U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

D7

[redacted]

FEB 24 2004

FILE: SRC 02 156 50714 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)

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, 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 claims to be engaged in international trade and restaurant management. It seeks to change the beneficiary's visa classification and extend its authorization to employ the beneficiary temporarily in the United States as its financial director. The director determined that the petitioner failed to establish that the beneficiary is eligible for an extension of stay or that the beneficiary would be employed in managerial or executive capacity. The director also concluded that the petitioner did not provide sufficient documentation to establish that it and the foreign entity have been doing business. On appeal, counsel refutes the director's decision and resubmits various documents.

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.

The U.S. petitioner states that it was established in 1996 and that it is a subsidiary of Shenyang Lantian Co., Ltd., located in China. The initial petition to classify the beneficiary as an L-1B specialized knowledge employee was approved and was valid from May 8, 1997 to May 8, 2000. A subsequent petition to extend the beneficiary's stay was also approved and was valid until May 9, 2002. The current petition was filed on April 23, 2002, sixteen days prior to the expiration of the beneficiary's stay. The petitioner now seeks to change the beneficiary's visa classification to that of an L-1A manager or executive and to extend the beneficiary's stay for two years at an annual salary of $24,000.

The first issue in this proceeding is whether the beneficiary is eligible to amend her visa classification to that of an L-1A manager or executive.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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 stated that the beneficiary will control the petitioner's finances. The petitioner also provided the following statement regarding the beneficiary's job duties prior to her promotion:

> [S]he coordinated the accounting functions of six subsidiaries with 38 professional accountants under her direct supervision. She developed and established company policies and procedures for financial arrangement, planned and reviewed the company's annual budgets and financial goals as well as supervised the operations of the accounting department.

On June 15, 2002, CIS issued a request for additional evidence addressing, in part, the beneficiary's new job position. The petitioner was asked to provide a copy of its organizational chart identifying all of its employees by name and job title and listing their respective job duties. The petitioner was also asked to provide a detailed description of the beneficiary's position including a list of her duties and the percentage of time spent performing each duty.

The petitioner's response included the following list of the beneficiary's job duties:

25% Accounts Manager, including signing checks, bills, and making accounting decisions

25% Oversees company investments

25% Checks balance sheets, end of business day

10% Balances end of month financial figures, deposits earnings

10% Establishes projections

5% Determines profit shares

The petitioner also submitted an organizational chart identifying a president, vice president, and general manager as the three positions above the beneficiary. The chart also included an operation department with three employees; an international trade department managing one U.S.-based sales representative (with one sales representative in China and another in Taiwan); and the accounting department where the beneficiary is identified as the manager. The chart does not list any subordinate employees under the beneficiary.

On September 10, 2002, the director denied the petition concluding that the evidence submitted by the petitioner does not establish that the beneficiary's job duties changed from that of an employee working in a specialized knowledge capacity to one employed primarily as a manager or executive.

On appeal, counsel states that as financial director the beneficiary "is responsible for directing a major component or function of the business, she has wide latitude in discretionary decision making in financial matters and receives only general direction from higher level executives."

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. While counsel is correct in stating that the beneficiary does not need to manage people in order to be eligible for classification as a manager, the petitioner still has the statutorily imposed burden of establishing that the beneficiary is primarily performing managerial duties. If the beneficiary claims to be a function manager, the petitioner must show that the beneficiary is "managing" rather than performing the essential function. The beneficiary must be relieved

from having to perform the function. Whether this is accomplished by a staff that the beneficiary manages directly or by a staff that the petitioner employs or contracts is irrelevant as long as the beneficiary's duties are primarily managerial or executive. As established by legal precedent, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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). In the instant case, counsel asserts that the beneficiary would act as a function manager rather than a personnel manager. However, she fails to identify the actual function the beneficiary would be managing and does not discusses how this function is essential to the overall organization. Instead, counsel uses the paraphrased statutory definition of "manager" to support her statement. Although the petitioner previously submitted a breakdown of the beneficiary's duties in its response to CIS's request for additional evidence, the list of duties is vague and as a result fails to convey a true understanding of what the beneficiary will be doing on a daily basis. The petitioner did not specify what the beneficiary actually does in overseeing company investments, establishing projections, or making account decisions. Thus, at least 60% of the beneficiary's duties remain entirely unclear. 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). 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.

