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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: EAC 02 075 52554 Office: VERMONT SERVICE CENTER Date: AUG 15 2005

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 1991 and is described as a travel and tour agency. The petitioner claims to be a subsidiary of China International Travel Service, located in Beijing, China. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager and chief of operations for two years, at an estimated annual salary of $30,000.00. The director determined that the petitioner had not submitted sufficient evidence to establish: (1) that a qualifying relationship exists between the U.S. and foreign entities; or (2) that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision. Counsel states that the petitioner has submitted sufficient evidence to establish that a subsidiary relationship exists between the U.S. and foreign entities, and that the beneficiary will be employed by the U.S. entity primarily in a managerial capacity.

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 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) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;

B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);

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 managerial or executive capacity; and

E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the U.S. and foreign entity.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(*1*) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(*2*) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(*3*) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operation division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(*1*) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(*2*) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner initially stated in the petition that the U.S. entity was "wholly owned" by the foreign entity.

In response to the director's request for additional evidence, the petitioner submitted a copy of the U.S. entity's IRS Form 1120, Corporate Income Tax Return for 2001.

The director denied the petition after determining that the evidence failed to establish the existence of a qualifying relationship between the U.S. and foreign entities. The director noted that the petitioner submitted a copy of the organization's IRS Form 1120, Corporate Income Tax Return for 2001, which indicated that two individuals owned 25 percent of the shares of stock in the U.S. entity. The director also noted that the entity indicated on the tax form that it had three shareholders at the end of the tax year. The director further noted that the U.S. entity's tax records indicated that the organization was not a subsidiary, and that no foreign person or entity owned any shares of stock in the company. Based on the discrepancies the director determined that the petitioner had failed to establish that the foreign entity wholly owned the U.S. entity.

On appeal, counsel disagrees with the director's decision and submits a brief and evidence in support of the petition. Counsel asserts that the same qualifying relationship which existed at the time the initial petition and the first petition for extension was filed is the same qualifying relationship that existed when filing the instant petition. Counsel states that two individuals each own 25 percent of the U.S. entity's stock, and that the foreign entity owned the other 50 percent of the stock. Counsel also argues that the director should have addressed this issue in the request for evidence, and that denying the petition based upon the discrepancy denies the petitioner an opportunity to explain and submit evidence in support thereof. Counsel further contends that despite the director's conclusions, a parent-subsidiary relationship exists where the foreign entity owns 50% of the shares of stock in the U.S. entity and the entity is controlled by the foreign entity.

Based upon the evidence of record, it cannot be established that a qualifying relationship exists between the U.S. and foreign entities. Counsel has failed to submit independent documentation on appeal to support his explanations for the discrepancies found in the petition and the U.S. entity's federal tax returns. The petitioner stated in the petition "petitioner is a wholly-owned subsidiary of China International Travel

Service, Beijing, China." On the other hand, the company tax records indicated that two individuals each own 25 percent of the U.S. entity's stock, and there has been no evidence submitted to demonstrate who owns the other 50 percent. In addition, the corporate tax records, Schedule K indicates that there is no subsidiary relationship, and that no foreign person or entity own any shares of stock in the U.S. business. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel contends that the same qualifying relationship that existed at the time of filing the initial petition continues to exist in reference to the instant petition. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If, however, the prior petition was approved based on evidence that was substantially similar to the evidence contained in the record of proceeding that is now before the AAO, the approval of the initial petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International,* 19 I&N Dec. 593 (Comm. 1988).

The petitioner must establish that the beneficiary qualifies for an extension of his L-1 status regardless of any prior petition that CIS approved on the beneficiary's behalf. The petitioner's statements do not warrant a reversal of the director's decision to deny the petition.

