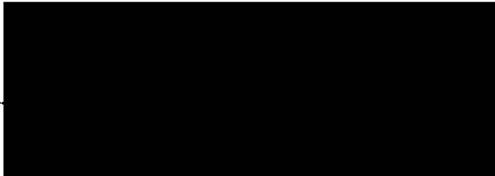




U.S. Citizenship
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File: WAC 04 057 52200 Office: CALIFORNIA SERVICE CENTER Date: **JUL 17 2006**

IN RE: Petitioner: 
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)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president/general manager/financial officer 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).¹ The petitioner indicated that it is a corporation organized in the State of California that is engaged in the "import and distribution of electromachinery [sic], electronic tools & accessories, and hardware products." The petitioner claims that it is the subsidiary of [REDACTED] located in [REDACTED]. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) the petitioner has not shown that there exists a qualifying relationship between the U.S. and foreign entities. The director noted in particular evidence showing that the initial investment in the U.S. entity was provided by third parties rather than by the foreign entity as the petitioner claimed.

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, the petitioner asserts that the foreign entity is in fact the owner of the U.S. entity, and that the fund transfers through third party individuals were only for the purpose of expediting the transactions and were not in violation of Chinese law. Regarding the beneficiary's managerial role in the U.S. entity, the petitioner appears to assert that because of SARS, the beneficiary returned to the United States later than intended and the development of the business was delayed accordingly. The petitioner submits additional evidence in support of its assertions on appeal.

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 AAO notes that although the petitioner stated the requested nonimmigrant classification as "H-1B" on the Form I-129, Petition for a Nonimmigrant Worker, all other documents and correspondence on record indicate that the petitioner actually is seeking an extension of the beneficiary's L-1A status.

- (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) also provides that a visa petition, 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (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 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 a letter dated November 5, 2003 accompanying the Form I-129, the beneficiary, writing on behalf of the petitioner, described his job duties as follows:

- plan and develop organization policies and goals, and implement goals through subordinate administrative personnel;
- add or delete departments as needed;
- chair regular meetings to implement operational guidelines, review operation, and sales activities;
- sign all documents requiring officer's signature;
- hire and dismiss employees at the managerial/supervisory level;
- hear and read reports from managerial staff for company's progress review;
- review financial statements and analytical reports to develop and finalize budget balancing plans;
- authorize fund disbursement;
- review financial reports to determine appropriateness of fund usage and reason for further investment from the parent company;
- discuss with board of directors abroad on sales, products, quality and strategies;
- see to the overall planning and management of the company's finance and administration.

The petitioner also submitted an organizational chart for the U.S. entity showing that in addition to the beneficiary, the anticipated staff would include an import/export manager, a business development manager, a import product marketing & sales supervisor, an export product supervisor, an in-house sales department and sales agents/network, an import/export document coordinator, a quality controller, a purchaser, and possibly professional analysts or joint venture managers. However, the chart also shows that in addition to the beneficiary's position, only the position of import product marketing & sales supervisor was filled; all other positions on the chart remained to be filled.

On the basis of the evidence submitted with the initial petition, the director denied the petition. The director determined the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director found that the beneficiary's job description is not sufficiently detailed and fails to demonstrate that the beneficiary would be managing the organization or a department, subdivision, function or component of the U.S. entity. The director further observed that it appears that the petitioner only has one other part-time employee in addition to the beneficiary. Thus, the evidence does not establish that the beneficiary will be managing a subordinate staff of professional, managerial or supervisory personnel who would relieve him from performing non-qualifying duties, and the beneficiary likely would have to perform practically all of the day-to-day operations of the business.

On appeal, with respect to the issue of the beneficiary's managerial capacity, the petitioner appears to assert that because of SARS, the beneficiary returned to the United States later than intended and the development of the business was delayed accordingly. The petitioner indicates that once the business actually begins exportation, more employees will be hired.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. 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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

In this matter, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "plan[ning] and develop[ing] organization policies and goals, and implement goals through subordinate administrative personnel," " chair[ing] regular meetings to implement operational guidelines, review operation, and sales activities," and " see[ing] to the overall planning and management of the company's finance and administration." The petitioner did not, however, provide details of the company's goals, policies, operational guidelines or financial and administrative planning and management, nor did the petitioner describe the beneficiary's subordinate personnel through whom the beneficiary would accomplish these tasks. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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).

Moreover, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. Absent such further details, the AAO cannot determine whether the beneficiary is *primarily* performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In addition, as the director noted, the record indicates that despite the multilayered organizational chart it submitted, the petitioner actually has only one other part-time employee in addition to the beneficiary. Thus, even though the petitioner claims that the beneficiary engages in such tasks as overseeing the implementation of organizational policies and goals and operational guidelines through subordinate administrative personnel, reviewing operation and sales activities, reviewing reports from managerial staff, financial statements and analytical reports to develop and finalize budget balancing plans, the petitioner does not appear to have anyone on its staff to actually perform the tasks that the beneficiary purportedly oversees and reviews. Thus, it is reasonable to conclude that the beneficiary himself is performing much of the operational tasks of the company rather than managing the performance of such tasks as claimed by the petitioner. 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Further, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. As previously noted, the record indicates that the beneficiary has a subordinate staff consisting of one apparently part-time employee. Although this employee bears the title of import product marketing and sales supervisor, there is no other information on the record regarding this employee. Thus, the record is insufficient to show that the beneficiary supervises subordinate employees who are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

In view of the foregoing, the AAO finds that the record is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity in the U.S. entity. The petitioner's assertions on appeal are also not persuasive on this issue. The petitioner indicates that the development of the U.S. entity was unintentionally delayed, and that it plans to hire additional employees in the future. However, 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). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in the Citizenship and Immigration Service (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the

instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity in the United States, as required by 8 C.F.R. § 214.2(l)(3).

The second issue in this proceeding is whether a qualifying relationship exists between the U.S. and foreign entities.

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

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.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii) state, in pertinent part:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

* * *

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.

* * *

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.

It should be noted that, according to California State corporate records, the petitioner's corporate status in California has been "dissolved." Therefore, as the petitioner has voluntarily elected to wind-up its operations and has completely dissolved its business as a corporation, the company no longer exists and can no longer be considered a legal entity in the United States. Therefore, as this clearly and unequivocally renders the petitioner ineligible for the classification sought, the issue of whether a qualifying relationship ever existed between the petitioner and the foreign entity is moot. *See* 8 C.F.R. § 214.2(1)(1)(ii)(G).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the petition will be denied.

ORDER: The appeal is dismissed.