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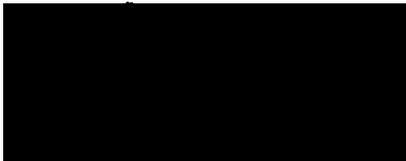
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File: WAC 04 209 51100 Office: CALIFORNIA SERVICE CENTER Date: **NOV 08 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

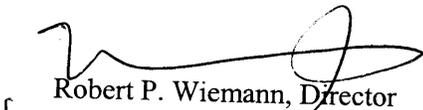
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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 withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as 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 California that is engaged in the import and export business. The petitioner claims that it is the subsidiary of [REDACTED] Co., Ltd., located in Chengdu, China. The petitioner employed the beneficiary as its president in L-1A status from June 2001 to June 2004¹ and now seeks to employ her for a three-year period.

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 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 asserts that the beneficiary will be employed in a primarily managerial or executive capacity, and that the director erred in determining that the beneficiary will directly provide the petitioner's services. Counsel notes that the beneficiary was previously granted L-1A status on two occasions and asserts that the director failed to articulate a material error, changed circumstances or new material information that would justify the denial of the instant petition. In support of these assertions, counsel submits a brief and additional evidence.

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.

¹ The petitioner previously submitted a request to extend the beneficiary's L-1A status on May 21, 2004. (WAC 04 167 50071). The petition was denied by the California Service Center on June 3, 2004 and the AAO subsequently dismissed the petitioner's appeal.

- (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 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 an attachment to its July 15, 2004 letter, the petitioner described the beneficiary's job duties as follows:

Beneficiary will direct the management as a whole – establishing the goals and policies of the company, exercising wide latitude in decision-making, supervising the work of other professional or managerial employees – consistent with her role in an executive and managerial capacity pursuant to 8 C.F.R. §§ 214.2(l)(1)(ii)(C) and 214.2(l)(1)(ii)(B)

- ***Establishes Petitioner's Goals and Policies***
Beneficiary will formulate strategic plans and goals in accordance with company business plans and instructions. She establishes policies in order to increase sales and reviews activity and financial reports to determine progress of petitioner and the best way to achieve goals. She is responsible for policy-making concerning franchisee arrangements/agreements, interior management, and company policy, etc. She delineates all petitioner's financial policies and goals.
- ***Directs Petitioner's Major Functions and Components***
Beneficiary will plan, direct, organize and control the petitioner's major functions. She will implement the annual budget and procurement; represent petitioner and the overseas company in business negotiations and client development; authorize staffing levels, recruit specialized staff; and market overseas company's herbal supplement products. For the latter function, beneficiary will provide instruction on advertising campaigns and the establishment of sales networks. She will direct the creation of corporate arrangements to facilitate the importation of herbal medicines from China, such as the incorporation of additional subsidiaries in the U.S. In addition, she will review contracts, leases, investments, and patent applications.
- ***Exercises Wide Latitude in Discretionary Decision-making & Occupies Highest Level within Petitioner's Organization***
In her role as President, [the beneficiary] receives only general supervision from the foreign parent company Board of Directors. She also occupies the highest level within the petitioner's organizational hierarchy. By virtue of her position and authority, beneficiary exercises a great deal of discretion over the company's distribution of health products to Asian countries. She approves presentations by the Vice President on personnel decisions and business partner selections. [The beneficiary] will guide and lead the company to increase sales of its parent company products . . .

- ***Supervises and Controls the Work of Other Supervisory, Professional or Managerial Employees***

Because of the nature of her duties and due to the fact that [the beneficiary] must spend a significant time abroad in her concurrent position as Deputy Manager with the overseas parent company . . . daily operations have been supervised by the Vice President and performed by the managers. This organizational structure within a small company such as the petitioner's enables the beneficiary to focus on increasing the market share of American herbal supplement products and business development. Beneficiary is therefore employed in an executive capacity with petitioner.

The petitioner indicated on Form I-129 and in its accompanying letter that it employs six employees. The petitioner submitted an organizational chart that shows a total of seven individuals including the beneficiary. The subordinate employees depicted included a vice president, a trade department manager who supervises a marketing associate and a product specialist, and the manager of First World Wide Travel & Tours, who supervises a travel agent. The organizational chart also depicts a subsidiary company identified as [REDACTED]. The petitioner submitted a separate statement providing job descriptions for the vice president, the manager of the "import export department," the manager of the marketing department/"marketing associate," the manager of First World Wide Travel and Tours, and the travel agent/bookkeeper. The petitioner also submitted its California Form DE-6, Employer's Quarterly Report, for the first quarter of 2004, which indicates that the company had a total of four employees, including the beneficiary, as of March 31, 2004.

