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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 082 50100 Office: CALIFORNIA SERVICE CENTER Date: JUN 18 2004

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 nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a wholesaler of telecommunications products. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed by the U.S. entity primarily in an executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties will be primarily executive in nature.

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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 (1)(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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1997 and claims to be in the wholesale business of telecommunication products. The petitioner claims that the U.S. entity is a subsidiary of Dan Chief Enterprises Company, located in Taipei County, Taiwan. The petitioner declares seven employees and a gross annual income of $822,562.00. The petitioner seeks to continue to employ the beneficiary as its president for a period of three years, at a yearly salary of $60,000.00.

The issue presented in this proceeding is whether the petitioner has established that the beneficiary will be employed by the U.S. entity primarily in an executive capacity.

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 the petition, the petition stated that the beneficiary would be responsible for the overall business development and operations of the U.S. entity, where he will be establishing company policies and objectives and evaluating executives' performance.

In a letter of support, dated December 12, 2001, the petitioner stated, in part:

> The need to retain [the beneficiary's] services for additional years has arisen because of his superior managerial experience is essential to lead [the petitioner] to well operate to get over the economic slowdown in the states. Further, as [the petitioner] is planning to recruit and train more sales agents to develop the U.S. market and find more telecommunication products, especially fiber optical and computer networking equipments, that have potential in the US as global market suitable for increasing our production lines in the next three years, [the beneficiary's] excellent managerial skills and know-how about [the petitioner's] products and production capacity are indispensable to accomplish our business plans.

The petitioner submitted a copy of the U.S. entity's organizational chart, which depicts the beneficiary as the president, and Pan Chin-Yu Johnson as marketing manager, Kimberly Anne Brown as sales manager, Nai T. Tam as operation manager, Ruby E. Tam as financial officer, Peter Wan-Tun Hsu as sales representative, Sonya Yvette Smith as sales representative, and Ji Kong Chang as customer service representative.

On February 27, 2002, the director requested that the petitioner submit additional evidence. The director specifically stated:

U.S. BUSINESS ORGANIZATIONAL CHART: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages (in U.S. Dollar equivalents) and immigration status . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission.

DUTIES IN THE UNITED STATES: Submit a more detailed description of the beneficiary's duties in the U.S. Be specific.

FORM DE-6, QUARTERLY WAGE REPORT: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers, and number of weeks worked for all employees.

In response to the director's request for additional evidence, the petitioner submitted a copy of the U.S. entity's organizational chart that depicts the following:

1. The president's educational level is high school, his annual salary in the United States is $60,000, and his status is L-1.
2. The accounting/operations manager' [redacted] educational level is B.A., her annual salary in the United States is $26,400, her employment date is September 13, 1999, and her status is United States Citizen.
3. The sales manager's [redacted] educational level is B.S., his annual salary in the United States is $42,000, his employment date is February 21, 2000, and his status is United States Citizen.
4. The marketing manager's [redacted] educational level is B.S., his annual salary in the United States is $42,000, his employment date is April 1, 2002, and his status is permanent resident.
5. The sales person's [redacted] educational level is "College", his annual salary in the United States is $30,000, his employment date is December 24, 2001, and his status is F-1.

The petitioner described the beneficiary's proposed duties as follows:

1. Coordinate with parent company's top management – Monitor, assess and report to the parent company on a continual basis about the competitive situation, market development and business status of the U.S. company as well as seek solutions to the problems encountered.

2. Implement parent company's international policies – Under the global guideline directed by the parent company from time to time, working out detailed scheme suitable for local environment and execute it.

3. Set up company's goal and make business development plan – Develop and execute a comprehensive business plan and review, revise and update the plan on a monthly basis to achieve company's business goal.

4. Build up relations with top management of major customers – Cultivate mutually beneficial strategic and profitable relationships with existing and potential customers.

5. Oversee executives' work, evaluate their work performance and make important decisions – Meet with accounting manager, operation manager, marketing manager and sales manager in daily meeting to discuss the overall management and operation issues including structuring pricing policies, promotion projects, resolving outside/internal problems encountered, making important decisions regarding complicated cases, etc.

The petitioner also submitted descriptions of the manager's duties as follows:

> Accounting/Operation Manager – accounts payable, accounts receivable, customer credit review, inventory company's stock, and prepare company's financial statements.
>
> Sales Manager – Implement procedures to improve sales, identify and target new customers in the U.S. market, conduct regular account maintenance of existing customers, chair the daily sales meeting and discuss problems encountered, and review sales representatives' performance.
>
> Marketing Manager – market research, consumer study, competitor profile, develop and implement marketing strategies, and media relations and advertisement resources planning.

The petitioner stated in response to the director's request, "the source of remuneration of all employees comes from the capital and income of the U.S. subsidiary, Eastern Manufacturing Co., Inc."

The petitioner provided copies of its EDD Form DE-6 for the quarter ending March 31, 2001, June 30, 2001, September 30, 2001, and December 31, 2001.

The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be performing job duties primarily in an executive capacity. The director stated that based upon the evidence submitted, it appeared that the petitioner's business would require the beneficiary to perform more than just executive duties. The director noted the inconsistencies in the number of persons employed by the petitioner. The director further stated that the petitioner had failed to demonstrate that the beneficiary would manage a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary will continue to perform primarily in an executive capacity. Counsel further contends that the beneficiary has always been responsible for supervising three managers, and that the names have changed but the positions have remained the same for all managers. Counsel also asserts that the beneficiary's and the other employees' job duties have been clearly defined by the petitioner. On appeal, the petitioner resubmits copies of Form DE-6 for the

last four quarters preceding the filing of the petition, a company organizational chart with position descriptions, a master list of employee information, and a copy of the commercial lease agreement.

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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In the instant matter, there is insufficient evidence to show that the beneficiary performs the high level responsibilities as defined, or that he primarily performs those duties rather than spending the majority of his time performing day-to-day functions of the organization.

The record contains insufficient evidence to demonstrate that the majority of the beneficiary's duties will primarily be executive in nature. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be directing the management of the organization or a major component or function of the organization, that he will be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. There is no evidence submitted to show the number of hours to be attributed to each of the beneficiary's executive and non-executive duties. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Furthermore, the petitioner did not define the organizations goals or policies to be carried out by the beneficiary, nor did it clarity who would be performing the functions of the business. 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). 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).

In review of the petition and evidence submitted, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in a qualifying executive capacity. The petitioner has failed to overcome the objections made by the director in relation to the inconsistencies found in the number of individuals employed by the U.S. entity. Furthermore, it is unrealistic for a corporation to employ more than half of its workers in a strictly executive or managerial capacity. For these reasons, the appeal will be dismissed.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.