiary of Harbin VEIC Technology Co., Ltd., located in Harbin, China. The beneficiary was previously granted a one year period of stay to open a new office, 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 had been and will continue to 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 contends that the director's decision erred in both law and fact, and that the description of duties provided clearly established that the beneficiary was functioning in a primarily executive capacity. In support of this assertion, the petitioner submits a detailed brief.

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 primary 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, counsel for the petitioner submitted a detailed letter, prepared by the beneficiary in her capacity as president of the U.S. entity, outlining her duties while employed by the United States. The duties were described follows:

> Evaluate, review, and implement the business goals and policies of [the foreign entity] in the U.S. Direct the management of [the U.S. entity] and develop its business strategies. Set up the U.S. operation. Exercise wide latitude in discretionary decision making in the U.S. operation. Confer with U.S. firms and industrial representatives to explore possible business ventures with the parent company in China. Coordinate strategic alliance with the U.S. companies. Purchase of equipment and railway operating systems in the U.S. Review any other investment opportunities.

On May 5, 2003, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. Specifically, the director requested information regarding the staffing levels of the U.S. entity, a specific description of the beneficiary's duties and the percentage of time she devoted to each duty, and evidence of wages paid to other employees of the U.S. entity.

On July 17, 2003, the petitioner, through counsel, submitted a detailed response which outlined her duties and the time she devoted to each identified duty. The petitioner also provided a payroll record demonstrating the wages paid to the beneficiary. No additional documentation regarding the staffing levels of the U.S. entity was provided, although the petitioner submitted extensive documentation pertaining to corporate transactions for both the U.S. and foreign entities.

On August 4, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the evidence in the record did not demonstrate that the beneficiary was

supervising a subordinate staff of qualifying personnel, and asserted that the U.S. entity, with the beneficiary as the sole employee, appeared to be merely a shell company and noted that the mere presence of the U.S. entity in the U.S. could not support a finding that the U.S. entity was a qualifying organization that supported the employment of a manager or executive.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous. Specifically, counsel alleges that the director ignored the reasonable needs of the U.S. entity, and asserts that the director erroneously based his decision on the size of the operation.

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

Prior to adjudication of the petition, counsel contended that the beneficiary had been employed in a capacity that was primarily managerial in nature. In support of these contentions, counsel submitted a detailed response to the director's request for evidence, which included an overview of the beneficiary's duties, prepared by the beneficiary herself, for the period from March 2002 to June 2003. These duties were listed as follows:

1. Starting [the U.S. entity]: (15% of 15 months)
2. Working with TransCore in Dallas to accomplish the AEI project for China railway: (30% of 15 months)
3. Working with Transportation Technology Center, Inc. . . . on Project of TPDs and TADs into China railway market: (25% of 15 months)
4. Introducing and marketing [the foreign entity's] products to railroad clients outside China . . .: (10% of 15 months)
5. More and more consulting work . . .: (20% of 15 months)

The petitioner concluded by stating that the beneficiary was employed as an executive, and had five persons assisting her at the foreign office.

The petitioner, through counsel, additionally provided an explanation regarding its hiring plan, and stated that the functions of the U.S. office will continue to be carried out solely by the beneficiary until the time comes for the U.S. entity to transition from a branch office into a subsidiary. Once a subsidiary, counsel asserted, the U.S. entity will require an extended organizational structure and a large number of employees. Counsel further stated that since the U.S. entity was not an individual business entity and does not engage in any sales activities or generate any income in the U.S., it keeps its organization structure at a minimum.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary was not employed in a primarily managerial or executive capacity. Specifically, the beneficiary's stated duties and the fact that that the beneficiary is the only person employed by the U.S. entity does not support a finding that the beneficiary's duties are primarily managerial or executive. Nor does there appear to be significant evidence to establish that the beneficiary qualifies as a function manager.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner claims that her duties are exclusively executive in nature, yet the list of duties provided includes almost all non-executive tasks. For example, the petitioner states that the beneficiary performs extensive consulting work, works on various projects herself, and conducts the marketing functions of the U.S. entity. There is no indication that any other employee is present to assist with the day-to-day duties of the organization. The petitioner's claim that the beneficiary has five employees at the China office who are able to assist her is not persuasive in this matter, as they are not employees of the U.S. entity and are therefore not available on a daily basis to perform the daily tasks essential to the operation of the business. Consequently, it is evident that the beneficiary is performing all the required tasks associated with the successful operation of the business. 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).

Since the evidence confirms that the beneficiary does not supervise a subordinate staff nor does she have any coworkers, the AAO will examine the record to determine whether the beneficiary may be acting as a function manager.[1] The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties, but it fails to quantify the time the beneficiary spends on them on a daily basis. Instead, the petitioner chose to provide an overview of the

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[1] Although the petitioner claims that the beneficiary is employed in a primarily executive capacity, the AAO will examine the beneficiary's stated duties for eligibility under the classification of manager.

beneficiary's duties for fifteen months, without providing a concise picture of the day-to-day activities of the beneficiary in her stated position at the U.S. entity. This failure of documentation is important because several of the beneficiary's identified tasks, such as "consulting and marketing products," do not fall directly under traditional managerial duties as defined in the statute. For this reason, 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).

Additionally, counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. However, pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, 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.

At the time of filing, the petitioner was a 1-year-old railway technology company. It did not provide its gross annual income, and employed the beneficiary as president. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial 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 and no additional employees to assist in conducting business operations. 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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, counsel refers to an unpublished decision involving an employee of the Irish Dairy Board. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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 petitioner employs only the beneficiary and has not submitted evidence that it plans to hire additional employees to perform the daily functions of the business. The regulation at 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. For this reason, the petition may not be approved.

Although not discussed by the director, the AAO notes that the record contains insufficient evidence that a qualifying relationship exists between the U.S. and foreign entities. Specifically, counsel submits a copy of the Minutes of the Organizational Meeting for the U.S. entity dated January 26, 2002, which show that the foreign entity has acquired 10,000 shares in the U.S. entity. Additionally, a photocopy of a stock certificate is provided evidencing this alleged ownership. However, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Therefore, for this additional 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.