On July 29, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director observed that the petitioner provided only a broad and non-specific description of the beneficiary's duties, and found insufficient information to establish that the beneficiary's duties would be primarily managerial or executive in nature. Counsel also noted that while the petitioner claimed to employ six employees and shows seven employees on its organizational chart, the petitioner had not submitted evidence to confirm the employment of more than four employees, including the beneficiary. The director determined that none of the beneficiary's subordinates would serve in a managerial, supervisory or professional capacity, and that the number of subordinates was insufficient to relieve the beneficiary from performing the day-to-day operations of the company. The director concluded that the beneficiary would be performing, at most, as a first-line supervisory of non-professional employees, rather than as a manager or executive.

On appeal, counsel for the petitioner asserts that all of the beneficiary's duties are at the executive or managerial level. With respect to the petitioner's staffing, the petitioner submits a Form DE-6, Employer's Quarterly Wage Report, for the second quarter of 2004, which shows six employees. Counsel also claims that the supporting documents previously submitted show that the petitioner's vice-president supervises the daily operations of the company, and that the petitioner employs professional, supervisory or managerial staff to relieve the beneficiary from performing non-qualifying duties. Counsel asserts that the petitioner previously provided a comprehensive description of the beneficiary's duties that demonstrates her employment in a qualifying managerial or executive capacity. Counsel further explains that the beneficiary maintains her

position as deputy manager with the foreign entity, and thus the petitioner's vice president must supervise the U.S. managers in daily operations.

Counsel states that the petitioner's vice president supervises the managers of the petitioner's departments, who are in turn responsible for the day-to-day operations. Counsel provides that the vice president "continues to support [the] beneficiary in implementation of company policies, with primary responsibility for managing and coordinating operation and sales activities [The vice president] also assists [the beneficiary] in negotiations, implementing sales and marketing strategies, developing clientele, and franchise arrangements . . ." Counsel states that "[t]he remaining managers and staff are charged with day-to-day operations and essential business functions of their respective departments."

Counsel submits an updated organizational chart for the petitioner, and job descriptions for the petitioner's employees. Finally, counsel states: "In light of petitioner previously establishing beneficiary's employment in a managerial/executive capacity, the Service should not question the prior determination of petition validity in the context of an extension petition." Counsel submits a copy of an April 23, 2004 CIS policy memorandum in support of this assertion. *See* Memorandum of William R. Yates, Associate Director for Operations U.S. Citizenship and Immigration Services, to Service Center Directors, et al, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004).

Upon review, the AAO will withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

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 [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence

As the present petition is a request for an extension of the beneficiary's L-1A status, the petitioner was not required to submit supporting documentation pursuant to 8 C.F.R. § 214.2(l)(14)(i). The director examined the petitioner's evidence and determined that the petitioner failed to establish eligibility. The director's decision was based in part on a finding that the petitioner did not submit sufficient documentation regarding the beneficiary's actual job duties. However the director did not point to any evidence of clear ineligibility that would justify his decision to deny the petition without first requesting additional evidence or issuing a notice of intent to deny the petition. *See* 8 C.F.R. § 103.2(b)(8); *see also* Memo. of William R. Yates, Associate Director, Operations, USCIS, to Regional Directors, et al, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2 (February 16, 2005).

Accordingly, as the evidence of record does not directly reflect that the petitioner or beneficiary is ineligible, the director should not have denied the petition based on a lack of evidence without first requesting additional explanation and documentation. *See* 8 C.F.R. § 103.2(b)(8); 8 C.F.R. § 214.2(l)(14)(i). The AAO agrees that the evidence of record raises underlying questions regarding eligibility. In such an instance, the director "shall request the missing initial evidence, and may request additional evidence" 8 C.F.R. § 103.2(b)(8).

As noted by the director the provided descriptions of the beneficiary's U.S. duties provide little insight into the true nature of the tasks she will perform in the United States. For example, the petitioner indicated that the beneficiary "has formulated strategic plans and goals in accordance with company objectives and foreign company business plans and instructions," "[s]he has been in charge of [policy]-making concerning franchisee arrangements, interior management, and company policy," and she will "plan, direct, organize and control the petitioner's major functions." These general statements do not describe the actual tasks the beneficiary will perform on a daily basis. The petitioner identified the beneficiary's scope of authority, such as her discretion over financial decisions, yet it failed to account for how she will actually spend her time in the United States. The petitioner should provide a comprehensive, specific description of the duties performed by the beneficiary, including a breakdown of the percentage of time she will devote to those duties on a weekly basis, and a description of the duties she performs on a "typical day." The AAO notes that the beneficiary is only in the United States on a part-time basis. The petitioner should indicate how she divides her time between the Chinese and United States entities, and submit any evidence that would demonstrate how she oversees the management of the United States company from China.

