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U.S. Citizenship
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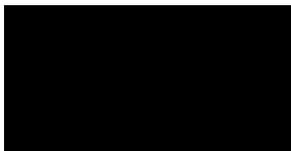


FILE: EAC 03 208 53772 Office: VERMONT SERVICE CENTER Date: **AUG 11 2005**

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)

ON 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

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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 January 21, 1999, and claims to be an importer/exporter and seller/distributor of food, consumer products, and services. The petitioner claims that it is a subsidiary of [REDACTED] located in Guangdong, P.R. China. The petitioner seeks to employ the beneficiary temporarily in the United States as its director of marketing for three years, at an annual salary of \$20,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary's proposed job duties were primarily managerial or executive in nature, and that there was insufficient evidence to show that the U.S. entity was able to support such a position.

On appeal, counsel disagrees with the director's determination and asserts that the evidence submitted is sufficient to demonstrate that the beneficiary's proposed duties are executive in nature, and that the U.S. entity is able to support such a position.

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 issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of 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 a letter dated June 23, 2003, the petitioner described the beneficiary's proposed job duties as:

1. Overall management of the marketing functions of our company as the domestic subsidiary in the United States for our foreign parent company.
2. Overall direction of the ramp-up procedures on behalf of our foreign parent company.
3. Overall development of the strategic expansion plans for our foreign parent company.
4. Recruitment and overall management of the management staff to execute duties of developed strategic plans on expansion efforts.
5. Conduct business negotiations with business partners on behalf of our company as the domestic subsidiary company and also on behalf of our foreign parent company.
6. Develop business reports to our parent company.
7. Review the overall financial and operations strategic plans [sic] of our company.

The petitioner further stated that the list of responsibilities indicated "a consistently high level of executive interaction with the critical parts of the businesses...and would require an individual with superior knowledge and executive expertise in the business operations...." The petitioner also stated: "[The beneficiary] is currently employed as the marketing manager at our foreign parent company in P.R. China." The petitioner provided a detailed explanation of the beneficiary's proposed job duties.

In a translated letter, dated May 21, 2003, the foreign entity's representative confirmed that the beneficiary had been employed abroad by their company from February 2002 to the present in a position of marketing manager. As evidence, the petitioner submitted copies of the beneficiary's passport and visa, I-94, which indicated that the beneficiary was in F1 visa status in the United States since September of 2001, INS Form I-20 A-B, Certificate of eligibility for nonimmigrant (F1) Student, and Form I-20 A-B/I-20-ID.

In response to the director's request for evidence on the subject, the petitioner described the beneficiary's proposed duties and number of hours to be spent performing such duties as:

- 10-12 hrs. 1. Overall management of the marketing functions....
- 5-7 hrs. 2. Overall direction of the ramp up procedures....
- 6 hrs. 3. Overall development of the strategic expansion plans....
- 3 hrs. 4. Recruitment and overall management of the management staff....
- 4-6 hrs. 5. Conduct business negotiations....
- 8-10 hrs. 6. Development of strategic marketing plans....
- 4 hrs. 7. Develop business reports....
- 2 hrs. 8. Review overall financial marketing strategic plans.

The petitioner submitted a copy of the U.S. entity's Pro-Forma organizational chart for 2003-2004, which depicted the beneficiary as director of marketing and the finance director all under the direction of the company president. The chart showed that the president of the company was also designated "acting manager" of the strategy development department and the beneficiary was also designated as the "acting" import/export regulations project analyst. The chart also demonstrated that the aforementioned "acting" positions coupled with a sales manager, warehouse operations manager, and warehouse clerk were all under the direction of the beneficiary as director of marketing. The petitioner also submitted a copy of job duty descriptions for all positions labeled in the U.S. entity's organizational chart.

The director subsequently denied the petition. The director stated that the evidence submitted failed to demonstrate that the beneficiary would be engaged in primarily managerial or executive level duties or that the entity would be able to support such a managerial or executive level position. The director stated that the petitioner noted the U.S. entity was currently in their "ramp-up phase" in their strategic plan and that their financial parameters were in their infancy. The director noted that the U.S. entity was not a new office and therefore, the company had to demonstrate at present its ability to support such a managerial or executive level position. The director also noted that employing an individual in a L1 status in anticipation of projected growth is not allowed in the absence of a showing that the entity is a "new office." The director further noted that the U.S. entity's organizational chart was suspicious in that 5 out of the 6 employees listed had managerial titles, the president and the beneficiary had 2 managerial titles apiece, and that the job duties of the beneficiary's subordinates (warehouse operations, strategy development, and import/export regulations) dictated that they should not be subordinate to the beneficiary as marketing manager. The director stated that although the petitioner stated that the beneficiary would have overall management of the marketing functions of the U.S. entity, it appeared from the proposed job duty descriptions that the beneficiary would be performing the majority of the tasks associated with the function herself. The director further stated that since the beneficiary's subordinates would be engaged in tasks involved in entirely different aspects of the business, there would be no subordinates available to relieve the beneficiary from performing the non-qualifying marketing duties of the organization. The director concluded by noting that the U.S. company, as an established entity, was not currently of sufficient size to justify any executive or managerial level positions. The director also noted that projected growth and expansion were not appropriate indicators for a business that is not considered a "new office."