Counsel contends that the director incorrectly denied the petition without allowing the petitioner an opportunity to address the qualifying relationship issue. Counsel contends that the director should have included in its request for evidence, a request for evidence pertaining to the existence of a qualifying relationship between the U.S. and foreign entities. Contrary to counsel's contentions, if there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. 8 C.F.R. § 103.2 (b)(8). In such an instance the petitioner is granted the right to appeal the decision of the service center. *See* 8 C.F.R. § 103.3. Therefore, the petitioner is given an opportunity to establish eligibility in the appropriate forum, that being the AAO. The fact that the director did not indicate in the request for additional evidence that he would later address the issue of a qualifying relationship in the denial in no way precludes the petitioner from establishing eligibility for the desired immigration benefit. There is no requirement that the only issues in a potential denial will be those that were previously addressed in the request for additional evidence. In the instant case, tax records submitted in response to the director's request for evidence revealed a grave discrepancy in the information submitted sufficient to question the existence of a qualifying relationship. Counsel was made aware of the discrepancy from the director's decision, but elected not to submit evidence to substantiate the petitioner's claim on appeal. Therefore, the director's decision with respect to this issue will be affirmed.

The second issue in this proceeding is whether the evidence establishes that the beneficiary will be employed primarily in a managerial or executive capacity.

> 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 describing the beneficiary's duties, the petitioner initially stated that he would:

> Supervise all departments of New York branch office of company. Manage and direct department handling financial, sales and marketing of tours, personnel and investments and develop strategies, planning and analyses of these operations. Coordinate activities of New York office with U.S. headquarters in Los Angeles and head office in Beijing.

In response to the director's request for additional evidence, the petitioner described the beneficiary's responsibilities to include: financial operations 30 percent, marketing operations 30 percent, investing operations 25 percent, and personnel review 15 percent.

The director determined that the evidence submitted was insufficient to establish that the beneficiary had been or would be primarily employed in a managerial or executive capacity. The director noted that the petition was a "new office extension" in that it was the first extension petition filed on behalf of the beneficiary from the New York office. The director concluded that the record was not persuasive in demonstrating that the beneficiary would be employed in a primarily executive or managerial capacity, or that the organization was able to support such a position.

On appeal, counsel disagrees with the director's decision and asserts that the beneficiary will be employed primarily as a function manager in that he will be responsible for managing the New York branch of the company. Counsel infers that due to the economic effects of the September 11 attacks in New York, the petitioner has had to downsize leaving the beneficiary to manage the New York office. Counsel contends that the instant matter should not be categorized as a new office extension where this is the third petition filed on behalf of the beneficiary. As evidence on appeal, the petitioner submits an article from the Los Angeles Times, which addresses business economic woes post September 11, 2001.

Counsel's assertions are not persuasive. Although the instant petition may be the petitioner's third request to extend the beneficiary's stay in the United States, AAO will consider it as a "new office extension" in that it is only a second request for extension of stay in the New York office (the first being a new office petition). Furthermore, the evidence does not establish that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive or function manager capacity. Counsel contends that the beneficiary will be performing a function of the organization, namely operating the entire business in an effort to keep it operational. Counsel infers that managing the entire operation classifies the beneficiary as a function manager. Contrary to counsel's belief, the beneficiary's duties described as handling sales and marketing of tours are not duties performed by a function manager. The petitioner's compliance with the director's request for additional evidence is marginal, at best.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he would 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 has been no independent documentary evidence presented to demonstrate what goals and policies have been and will be established by the beneficiary.

The record does not demonstrate that the beneficiary primarily manages an essential function of the organization. The beneficiary's proposed job description depicts an individual who performs the day-to-day services of the organization, not an individual meeting the definition of a function manager. Although the petitioner stated that the beneficiary would be primarily responsible for managing the sales and marketing functions, the record reflects that the beneficiary is currently the company's only employee and therefore, will continue to perform the day-to-day functions of the business. When managing or directing a function, the petitioner is required to establish that the function is essential and that the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must also demonstrate that the executive or manager does not directly perform the function. Although counsel argues that the beneficiary will be managing an essential function of the U.S. entity by directing all aspects of the business, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather

than performing, the function. The petitioner has failed to provide a detailed position description specifying exactly what the management of the travel and tour business will entail.

Based upon evidence submitted on the record, it appears that the beneficiary will be performing the services of the U.S. entity rather than performing as a function manager. 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). The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. The record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed managerial or executive position. Although the petitioner stated that the U.S. entity employed an operations manager who spends 85 percent of his time managing office operations and 15 percent of his time as tour coordinator, there has been no evidence submitted to substantiate this claim. The petitioner has failed to demonstrate that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. Accordingly, 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.