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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **MAR 20 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiaries:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center revoked the previously approved nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be revoked.

The petitioner, an Illinois corporation, claims that it is engaged in wholesale. The petitioner states that it is a subsidiary of [REDACTED] located in the People's Republic of China. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 was initially granted a one-year period of stay and subsequently an extension of L-1A status for three years. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of Chairman and Vice President for a three-year period.

On May 7, 2009, the director revoked the petition concluding that the petitioner did not submit sufficient evidence in rebuttal to the United States Citizenship and Immigration Services' ("USCIS") Notice of Intent to Revoke ("NOIR") and has not overcome the grounds for revocation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation, dated June 13, 2008; (2) the director's NOIR, dated March 17, 2009; (3) the petitioner's response to the NOIR; (4) the director's May 7, 2009 notice of revocation; and, (5) the Form I-1290B, filed on June 8, 2009. The AAO reviewed the record in its entirety before issuing its decision.

On June 13, 2008, the petitioner filed the Form I-129 (Petition for Nonimmigrant Worker) to continue to employ the beneficiary in L-1A classification for the period from August 3, 2008 until August 2, 2011. The director approved the petition. On March 17, 2009, the director notified the petitioner of his intent to revoke approval of the L1A petition. In the notice of intent to revoke, the director stated the reason for revocation as follows:

The petitioner is [the petitioner], a for-profit institution engaged [in] wholesale and established in 1999. According to the record, the petitioner employs four employees. Form I-129 states that the petitioning organization is located at [REDACTED] in [REDACTED] Illinois. On January 29, 2009, USCIS conducted a site visit at the petitioning entity's address. The site visit found that the company is no longer located at the location. There was no one available at the location for interview. After communication with the leasing office, it was found that [the petitioner] moved out in July 2008 with no forwarding address.

Form I-129 states that the beneficiary currently resides at [REDACTED] in [REDACTED] Illinois. USCIS conducted a site visit at the beneficiary's listed address and found that the beneficiary was no longer residing at the address.

In addition, a review of the record reveals that the petitioning entity is fifty percent owned by [the foreign company]. The record does not contain documentary evidence of the remaining fifty percent ownerships. Absent additional documentary evidence, it is unclear to determine the complete ownership of the petitioning entity.

USCIS has no evidence that the petitioning company, [the petitioner], is currently operating. In addition, there is no evidence that the beneficiary is performing duties that qualify him as an L-1A Manager or Executive. Although the petitioner states that the U.S. entity employs four employees in four departments, there is no documentary evidence to support this claim. Absent additional evidence, it is unclear for USCIS to determine that a qualifying relationship continues to exist between the petitioner and foreign entity abroad. It is also unclear whether the beneficiary qualifies as an L-1A Manager or Executive.

The petitioner presented insufficient evidence to overcome the revocation. For the reasons discussed below, the appeal will be dismissed and the petition revoked.

The first issue is whether the petitioner provided sufficient evidence of sufficient physical premises to house the office in the United States. As noted by the director in the intent to revoke, USCIS performed a site visit at the petitioner's office address as provided on the Form I-129 but the petitioner was no longer located at this address.

In a response letter, dated April 14, 2009, counsel for the petitioner stated that the petitioner moved out of the office listed on the Form I-129 on "July 31, 2008 and moved to a new location located at [redacted] in San Diego CA, 92128." The petitioner submitted the lease agreement between the petitioner and The [redacted] that stated the petitioner will lease a space consisting of 290 square feet, commencing on September 1, 2008 until October 31, 2009. In the lease agreement, it stated that Exhibit "E" is included in the agreement which discusses the option to extend. However, the petitioner did not submit the complete leasing agreement, including Exhibit "E" that discusses the option to extend the agreement. In addition, the petitioner did not provide the signature page indicating that both the petitioner and the landlord signed the agreement and dated the agreement. 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 director revoked the petition based on the fact that the petitioner had not secured sufficient physical premises to support an L-1A manager/Executive. The director noted that the office space is only 290 square feet which is not sufficient space for four employees and an additional two employees that were originally planned to be hired within the first year of operation. The petitioner submitted photographs of the office space that show that two desks are put in each office. On appeal, counsel states that "our office space has two rooms covering 290 square feet."

The petitioner stated that this is sufficient space “since we are an export and import distribution company without actual inventory in our possession, we do not need a large space to work.” However, it is unclear how the employees can adequately perform all business activities in a small space in view of the petitioner’s plans to hire more employees. The petitioner’s explanation does not overcome the director’s concerns. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In regard to the director’s concern that the petitioner moved the business location and the beneficiary moved her residence without informing USCIS, the petitioner did not submit sufficient evidence to explain why it did not inform USCIS of the change of address. By statute, each alien is required to notify USCIS in writing of each change of address within 10 days from the date of such change. *See* section 265 of the Act, 8 U.S.C. § 1305. The petitioner cannot reasonably expect USCIS to find that it has sufficient physical premises to house the business if it moves to a new location without informing USCIS.