On appeal, counsel disagrees with the director's decision and asserts that the company size should not be solely used in determining the beneficiary's eligibility. Counsel also asserts that the U.S. entity is structurally and financially able to support a managerial or executive position. Counsel further asserts that the beneficiary will be employed by the U.S. entity in an executive capacity and that she will manage the marketing function of the business. Counsel contends that the U.S. entity is still in its "ramp-up" expansion mode in its business operations and as such will continue to grow financially, expand its products and services, and allow the beneficiary to hire subordinates to work in the company's marketing department. Counsel relies on the company business plan and organizational chart to support his contentions. Counsel argues that although the company is mature in name only, it should be given an opportunity to realize its growth and full development based upon the company's sound business plans and proposals. Counsel describes the beneficiary's proposed duties as:

[The beneficiary] would be responsible for (i) the establishment of the strategic plans to be used by the corporation, (ii) provide for the overall management of the marketing operations of the corporation with minimal supervision from higher level executives, and (iii) possess substantial discretionary authority in the discharge of its duties, including discretionary

authority in the hiring and firing of managerial personnel for the corporation in accordance to the developed strategic plans. Further, [the beneficiary] will be solely responsible for the executive management of the marketing function (and the operations division temporarily) of the petitioning corporation, with duties relating specifically to executive functions and responsibilities essentially similar, in nature, to those delineated in 101(a)(44)(B) of the INA.

Counsel's assertions are not persuasive. On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. The Articles of Incorporation for the U.S. entity indicate that the company was established January 21, 1999. The U.S. entity's Corporate Income Tax Return for 2002 demonstrates that the entity has been doing business for more than one year prior to the filing of this petition. Therefore, it is not a new office pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F), and will therefore be viewed by the AAO as an ongoing enterprise.

The information provided by counsel shows that the petitioner wishes to transfer the beneficiary to its office in the United States for the purpose of starting up and managing the marketing division within the organization. It is also explained that the U.S. entity is still in its developmental "ramp-up phase," and as such the beneficiary will hire a subordinate staff for the new division after she has been approved for L-1A status. Counsel further maintains that as the company develops, additional subordinate staff will be hired and eventually, the beneficiary will hire personnel sufficient to relieve her from performing non-qualifying duties. Counsel claims that the U.S. entity is mature in name only and that the organization should be given an opportunity to realize its full financial and staffing potential through growth and development based upon the company's business plan, organizational chart, and proposals. However, the petitioner does not qualify as a "new office" pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C) which allows a petitioning business one year to become sufficiently operational. The petitioner submitted an organizational chart depicting the U.S. entity's hierarchical structure. The chart shows the existence of a proposed marketing department, not one that is currently operational. Further, the employment projections made by counsel for the creation and development of the marketing division are speculative and indefinite. The fact that the petitioner is in a preliminary "ramp-up phase" of organizational development does not relieve the petitioning company from meeting statutory and regulatory requirements as an established entity. 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).

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.* In this matter, the information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Without clarification, the beneficiary's proposed job duties cannot be construed as being managerial or executive in nature.

Although counsel contends that the beneficiary will be employed in an executive capacity, the petitioner has provided no independent documentary evidence or comprehensive description of the beneficiary's duties that would demonstrate that she will be directing the management of the organization or a major component or function of the organization, that she will be establishing goals and policies, that she will be exercising a wide latitude in discretionary decision-making, or that she will receive only general supervision or direction from

higher level executives. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Rather than providing a specific description of the beneficiary's proposed job duties, counsel generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, counsel depicted the beneficiary as establishing strategic plans, managing the marketing operations, and possessing substantial discretionary authority. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Although the petitioner asserts that the beneficiary as marketing manager will be managing a subordinate staff, the record does not establish that the subordinate staff will be composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary will be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Although the petitioner claims that the beneficiary will direct and manage the petitioner's marketing activities, it does not claim to have anyone on its staff to actually perform the marketing function. Thus, either the beneficiary herself will be performing the marketing function or she does not actually manage the marketing function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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). If the beneficiary is performing the marketing function, the AAO notes that 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).