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). The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature, nor does it adequately indicate what proportion of the beneficiary's time will be devoted to qualifying duties.

In addition to noting that the beneficiary's job description was too general, the director observed that the petitioner appeared to have only three other employees, and concluded that the staff would be insufficient to relieve the beneficiary from performing non-qualifying duties. The director relied on the petitioner's Form DE-6, Employer's Quarterly Report for the quarter ended on March 31, 2004 in drawing this conclusion. The Form DE-6 for this period shows a total of six employees, but indicates that only five were employed in January 2004, with four employees on the payroll in February and March 2004, including the beneficiary. On appeal, the petitioner submits its Form DE-6 for the second quarter of 2004, which identifies the same six individuals, but shows that all were on the payroll during April, May, and June 2004. Accordingly, it appears that two or more employees who were not receiving wages from the petitioner in February and March 2004 were back on the company's payroll as of April 2004. To clarify this apparent discrepancy, the petitioner should request and submit original sealed copies of its Forms DE-6 from the California Employment Department and provide copies of its IRS Forms W-2, Wage and Tax Statement, for all of its employees for 2004.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The record as presently constituted contains confusing evidence regarding the nature of the petitioner's business. 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).

The petitioner indicated in its July 15, 2004 letter that the U.S. company has been engaged in the wholesale distribution of its parent company's herbal products and export of U.S. approved antibiotics. The petitioner claims that it is a franchise of Great Earth Companies Inc. and distributes health products to Asian countries under the agreement. The petitioner also indicated that it acquired a travel agency, First Worldwide Travel & Tours, in early 2003, and that it established a wholly-owned subsidiary [REDACTED] inc., in December 2003 to "better serve its customers." The petitioner submitted a copy of its lease agreement which states that the leased premises are to be used for "Travel Agency and repair of TV's, electrical appliances, and electronic equipment." The petitioner submitted copies of utility bills which indicate that it is billed as a "Small General Service" business, specifically, a "TV Repair Shop." The petitioner's business license for the address identified on the petition and in the lease agreement indicates the type of business as "Service - Interpreter." 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). The petitioner should submit evidence to clarify all business activities undertaken by the company to enable CIS to better understand the roles of the beneficiary and her subordinates.

The petitioner's lease agreement is for a 300 square foot premises located in a retail shopping center, valid for a one-year period commencing on September 1, 2003. It appears that the dates of the lease and the names of the parties involved in the agreement have been altered, as the typeface differs from that used throughout the remainder of the agreement. In addition, the AAO notes that the lessor of the property is "First Worldwide Travel and Tours," the travel agency that the petitioner claimed to have purchased many months before this agreement was signed. The petitioner should be instructed to submit the original lease agreement for these premises and clarify its relationship with First Worldwide Travel and Tours.

In addition, the petitioner submitted black and white photocopies of two photographs purportedly depicting the interior and exterior of its business premises. Although the photographs do appear to depict a commercial retail space in the shopping center identified in the lease, the address appears to have been altered by placing a temporary sign over the actual building number. An "open" sign on the door suggests that this is actually the premises of First Worldwide Travel and Tours which, according to the lease is located at [REDACTED]. The adjacent business has a street number of "13988." The petitioner's claimed address is "[REDACTED]." The petitioner should be instructed to submit original photographs of the premises located at [REDACTED] and any other premises it occupied as of the date of filing the petition, along with lease agreements for any office or warehouse space. If the petitioner does not have additional premises, it should

explain how it operates as an import, export and wholesale distribution company from a small commercial retail space.

It is emphasized that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, July 22, 2004. Documentation of business activity and hiring that occurred after the date of filing is not probative of the petitioner's eligibility and will not be considered.

Although the petition will be remanded for further review, the AAO acknowledges counsel's assertion that the director failed to articulate a material error, changed circumstances or new material information that would justify the denial of the instant petition. CIS previously approved a request for an extension of status submitted by the petitioner on behalf of the beneficiary. The record of proceeding does not contain copies of the prior extension petition that was approved. It must be emphasized that that 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 that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Each nonimmigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the beneficiary meets the requirements for L-1A classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated July 29, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.