The second issue that was discussed in the director’s notice of revocation is the ownership of the petitioner. The director noted that the evidence reveals that the foreign company owns 50% of the petitioner but there is no evidence on record regarding the other owners of the petitioner. On appeal, the petitioner submits a stock transfer ledger, copies of the stock certificates, written consents and resolutions of shareholders of the petitioner and an amendment for authorized stock shares of the petitioner. The record as supplemented on appeal shows that the foreign company owns 50% of the petitioner, Frank Jiang owns 45%, and John Jiang owns 5%. Thus, the foreign company has 50% ownership and controls the petitioner. The AAO will withdraw this portion of the director’s decision.

The third issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity. As an initial matter, the director noted that it was unclear if the petitioner is doing business. On appeal, the petitioner submitted additional evidence to indicate that the petitioner is doing business such as gross profits for 2008 and 2009, utility bills, bank statements, commercial invoices, business contracts and shipping documents. Thus, the petitioner provided sufficient evidence that it is doing business.

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.

Counsel for the petitioner listed the beneficiary's duties as follows:

- Evaluating and changing the company's management structure and organizational functions as she sees fit;
- Evaluating operating guidelines and procedures and formulating new business goals as needed;
- Evaluating business performance and development, and implement remedies as necessary to improve performance;
- Directing and supervising the development and implementation of business plans;
- Maintaining business contacts and relations with top executives of major customers in the United States;

- Supervising the work of other management personnel of the company, and evaluating the performance of the managers, and deciding promotion and transfer of high level executives/managerial offices and professionals;
- Controlling the company budget and overseeing the fulfillment of ongoing projects;
- Presiding at all meetings of directors of the company and assigning duties to others on the Board of Directors and having those employees report directly to her as the Chairman of the Board of Directors; and
- Representing [the petitioner] to attend business negotiations and signing contracts concerning large scale and important cooperative projects and transactions.

The petitioner also stated that the beneficiary manages an essential function of the organization. The petitioner further states that the "Beneficiary maintains wide latitude in discretionary decision-making concerning all major business matters of the company (including hiring and firing employees, the formation of the Petitioner's overall business policies and goals, and controlling of company budget) that the Beneficiary satisfies the regulatory definition of executive/manager under the law." Furthermore, the petitioner states that the beneficiary supervises an accountant and sales manager who have college degrees and who are performing complex duties.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be 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 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I & N Dec. at 604.

While the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of her proposed duties suggest that the beneficiary's actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description includes vague duties such as "evaluating and changing the company's management structure and organizational functions," "directing and supervising the development and implementation of business plans," and "evaluating operating guidelines and procedures." 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 provide any detail or explanation of the beneficiary's activities in the course of her daily routine. 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).

In addition, the job duties required of the beneficiary include non-qualifying duties such as "controlling the company budget," "business negotiations and signing contracts," and "evaluating operating guidelines. At the time the petition was filed, the petitioner employed the president, the beneficiary as vice president, the secretary, and a sale and purchase person. Since the petitioner has not explained that the U.S. company has hired any employees in marketing, finance and bookkeeping, public relations or human resources, it appears that the beneficiary will be providing the services of market research and operations, bookkeeping, and human resources, rather than directing such activities through subordinate employees. Again, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Furthermore, the petitioner is engaged in the distribution of wholesale products and it is not clear who is responsible for purchasing orders; managing the import and delivery of wholesale products; managing customs requirements; inventory; and, negotiating contracts with wholesalers. 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 job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how her time will be divided among managerial and non-managerial duties. In addition, the petitioner has not provided a breakdown of the percentage of time the beneficiary will spend on various duties, and the petitioner has not articulated whether each duty is managerial or executive. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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. On appeal, counsel for the petitioner submits documentation to establish that the positions claimed to be supervised by the beneficiary include a secretary and a sale and purchase person. The petitioner did not provide a job description for the two positions supervised by the beneficiary, thus, the AAO cannot determine if the positions are considered professional because they normally require an individual with a bachelor's degree in a specific field in order to fill these positions. Thus, the petitioner has not established that the employees supervised by the beneficiary are in fact professional positions.

Furthermore, if the position offered to the beneficiary is executive in capacity, the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not established that the beneficiary's position is in an executive capacity.

Based upon the record, it cannot be concluded that the beneficiary will be employed by the petitioner in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.