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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: EAC 99 101 53073 Office: VERMONT SERVICE CENTER Date: JAN 22 2002

IN RE: Petitioner: [redacted]
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:

[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 engaged in the import and export and distribution of books, magazines, films, audio, video and other entertainment works between China and the United States. The petitioner seeks to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's denial is clearly against the weight of the evidence and should be overturned on appeal.

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 New York corporation, incorporated in 1986. It is a wholly owned subsidiary of the foreign entity in this case, China National Publishing Industry Trading Corporation in Beijing, China. The petitioner previously employed the beneficiary as an L-1 intracompany transferee from 1992 through 1997. The beneficiary returned to China in January 1998 and the petitioner replaced the beneficiary with another L-1 intracompany transferee. The petitioner now seeks to employ the beneficiary again in the capacity of president and requests an L-1 classification for the time period of February 6, 1999 to February 5, 2002.

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.
>
> 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.

The petition requesting L-1 classification for the beneficiary indicated that the beneficiary would, "coordinate our publishing business projects, direct 2 properties management, supervise depts [sic], recruit his sales team, decision-making authority on

strategies, principal function is oversight and control our co. [sic].

The petitioner also included a statement describing the beneficiary's duties as follows:

> Plan and formulate policies and objective [sic] for the company--Negotiate contracts for import and export projects--Reviewing and analyzing financial statements and trading proposals to determine time frame, funding procedures for accomplishing the projects--Setting marketing and project strategies for overseas and North American--Negotiating and signing the trading contracts, join book fairs for the company--Represent our company to direct managers for properties' maintenance, dealing with the banking institutes for paying mortgage and collect rents from tenants, direct housing staff to work for tenants, contact lawyers to solve the legal problems on the properties.--Guiding and coordinating activities of 3 departments, Trading, Properties Management and Distribution Center, direct and recruit his salesmen in 13 leading book stores and publishing companies in the U.S.--Directing and coordinating our branch, Flushing Book (NY) Co.,Inc in New York City, operations--Budget allocation and control, direct CPA to work for the company's financial section, represent the company to contact the U.S. bank concerning our business banking needs and sign the company check --Review and analyzing reports and records on the projects with China, arranging implementing schedule; --Direct and conduct the marketing research activity for the products price, costs, quality and style in the United States, and report to parent company and recommend to Chinese publishing companies; --Organizing and directing the subordinates and affiliate offices to get purchase order and specifications, arrange paper work, find suppliers, negotiating [sic] contracts, and deal with the bank to issue the bank documentation, then shipping --Liaison with Directors of parent company--Exercise hire, fire, promotion and compensation--Overseeing day to day overall administrative and business operations of the company, assessing the policies and feasibility of expanding PUBLISHING NY
>
> <u>His principal function is oversight and control our company, and direct and supervise a sales manager, marketing coordinator, salesmen, property workers and supporting clerk</u>. [sic]

The petitioner also provided an organizational chart that indicated the beneficiary was its president. The chart indicated that the beneficiary supervised a sales manager. In turn the sales manager appeared to be in charge of two departments (the

trading department and the distribution center). The trading department was shown as including a marketing coordinator who was shown to have contact with "salesmen in 13 publishing companies." The distribution center was shown to include a sales representative. The properties management department, a third department noted on the organizational chart, was shown to include a clerk.

The petitioner also included Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Tax Return for the year of 1998. The IRS Form 941 listed four employees

In response to the director's request for evidence that would demonstrate that the beneficiary would be working in an executive or managerial capacity, the petitioner modified the description of the beneficiary's duties and added the time allocated to each of his tasks as follows:

> --Planning and formulating policies, especially, policy of import many kinds of books, magazines, CD, video, audio, files and other entertainment works, from China, and strategy activities of the company (5 hours);
> --Directing and coordinating two departments, Trading and Distribution Center, activities in commercial and industrial establishment; implement managerial system and plans targets for the departments (8 hours);
> --Budget allocation and control for the company, direct CPA to work for the company's financial section, represent the company to contact the U.S. bank concerning our business banking needs and sign the company check [sic] (8 hours);
> --Review and analyzing [sic] reports and records on the each [sic] transaction in the United States, arranging implementing schedule; (5 hours)
> --Negotiate contracts for distribution of the publications (5 hours)
> --Direct and conduct the marketing research activity for the publication's price, costs, and style in the United States, and report to parent company and recommend to Chinese companies (4 hours)
> --Organizing and directing the subordinates and affiliate offices to get purchase order [sic] from the United States and direct, through his subordinates to arrange paper work, find [sic] suppliers, negotiating payment contracts, and deal [sic] with the bank to issue the bank documentation, then [sic] shipping; (4 hours)
> --Exercising hire, fire, promotion and compensation authority (a hour)
> --Overseeing day to day overall administrative and business operations of the U.S. company.

The petitioner also included descriptions of the duties of the sales manager, marketing coordinator, sales representative and

clerk. The petitioner indicated that the sales manager was subordinate to the president of the company. The petitioner also indicated that the marketing coordinator was subordinate to the sales manager and further represented that the marketing coordinator directed and supervised "our thirteen salesmen working in major publishing companies in the United States (8hours)[sic]" The petitioner further indicated that the sales representative was under the direction and supervision of the sales manager and the clerk was under the direction and supervision of the marketing coordinator.