The second issue in this proceeding is whether the petitioner has established that it and its foreign counterpart have been doing business.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

> *Doing business* means 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.

In the request for additional evidence, CIS instructed the petitioner to submit additional evidence to establish that the petitioner and the foreign entity with which the petitioner claims to have a qualifying relationship are doing business.

The petitioner's response included the following documents:

1. The petitioner's tax returns for 1999 and 2000;

2. The petitioner's bank statements for January 2001 through July 2002;

3. UPS invoices billing the petitioner for its services;

4. Numerous invoices for 2002 from Hi Lite Watch Co., Ltd. listing watches purchased by the petitioner;

5. Numerous handwritten invoices for 2002 enumerating items sold and/or purchased in abbreviated terms.

Although the invoices discussed in No. 4 above identify the buying and selling parties, the invoices in No. 5 above do not contain this pertinent information. A number of the invoices contain the names [redacted] or [redacted] However, there is no indication as to the relationship of these people to the petitioner. The petitioner made no attempt to provide any further information regarding the vague invoices. Furthermore, the petitioner's tax returns and bank statements, though indicator's of the petitioner's financial status, do not establish that the beneficiary has been engaging in the regular course of business. While purchase and sales invoices are proper indicators of a company "doing business," the petitioner in the instant case provided only purchase invoices to indicate the purchase of what may be the petitioner's inventory. The AAO can only assume that the invoices listed in No. 5 above are sales invoices. There is no actual evidence to support this assumption. Furthermore, there is no evidence that the overseas office is doing business. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, the petitioner has failed to demonstrate that it and the foreign entity have been doing business through the regular, systematic, and continuous provision of goods or services. For this additional reason, the petition may not be approved.

The final issue in this matter is the beneficiary's extension of stay. In regard to the petitioner's request for an extension of the beneficiary's stay based on the amended petition, the regulations at 8 C.F.R. § 214.2(l)(15)(ii) state the following, in pertinent part:

> The total period of stay may not exceed five years for aliens employed in a specialized knowledge capacity. The total period of stay for an alien employed in a managerial or executive capacity may not exceed seven years. No further extensions may be granted. When an alien was initially admitted to the United States in a specialized knowledge capacity and is later promoted to a managerial or executive position, he or she must have been employed in the managerial or executive position for at least six months to be eligible for the total period of stay of seven years. The change to managerial or executive capacity must have been approved by [CIS] in an amended, new, or extended petition at the time that the change occurred.

In the denial, the director determined that the beneficiary is not eligible for the total period of stay of seven years because she has not been employed in a managerial or executive position for the required six months.

It is noted that 8 C.F.R. 214.l(c)(5) states that there is no appeal from the denial of an application for extension of stay. Although the AAO may not enter a decision on the denial of the beneficiary's extension of stay, the AAO will review the matter and make notes for the record.

Counsel asserts that the beneficiary "was out of the country and not actually in the U.S. in an L classification for over six months . . . ." While counsel also states that the petitioner filed the petition to amend the beneficiary's status prior to expiration of her lawful stay under the L-1B classification, she does not indicate when the change in job duties occurred or that the petition was filed at the time of such change. Counsel claims that the beneficiary's time abroad entitles her to an approval of the petition to amend her status.

Counsel's assertion is not persuasive. If a petitioner that seeks to extend a specialized knowledge beneficiary's stay beyond the five-year limitation by changing a beneficiary's status from L-1B to L-1A

manager or executive, the beneficiary must have been in that executive or managerial position for at least six months prior to the expiration of the original period of stay. Furthermore, the regulations clearly require CIS approval for the change in the beneficiary's employment position at the time of the promotion. An extension of stay may not be approved based on a change from L-1B to L-1A unless the employer files an amended petition no later than six months prior to the expiration of the beneficiary's period of stay as an L-1B. In the present matter, the petitioner filed the petition for change of status a mere sixteen days prior to the expiration of the beneficiary's stay.

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.