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. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, 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.

At the time of filing, the petitioner was a three and one-half-year-old import and export company that claimed to have a gross annual income of \$338,479.00. The firm employed a president, director of finance, sales manager, warehouse operations manager, and warehouse clerk. The AAO notes that all of the employees have managerial or executive titles, except one. 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's marketing department. The AAO does not find that the petitioner has demonstrated that the U.S. entity will be able to support a managerial or executive position. 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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility. Accordingly, the appeal will be dismissed.

Although not directly addressed by the director, another issue in this proceeding is whether the petitioner has submitted sufficient evidence to demonstrate that the beneficiary was employed by the foreign entity in a managerial or executive capacity. In a letter of support, the petitioner stated that the beneficiary graduated from the South China Normal University in February of 2000 with an Associate of Science degree in Secretary Studies. The petitioner also stated that the foreign entity was a toy company and that the beneficiary had been employed by the entity since February of 2000 as a marketing manager. The evidence showed that the beneficiary's father owns the toy company. The petitioner asserted that the beneficiary continued to be employed by the foreign entity during her stay in the United States as a student and that her employment status abroad would not be jeopardized by granting her L1 status. The petitioner described the beneficiary's job duties abroad as:

[The beneficiary] was responsible for the overall development of marketing plans for [REDACTED]. She was also responsible [for] handling all import and export business documents...[the beneficiary] was also actively engaged in the management of major executive functions for our company...[The beneficiary] completed much analysis and the development of the budget schedule used by [REDACTED].

The petitioner also described the beneficiary's job duties abroad as:

[The beneficiary] has been employed by the foreign parent company in executive management capacity since February 2000. In this position, [the beneficiary] was primarily responsible for the overall development of marketing plans and strategies for foreign parent company. [The beneficiary] was responsible for the handling of import and export business negotiation and agreements, and had authority to hire the necessary management staff to effectuate these strategies.

The petitioner submitted a copy of the foreign entity's organizational chart, which depicted the beneficiary as marketing manager with a market analyst, advertisements consultant, publicity directors, international trade consultants, sales representatives and their subordinates under her direction. The petitioner also submitted a breakdown in the number of hours spent weekly by the beneficiary performing job duties abroad. The breakdown was described as:

- (8 hrs) Overall development of marketing plans
- (7 hrs) Management of major executive functions for our company
- (3-4 hrs) Recruitment personnel used for supervisory and day to day staff to executive duties of developed strategic plans for expansion efforts
- (6 hrs) Instructing, coordinating, and training of supervisory and day to day staff to execute duties of developed strategic plans for expansion efforts
- (5-7 hrs) Analyze and develop overall budget schedule used by our company and create business reports and review marketing plans and finance
- (8-10 hrs) Negotiate and develop joint venture agreements with business partners and foreign contacts

The petitioner also submitted an untranslated copy of the foreign entity's payroll.

The evidence is insufficient to demonstrate that the beneficiary has been employed by the foreign entity in a managerial or executive capacity. The petitioner asserts that the beneficiary has been employed by the foreign entity as a marketing manager since February of 2000. However, as a student in the United States in F1 visa status the beneficiary received student employment authorization in 2003 as an "Import Administrative Assistant." See INS Form I-20 A-B. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. As previously stated, 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). 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). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, the petitioner consistently insists that the beneficiary remains employed by the foreign entity while attending college in the United States on a full-time basis. Thus, either the beneficiary has been in violation of her F1 visa student status since coming to the United States in 2001 or she does not possess the managerial or executive qualities and experience as pronounced by counsel and the petitioner. 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). In addition, the petitioner submitted untranslated payroll documents from the foreign entity to demonstrate the length of the beneficiary's employment. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The petitioner asserts that the beneficiary received an "Associate of Science degree in Secretary Studies" from the South China Normal University in February of 2000. The petitioner has not submitted any information as to the beneficiary's work experience prior to February of 2000. It appears to the AAO that the beneficiary,

while competent to work for the foreign entity utilizing her secretarial skills, has not been employed in a primarily managerial or executive capacity. There is insufficient evidence in the record to demonstrate that she possessed the prerequisite education or experience to manage a subordinate staff consisting of professional, managerial, or supervisory personnel who could relieve her from performing non-qualifying duties or that she was capable of directing the management of the organization or a major component thereof. For these additional reasons, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp.2nd 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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.