The petitioner provided the same organizational chart and also included a description of the beneficiary's position in the organization as the president who:

> directly supervises the sales manager and marketing coordinator. . . . who in turn directs the Trading Department, and Distribution Center with the Sales Representative who in turn direct [sic] and supervise [sic] 13 salesmen in the major publishing companies in the U.S. and clerk, [sic] worker [sic] in our property as well as Flushing book (NY) Co,. Inc., a subsidiary of the U.S. entity.

The petitioner indicated that the above description demonstrated that the beneficiary would manage a subordinate staff of professional, managerial and supervisory personnel who would relieve him from performing non-qualifying duties.

The petitioner also submitted an unsigned IRS Form 1120, U.S. Corporation Income Tax Return for the year 1997. The petitioner, in addition, submitted a one-year contract with a salesman entered into in March of 1998.

The director determined that the petitioner only employed one salesperson and yet generated a substantial income. The director concluded that the beneficiary was primarily engaged in providing sales services to the organization. The director also determined that the record was insufficient to demonstrate that the beneficiary was supervising professional, managerial or supervisory employees. The director further determined that the evidence did not support a finding that the beneficiary would function at a senior level within an organizational hierarchy other than in position title. The director concluded that the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that substantial evidence was provided to the Service to demonstrate that at least thirteen salesmen would be working on behalf of the petitioner, thereby eliminating the need for the beneficiary to engage in sales services. Counsel re-submits the petitioner's organizational chart and the description of the beneficiary's position within the petitioner's organizational hierarchy and the description of the beneficiary's

duties as well as the other four employees. On appeal, counsel also submits a copy of a document that includes the names of thirteen individuals, their positions with various companies and their addresses and phone numbers. The document's first paragraph, which is partially obliterated by a "post-it" note states:

> China Publishing & Trading Inc. (NY) through following salesmen . . . (illegible) with the following America book and publishing companies to ser . . .(illegible) distribution and import/export business for China Publishing & T . . . (illegible) Inc.(NY).

The "post-it" note attached to this document reads "salesmen in 13 publishing co.s" [sic]. Counsel further asserts that the Service committed reversible error because its decision was not in accordance with the substantial evidence submitted with the petition.

Counsel's assertions are not persuasive. The evidence submitted with the petition and in the response to the director's request for evidence does not demonstrate that the petitioner employs thirteen salesmen. There is no indication that the petitioner has compensated these thirteen individuals in any way. It appears that other companies employ these individuals. There are no agreements, tax records, or other documentary evidence that indicates the petitioner or the beneficiary has the authority to direct or manage these individuals, nor is there any evidence that these individuals are performing duties that relieve the beneficiary from performing non-qualifying duties. The record is seriously deficient in this regard. The document submitted on appeal is of little help in delineating the relationship of these individuals with the petitioner. Counsel's assertion that these thirteen salesmen would be working on behalf of the petitioner is without merit. 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). In addition, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The text description of the beneficiary's position in the company and the organizational chart overview of his position in the company are confusing at best and inconsistent at most. The beneficiary is described as directing and supervising a sales manager and a marketing coordinator. The organizational chart shows that only the sales manager reports directly to the beneficiary. According to the organizational chart the marketing manager and the sales representative report to the sales manager. The text description of the organizational hierarchy of the petitioner indicates that the sales representative reports to both the sales manager and marketing coordinator.

The actual description of the beneficiary's duties is also confusing. In the petition, the beneficiary allegedly guided and coordinated three departments of the petitioner, while in response to the director's request for evidence, the petitioner stated that the beneficiary directs and coordinates two departments. The beneficiary's duties in the petition included "Represent our company to direct managers for properties' maintenance, dealing with the banking institutes for paying mortgage and collect rents from tenants, direct housing staff to work for tenants, contact lawyers to solve the legal problems on the properties.--Guiding and coordinating activities of 3 departments, Trading, Properties Management and Distribution Center. . .". In response to the request for evidence, reference to the beneficiary's involvement with the property management of two buildings is not included. In addition, this duty apparently has not been transferred to other personnel. There is also no indication that the properties have been sold.

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). As the record is presently constituted, it is unclear who or what is under the beneficiary's direction. It is also unclear who is now performing the activities necessary to manage the petitioner's properties, a duty as described in this case that clearly does not fall within the definition of executive or managerial capacity.

Further, the actual description of the beneficiary's duties is vague and general. Interpreting the description most liberally, it appears the beneficiary will spend a significant portion of his time performing non-qualifying duties. Analyzing reports and implementing schedules, conducting market research, negotiating contracts, and going to the bank, are duties that do not appear to be managerial or executive in nature. Many of the other duties of the beneficiary as described, essentially re-state essential elements of the regulation. There is no comprehensive description of the beneficiary's duties that provide a clear understanding of what the beneficiary will be doing for the petitioner. The statement that the beneficiary's "principal function is oversight and control [sic] our company, and direct and supervise a sales manager, marketing coordinator, salesmen, property workers and supporting clerk," is insufficient without the provision of consistent evidence to support it.

The record as presently constituted does not sufficiently demonstrate that the beneficiary actually manages the organization, supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization. The description of the beneficiary's duties, the confusing organizational chart and the text description of the beneficiary's position within the

organization are insufficient to demonstrate that the beneficiary primarily directs the management of the petitioner.

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.