U.S. Department of Justice

Immigration and Naturalization Service

D7

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 00 005 51499 Office: VERMONT SERVICE CENTER Date: 07 JAN 2002

IN RE: Petitioner:
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:

[redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Weimann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as an import and export company of various products, including vitamins, other nutritional supplements, polyethylene pipe fittings, and a water filtration system. It seeks authorization to continue the employment of the beneficiary temporarily in the United States as president of the company. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel briefly states on the Form I-290B that the director's decision to deny the petition is incorrect as a matter of fact and arbitrary as a matter of law. Although counsel stated that a legal brief would be provided to elaborate on the petitioner's argument, this office has not received a brief in this matter in the year since the filing of this appeal. Therefore, the record is considered complete.

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.

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.
>
> (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.

The United States petitioner was incorporated in 1996 and states that it is 100% owned by its parent company, the Sichuan Farms Industrial Co. of Chongqing, China. The petitioner declares four employees and approximately $497,000 in gross revenue for 1998. The petitioner seeks to continue the employment of the beneficiary

as its president at an annual salary of $24,000.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily 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 the September 1999 petition, the petitioner described the beneficiary's proposed job duties as follows:

> [Beneficiary] sets all of the company's corporate policies and also develops strategies for the marketing and sales of the products that our company sells. As the chief executive in New York, [beneficiary] has the ability to hire and fire employees and direct the course of business and the direction that the company will take in the future.

On October 22, 1999, the director requested that the petitioner submit additional evidence regarding the beneficiary's managerial or executive capacity, including a complete position description for all of the petitioner's employees in the United States, a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis, the minimum education requirements, if any, of the positions under the beneficiary's control, a copy of all Internal Revenue Service (IRS) 1998 Form W-2s and IRS Form 1099s issued by the petitioner, and a copy of fully executed INS Form I-9s for all of it's employees.

In reply, counsel for the petitioner submitted a brief fact sheet for four employees, a market research report signed by the beneficiary, and a copy of three IRS Form W-2s and two IRS Form 1099s issued by the petitioner. In addition, counsel provided a statement that the salespeople have sales experience, which is considered necessary for the position and that educational requirements for salespeople are irrelevant. Counsel further explained that the sales manager has a Masters in Business Administration (MBA) and the financial manager has a background in business finance through the MBA program at Columbia University. Counsel did not submit evidence substantiating the MBA degrees or schooling.

Counsel for the petitioner did not submit an IRS Form W-2 or an IRS Form 1099 for the claimed financial manager, nor did counsel submit a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis. Counsel indicated that INS Form I-9s were not available for submission.

The director determined that the information provided by the petitioner was insufficient to show the employee positions were professional in nature and that the petitioner failed to demonstrate that the beneficiary was employed in a managerial or executive capacity.

On appeal, counsel asserts that the director's conclusion that personnel positions were not professional is incorrect. Counsel further asserts that the description of the duties of the

beneficiary and personnel as vague is incorrect and that the Service must describe the specifics of the deficiency in the description of the duties of the beneficiary and personnel. Finally counsel asserts that the INS is incorrect in restating the INS regulations as a basis for concluding it's previous decision regarding this beneficiary is in error.

Counsel's argument is not persuasive. Counsel has provided no law or evidence to substantiate her assertions. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

On review, the record as presently constituted is not persuasive in demonstrating the beneficiary has been or will be employed in a primarily managerial or executive capacity nor that he will supervise professional employees.

The record does not establish that a majority of the beneficiary's duties will be managing or directing the management of the organization. The description of the beneficiary's duties is vague. At most it appears that the beneficiary is primarily involved in telephoning and meeting with potential customers along with his sales representatives. The record indicates that a preponderance of the beneficiary's duties have been and will be directly performing the non-managerial day-to-day operations of the organization in an effort to obtain contracts to export goods.

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. Counsel submitted brief fact sheets identifying four individuals who work for the company. The fact sheet of one individual identifies her as the financial manager. However, in the September 30th petition, the petitioner identifies her as the purchasing manager. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). No explanation is provided for the change to this individual's job title. Further, checks signed by the claimed financial manager reflect payment of the company telephone bills, a clerical duty rather than the action of a professional manager. The record contains no persuasive evidence that the employee is engaged in a professional capacity as either a financial or purchasing manager.

The duties of the remaining three employees involve sales. The description of the sales manager's duties as described in his personal fact sheet is vague. No concrete description is provided to explain the sales manager duties on a day-to-day basis. There is insufficient evidence to indicate that the sales manager's duties are professional in nature.

The petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The record provides a general description of job duties and reflects an inconsistent use of job titles for claimed professional employees. In addition, the record reflects that the beneficiary is primarily performing the functions of the petitioning organization rather than primarily directing, or managing, those functions through the work of others. Based on the evidence submitted, it cannot be found that the beneficiary has been or will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that there is sufficient common ownership and control between the United States company and the foreign entity to constitute a qualifying relationship pursuant to 8 C.F.R. 214.2(l)(1)(ii)(G). As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

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.

ORDER: The appeal is dismissed.