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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: WAC 00 085 53254 Office: CALIFORNIA SERVICE CENTER Date: 11 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, California 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 importing and wholesaling business specializing in housewares, gifts and related items. The petitioner seeks to continue the beneficiary's employment as its manager. 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 for the petitioner asserts that the director improperly relied upon staffing levels and failed to consider all the evidence in concluding that the beneficiary was not engaged in a managerial or executive 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.

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 petitioner is a California corporation. The foreign entity in this case is a company incorporated in Taiwan in April of 1996. The petitioner indicates that the United States entity is owned 51 percent by the foreign entity and 49 percent by Liberty Home Products, another California corporation. The petitioner seeks to continue the employment of the beneficiary an additional three years as its manager.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily

managerial 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
>
> iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the extension petition, the petitioner described the beneficiary's job duties as "manager of business operations." The president of the petitioner indicated that:

> [the beneficiary] performs the duties of president in my absence and functions at a senior level, with discretionary authority over day-to-day operations. She performs an essential function for the Fang Shye group, developing, cultivating, and maintaining Fang Shye/ASIMERA's business ties with Volandu's [an Australia department store] senior management. Moreover, she has the authority to set prices and to negotiate/revise contracts with key suppliers and customers. In addition, she is responsible for devising marketing and advertising incentives and implementing measures to promote the company's goodwill in the United States and abroad. Although it is not reflected on the company's payroll, [the beneficiary] supervises two workers from our affiliate, Liberty Home Products, who organize samples, prepare quote lists, follow up sourcing, trace shipments, coordinate consolidation and shipping, and search for new products on the Internet.

The petitioner also included its 1997 and 1998 Internal Revenue Service (IRS) Forms 1120, De-6 Quarterly Wage and Withholding Reports for the years 1998 and 1999 and IRS Form W-2 for the beneficiary.

The director requested the petitioner provide a copy of its organizational chart describing its managerial hierarchy and staffing levels, including the employees under the beneficiary's supervision in the United States and the beneficiary's job duties and responsibilities in detail.

In reply, the petitioner provided an organizational chart for Fang Shye, the foreign entity, that included a listing for the California office of the petitioner, a subsidiary of Liberty Home. The chart indicates that the beneficiary is the office manager and that David Lin is the president of the petitioner. The chart also lists employees of "Liberty." The petitioner also provided its 1999 IRS Form 1120 and unaudited financial statements for the year 1999.

The director determined that the description of the beneficiary's job duties was vague and general and was insufficient to demonstrate that the beneficiary was acting in a managerial or executive capacity. The director found that the petitioner had only provided information that it employed the beneficiary and a president. The director concluded from this information that the beneficiary was not managing a subordinate staff of professional, managerial, or supervisory personnel.

On appeal, counsel states that the director improperly relied upon staffing levels in contravention of section 101(a)(15)(44)(C) of the Act and had failed to consider all the evidence on the issue of the beneficiary's managerial or executive capacity.

Counsel's statements are not persuasive. The record does not contain sufficient evidence that the beneficiary has been or will be performing managerial or executive duties. The director has appropriately considered the evidence in the record to make her determination and has not improperly relied upon the staffing levels of the petitioner in making the determination.

The record contains a description of the beneficiary's job duties that essentially paraphrases the essential elements of the statutory definition of manager and executive. The record does not contain a comprehensive description of the beneficiary's day-to-day activities. The petitioner's description of the job duties is not sufficient to warrant a finding of managerial or executive job duties.

As noted by the director, the petitioner has not provided evidence that the petitioner consistently employs anyone other than the beneficiary. The 1997, 1998 and 1999 IRS Form 1120 indicates that no salaries or wages have been paid. The IRS Forms 1120 for those years indicate only that an officer of the petitioner has been compensated. The officer named on the IRS return is the beneficiary of this petition. The Quarterly Wage and Withholding Reports for the years 1998 and 1999 indicate that the beneficiary is the only individual employed by the petitioner, save for the latest report covering the quarter ending September 30, 1999 that includes one additional employee. The only IRS W-2 Form provided is for the beneficiary for the year 1997. The unaudited financial statement indicates that the payroll for the petitioner consists of clerical expenses. The organizational chart shows that the beneficiary is an office manager and does not supervise any employees of the petitioner.

Based on the inconsistencies in the record, it is not possible to conclude that the petitioner employs anyone other than the beneficiary of this petition. 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 (BIA 1988). The record does not demonstrate that the beneficiary has been or will be managing a subordinate staff of professional, managerial or supervisory personnel who relieve her from performing non-qualifying duties.

Finally, the petitioner's statement that the beneficiary performs an essential function because she manages a "major account" of the affiliated foreign entity is not supported in the record. The record does not demonstrate that the beneficiary is not primarily performing the duties associated with establishing and maintaining an account as opposed to primarily directing, or managing those functions through another.

On review of the record of this proceeding, the petitioner has not established that the beneficiary has been or will be primarily employed in a managerial or executive capacity. For this reason, the petition may not be approved.

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.