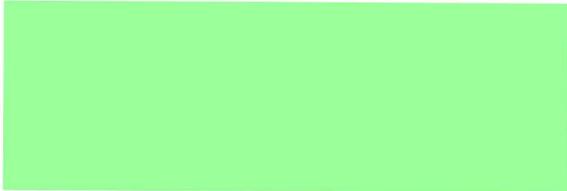




U.S. Citizenship
and Immigration
Services

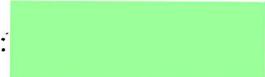
(b)(6)



DATE: **MAY 16 2014**

Office: CALIFORNIA SERVICE CENTER

FILE:



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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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.

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, revoked the approval of the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter to the director for further action and issuance of a new decision.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A 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 California corporation established in 2008 that is engaged in the retail sale and wholesale distribution of automobile parts. The petitioner states that it is a wholly owned subsidiary of [REDACTED] Ltd., located in China. The petitioner seeks to employ the beneficiary as the president of a "new office" in the United States for a period of one year.

The petition was initially approved for a period of one year. Subsequently, the director issued a notice of intent to revoke (NOIR) the approval upon receiving information from the United States Consulate in Shanghai that the beneficiary has no English reading or speaking skills. The director stated that this information cast doubt on whether the beneficiary could perform the duties assigned to her as president of the U.S. office. The director also noted that the lease submitted by the petitioner had expired and that documentation submitted at the beneficiary's visa interview in Shanghai revealed that the petitioner had only one employee earning less than \$11,000 per year.

In response, the petitioner stated that the beneficiary's subordinate in the United States, Chief Operating Officer (COO) [REDACTED], is fluent in English and Chinese and that he would take direction from the beneficiary. The petitioner asserted that fluency in English is not required for a beneficiary to act in a qualifying executive capacity, and also addressed the director's concerns regarding its lease and the salaries of its employees.

The director revoked the approval of the petition on March 25, 2010. The director stated that the petitioner's response to the NOIR was not persuasive in establishing that the beneficiary would act in a qualifying managerial or executive capacity in the United States. The director explained that the petitioner had failed to articulate how the beneficiary would perform the duties of the position, including interpreting applicable U.S. laws, resolving labor issues and directing advertising and public relations, without fluency in English.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel contends that the director misunderstood the beneficiary's stated job duties. Counsel explains that the beneficiary would not be required to understand U.S. corporate, tax, labor and import and export laws pursuant to her executive position. Counsel states that the beneficiary, much like other U.S. based executives, would consult professionals and accountants with respect to the application of U.S. laws to the business. Counsel asserts that the director arbitrarily and capriciously revoked the petition's approval based only upon the beneficiary lack of English language ability, noting that this ability is not required to qualify as a manager or executive pursuant to the regulations. Counsel states that the director failed to consider

that the beneficiary's subordinate COO is fluent in English and he can translate, communicate and handle matters requiring knowledge of the English language under the direction of the beneficiary.

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)(v) provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

Under USCIS regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

Upon review of the petition, evidence, the director's notice of revocation and counsel's assertions on appeal, the AAO will withdraw the director's decision to revoke the approval and remand the matter to the director for further action and issuance of a new decision. The director has based her decision

solely upon the beneficiary's lack of fluency in English. While the regulations require the petitioner to establish that the beneficiary's prior education, training and employment qualify her to perform the intended services in the United States, a review of the record reflects that the petitioner did not claim that the beneficiary is fluent in English or that English fluency is a requirement for the offered position.

Although the director's decision will be withdrawn, the record as presently constituted contains insufficient evidence to warrant a conclusion that the beneficiary has been employed abroad, and will be employed in the United States after one year, in a qualifying managerial or executive capacity. The AAO maintains authority to review each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Accordingly, the petition will be remanded to the director for further review and action consistent with the discussion below.

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:

- (ii) directs the management of the organization or a major component or function of the organization;
- (iii) establishes the goals and policies of the organization, component, or function;
- (iv) exercises wide latitude in discretionary decision-making; and

- (v) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

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). USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of 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 petitioner stated that the beneficiary had twenty three years of experience as an accountant and that she began work for the foreign entity in 2003 as the vice president of administration. The petitioner indicated that the beneficiary directed and facilitated the activities of two departments, the supply/purchasing department and the sales and distribution department.

The beneficiary's foreign job description is insufficient as it fails to provide specific details regarding her day-to-day tasks. For instance, the petitioner states that the beneficiary "directs production planning to match company needs," "sets forth sales objectives and sales operations plans in accordance with the overall company objective," "gather[s] necessary market research reports required for proper planning," "directs all after-sales activity in terms of customer service and customer relations management as well as building relationships with major distribution channels," and "directs product pricing and all sales operation policies." However, in each case, the petitioner has not specifically described or documented the day-to-day tasks that make up these broadly-described duties, nor provided sufficient detail or documentation to corroborate the production she planned, objectives she set, market research reports completed under her direction, the type of customer service and relations she managed, relationships she built with distributors, or the policies she implemented. It is reasonable to expect that the petitioner would provide some specifics as to the beneficiary's specific managerial or executive decisions or accomplishments abroad, particularly since she is asserted to have worked in this capacity since 2003. The listed duties could apply to any executive or manager with any company, in any industry and thus offer little insight into the beneficiary's actual duties with the foreign company. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. 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.).

Moreover, the submitted evidence of the foreign entity's organizational structure contains numerous discrepancies with respect to the beneficiary's job title, the titles of her subordinates and her position within the company's hierarchy. For example, the petitioner has provided inconsistent statements with respect to the beneficiary's foreign employment indicating that the beneficiary was employed as the vice president of administration at various places in the record, but elsewhere states that the beneficiary was in charge of the "commercial department." Further, another listing of employees refers to the beneficiary as simply as "manager" and the beneficiary's twelve subordinates are "ordinary" employees, leaving question that the beneficiary acts as more than a first line supervisor

of non-professional employees. 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'r 1988).

Additionally, while the petitioner has described the beneficiary as the "vice president of administration," one organizational chart shows that she reported to a "vice general manager" and shows another employee responsible for the administration department. 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). In sum, the preceding unresolved inconsistencies leave question as to the beneficiary's actual job title, level of authority, and duties with the foreign entity.

In addition, the petitioner has also not submitted sufficient evidence to establish that the beneficiary will act in a qualifying managerial or executive capacity in the United States after one year.

Similar to the beneficiary's foreign duties, the petitioner has submitted a vague position description that fails to explain the nature of beneficiary's proposed day-to-day tasks in the United States. 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 his 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). For instance, the petitioner provides no specifics, details or supporting documentation regarding the company's proposed policies, objectives, or procedures for which the beneficiary is stated to be responsible. Indeed, much like the beneficiary's foreign duties, the beneficiary's proposed duties in the United States could apply to any executive or manager working in any company or industry. Although the duty description suggests that the beneficiary will possess the appropriate level of authority to initiate the new company's operations, the petitioner has not met its burden to provide a detailed description of her actual proposed duties.

Although the director's decision will be withdrawn, the evidence of record as presently constituted does not establish the beneficiary's eligibility for the benefit sought. Accordingly, the AAO will remand this matter to the director for issuance of a new notice of intent to revoke and entry of a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse, shall be certified to the Administrative Appeals Office for review.